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*Midland Circuit*

A TREATISE

BBRN

ON

CRIMES AND MISDEMEANORS.

BY

SIR WM. OLDNALL RUSSELL, KNT.

LATE CHIEF JUSTICE OF BENGAL.

IN THREE VOLUMES.

VOL. III.

*Fourth Edition.*

BY

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# A TREATISE ON CRIMES AND MISDEMEANORS.

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## BOOK THE FIFTH.

OF OFFENCES WHICH MAY AFFECT THE PERSONS OF  
INDIVIDUALS OR PROPERTY.

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### CHAPTER THE FIRST.

OF PERJURY AND SUBORNATION OF PERJURY.

PERJURY, by the common law, appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. (*a*)

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Perjury by the  
common law.

Subornation of perjury by the common law is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath. But it seems clear that if the person, incited to take such an oath, do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury, yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment. (*b*)

Subornation of  
perjury by the  
common law.

Inciting a witness to give *particular* evidence, where the inciter does not know whether it is true or false, is a high misdemeanor, especially if the inciter, being attorney on one side, gets himself employed for that purpose by the other side; at least, if the evidence is given accordingly. The indictment charged that the defendant, an attorney, being retained to defend Wood against a charge of picking Lewis's pocket, deceitfully procured himself to be employed by Lewis, and persuaded Lewis to swear before the grand jury that he did not know who picked his pocket, which he did, and no bill was returned. An objection was made that Lewis's evidence was not stated to have been false; but, upon a case reserved, the judges thought it unnecessary, as the defendant's

(*a*) 1 Hawk. P. C. c. 69, s. 1. 3 Inst.  
164. Com. Dig. tit. *Justice of Peace*, B.  
102. Bac. Ab. tit. *Perjury*.

(*b*) 1 Hawk. P. C. c. 69, s. 10. Bac.  
Ab. tit. *Perjury*, and the authorities  
there cited.

crime was the same, unless he knew it to be true, and *that* he should have proved. (c)

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The false oath must be wilful, and taken with some degree of deliberation.

The false oath must be wilful, and taken with some degree of deliberation; for if upon the whole circumstances of the case it shall appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable. (d)

A man may be indicted for perjury in swearing that he *believes* a fact to be true.

It has been said that no oath will amount to perjury unless it be sworn absolutely and directly, and, therefore, that he who swears a thing according as he *thinks, remembers, or believes*, cannot, in respect of such an oath, be found guilty of perjury. (e) But De Grey, C. J., appears to have laid down a different doctrine. (f) And Lord Mansfield, C. J., is stated to have said, 'It is certainly true that a man may be indicted for perjury in swearing that he *believes* a fact to be true which he must know to be false.' (g) It is further said that, upon this question being agitated in the Court of Common Pleas, all the judges were unanimous that *belief* was to be considered as an absolute term, and that an indictment might be supported upon such a statement. (h) But it has been holden that perjury cannot be assigned upon an assertion the correctness of which depends upon the construction of a deed. (i)

So also if he falsely swears that he *thinks* a fact to be true.

An indictment for perjury alleged that the defendant swore that he *thought* that certain words written in red ink were not his writing; whereas the defendant, when he so deposed, *thought* that the said words were his writing; and the Court of Queen's Bench held that the assignment was sufficient. If a witness swore that he thought a certain fact took place, it might be difficult indeed to show that he committed wilful perjury. But it was certainly possible, and the averment was as properly a subject of perjury as any other. (j)

The important requisites in a case of perjury appear to be these: *the false oath must be taken in a judicial proceeding, before a competent jurisdiction, and it must be material to the question depending.* (k)

The oath must be false.

With respect to the falsity of the oath it should be observed, that it has been considered not to be material whether the fact, which is sworn, be in itself true or false; for, howsoever the thing sworn may happen to prove agreeable to the truth, yet, if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true which at the same time he knows nothing of, and impudently endeavours to induce those

(c) *Rex v. Edwards*, East. T. 1764, MS. Bayley, J. And as to dissuading witnesses from giving evidence, see vol. 1, p. 264.

(d) 1 Hawk. P. C. c. 69, s. 2.

(e) 3 Inst. 166.

(f) *Miller's case*, 3 Wils. 427. 2 Black. Rep. 881.

(g) *Pedley's case*, 1 Leach, 325.

(h) *Anon.* C. P. Mich. T. 1780. 1 Hawk. P. C. c. 69, s. 7, note (a), p. 88 (ed. 1795).

(i) *Rex v. Crespigny*, 1 Esp. 280. Lord Kenyon, C. J.

(j) *Reg. v. Schlesinger*, 10 Q. B. 670.

(k) By Lord Mansfield, C. J., in *Rex v. Aylett*, 1 T. R. 69.

before whom he swears to proceed upon the credit of a deposition which any stranger might make as well as he. (*l*)

The oath must be taken either in a judicial proceeding, or in some other public proceeding of the like nature, wherein the King's honour or interest are concerned; as, before commissioners appointed by the King to inquire of the forfeitures of his tenants, or of defective titles wanting the supply of the King's patents. But it is not material whether the court, in which a false oath is taken, be a court of record or not, or whether it be a court of common law, or a court of equity, or civil law, &c., or whether the oath be taken in the face of the court, or out of it before persons authorized to examine a matter depending in it, as, before the sheriff on a writ of inquiry, &c., or whether it be taken in relation to the merits of a cause, or in a collateral matter, as, where one who offers himself to be bail for another, swears that his substance is greater than it is. (*m*) But neither a false oath in a mere private matter, as in making a bargain, &c., nor the breach of a promissory oath, whether public or private, is punishable as perjury. (*n*)

The oath must be taken in a judicial proceeding.

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Much doubt formerly prevailed in certain cases as to the power to administer an oath; but this doubt is, to a great extent, removed by the Act to Amend the Law of Evidence, 14 & 15 Vict. c. 99, s. 16, by which 'every court, judge, justice, officer, commissioner, arbitrator, or other person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.'

Any court, &c., may administer an oath.

Where perjury was assigned upon an affidavit of an attorney of the Court of King's Bench, made in answer to a charge exhibited against him in a summary way, for having in his possession blank pieces of paper with affidavit stamps, and the signatures of a master extraordinary in Chancery and another person at the bottom of the papers, an objection was taken in arrest of judgment that the indictment did not show that the affidavit of the defendant was made in any legal proceeding. It was urged that the court had no right to call on the defendant summarily to answer any complaint against him merely because he was an attorney, unless in a case touching the defendant's office as an attorney, in his conduct towards some of the suitors of the court, or for a breach or contempt of some rule or order of the court, or for some matter touching the proceedings or process of the court, none of which were stated; or, if the paper found in the defendant's custody could have been the object of a summary inquiry (not having been used or attempted so to be, nor having a proper stamp), it could only have been in the Court of Chancery, where the paper could have been used, if at all, and not in the Court of King's Bench; wherefore all the proceedings respecting

Affidavit of an attorney in answer to an application against him.

(*l*) 1 Hawk. P. C. c. 69, s. 6. *Rex v. Edwards, cor. Adams, B., Shrewsbury Lent Ass. 1764*; and subsequently considered of by the judges, MS. And see per Lawrence, J., in *Rex v. Mawbey*, 6 T. R. 619. 2 Rolle Abr. Indictment (E), pl. 5, p. 77. *Allen v. Westley*,

*Hetley*, 97. *Gurney's case*, 3 Inst. 166. See *Reg. v. Newton*, 1 C. & K. 469, for a count framed to meet such a case.

(*m*) 1 Hawk. P. C. c. 69, s. 3. Bac. Abr. tit. *Perjury* (A).

(*n*) *Id. ibid.*



it were *coram non judice*, and could not be the subject of an indictment for perjury. But this objection was afterwards abandoned. (o)

Oath to procure a marriage license.

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It has been doubted, whether a false oath taken in Doctors' Commons, for the purpose of obtaining a *marriage license*, amounts to perjury. (p) And the same doubt was entertained in a subsequent case, where the defendant was indicted for perjury in an affidavit in Doctors' Commons, in order to obtain a license to marry one C. Hill, spinster, to which he swore that he knew no lawful impediment, whereas in truth and in fact he knew she was the wife of another man. (q) And it has been lately decided that a false oath before a surrogate, taken in order to procure a marriage license, will not support a prosecution for perjury; and, further, that if the indictment only charges the taking the false oath without stating that it was for the purpose of procuring a license, or that a license was procured thereby, the party cannot be punished thereupon as for a misdemeanor. The indictment stated that the prisoner, being minded to procure a marriage between himself and A. B., went before a surrogate, and was sworn to an affidavit in writing, that the said A. B. had been residing four weeks in the parish of S., whereas she had not, and so he had committed perjury; and the indictment had all apt allegations of an indictment for perjury. But a case being reserved upon the question whether on such an affidavit the party could be prosecuted for perjury, and if not, whether upon this indictment any offence was charged, the judges were unanimous that upon an oath before a surrogate, perjury could not be assigned; and that as this indictment did not charge that the defendant took the oath to procure a license, or that he did procure one, no punishment could be inflicted, and he was therefore pardoned. (r) It appears, however, from this case, that if the purpose of such an oath is to obtain a license, and the license is obtained, and marriage had, the party may be indicted as for a misdemeanor. The nature of the oath at present required to be taken before the surrogate is described in the 4 Geo. 4, c. 76, s. 14, and by sec. 23 of that statute, when a marriage has been effected between parties under age, contrary to the Act, by means of a false oath or fraud, certain proceedings are given by which the guilty party may be made to forfeit all property accruing from the marriage.

If a person make a false statement on oath before a surrogate for the purpose of

The third count of an indictment stated that W. James was a surrogate having authority to grant licenses for marriages, and that the defendant applied to the said W. James to grant a license for the solemnization of a marriage between J. Baker and S. Fry, and that the defendant, unlawfully intending to obtain

(o) *Rex v. Crossley*, 7 T. R. 315.

(p) *Alexander's case*, 1 Leach, 63. The point was submitted to the judges, and several times agitated; but the result was not communicated, as the prisoner died in Newgate.

(q) *Woodman's case*, 1 Leach, 64, note (a). The point appears to have been submitted also in this case to the consideration of the twelve judges; but their opinion was not publicly communicated.

In 3 Chit. Crim. L. 713, a precedent is given of an information by the attorney-general for a misdemeanor in procuring a marriage with a minor, by false allegations; and in the note (a), it is said, 'It seems doubtful whether an indictment for perjury could have been supported in this case: but it seems most probable that it might.' And 1 Leach, 63, is referred to.

(r) *Rex v. Forster*, MS. Bayley, J., and R. & R. 459.



such license for the said marriage in fraud of the 4 Geo. 4, c. 76, for the purpose of obtaining such license, before the said W. James, took his corporal oath upon the Holy Gospel of God, and that the defendant being so sworn as aforesaid before the said W. James as such surrogate (he the said W. James having competent authority, as such surrogate, to administer the said oath) did, for the purpose of thereby obtaining such license for the marriage of the said J. Baker and S. Fry, falsely, corruptly, &c., swear, &c., that the name of him, the defendant, was J. Baker, and that he was one of the parties for whose marriage a license was then applied for, and that he was a yeoman and widower, and that the said S. Fry had had her usual place of abode within the parish of W. in the county of S. for the space of fifteen days then last past. The count then negatived the matter sworn in the usual manner. By means of which false oath the defendant did then obtain from the said W. James, so being such surrogate, a license for the solemnization of a marriage between the said J. Baker and S. Fry. The prisoner having been convicted, upon a case reserved, it was contended that this count charged no offence. That a surrogate had no authority to administer an oath, and at all events not this oath, to the defendant. That the count did not aver that a written license was obtained, or the marriage celebrated by means of such license. But it was held that the count charged a misdemeanor. It distinctly averred that the prisoner swore falsely as to S. Fry; and any one material fact falsely sworn to is sufficient to support the charge. Then the only question was as to the surrogate's power to administer the oath; not such an oath as will support an indictment for perjury, but as will make a party guilty of a misdemeanor. By the canon law the surrogate had such power, and the 4 Geo. 4, c. 76, seems to assume that power. To make a false oath in order to procure a marriage license from an officer empowered to grant such license is a misdemeanor; because it is a step towards the accomplishment of a misdemeanor. The actual celebration of the marriage is immaterial. Anything essentially connected with marriage is a matter of public concern, and therefore may involve criminal consequences. (s)

improperly obtaining a marriage license, he is guilty of a common law misdemeanor.

In a recent case the question whether a father of an illegitimate child was included in the 4 Geo. 4, c. 76, s. 16, was raised on an indictment against the prisoner for falsely swearing before a surrogate that the father had given his consent to the marriage of his daughter, but not decided. (t)

Father of an illegitimate child.

(s) *Reg. v. Chapman*, 1 Den. C. C. 432. 2 C. & K. 846. There was a count charging the offence as perjury, but the judges pronounced no opinion upon the question whether the offence was perjury or not. Where one had stolen away a man's daughter, and went before a justice of the peace, and swore that he had the father's consent, in order to get a license to marry her, he was indicted and convicted. Anonymous cited by the C. J. of the K. B. 1 Ventr. 370.

(t) *Reg. v. Fairlie*, 9 Cox C. C. 309. The defendant was acquitted on the ground

of a variance. The indictment alleged that the prisoner, intending to procure a marriage to be solemnized between himself and E. A. E., she being under the age of twenty-one years, without the consent of the natural and lawful father of the said E. A. E., to wit, without the consent of G. E., he being the person whose consent was by law required before the license was granted, falsely swore that G. E., the natural and lawful father of the said minor, was consenting. The affidavit sworn by the prisoner contained the statement set out in the indictment; but

Death of a co-plaintiff.

Whilst a suit was abated by the death of a co-plaintiff, unless the death were suggested according to the 8 & 9 Will. 3, c. 11, s. 6, it was ruled that if a co-plaintiff died, after issue joined, a trial without such suggestion on the record, was *extra-judicial*, and that no perjury could be assigned upon any false evidence given at such trial. (*u*)

And it must be taken before a competent jurisdiction.

The oath must be taken before a competent jurisdiction, that is, before some person or persons lawfully authorized to administer it. So that a false oath taken in a court of requests, in a matter concerning lands, has been holden not to be indictable, that court having no jurisdiction in such cases. (*v*) And it seems clear, that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without legal authority for their so doing, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarrantable and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle. (*w*) But a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the King, is perjury, if taken before such time as the commissioners had notice of the demise; for it would be of the utmost ill consequence in such case to make their proceedings wholly void. (*x*)

Perjury may be committed on a commission to examine witnesses issued before issue is joined.

Where after a writ had issued, but before the appearance of the defendant, a commission was issued to examine a witness on behalf of the plaintiff, and a rule had been obtained to rescind the order for the commission, it was urged in support of the rule that for a commission to go the proceedings should be in such a state that perjury could be assigned on the depositions; and that could not be without an issue joined, to which the matter sworn would be material. Lord Campbell, C. J., ‘The question, on indictment for perjury, would be whether the evidence was material at the time of the trial?’ and the court held that the commission was properly issued; and Lord Campbell, C. J., said, ‘I do not admit that, on a deposition taken as now proposed, perjury could not be assigned; with proper averments I think it might.’ (*y*)

it appeared that the girl was the illegitimate daughter of G. E., who had not given his consent to her marriage. The Recorder held that, as the indictment had described G. E. as the natural and lawful father, and the evidence showed that E. A. E. had no natural and lawful father, the prisoner must be acquitted.

(*u*) *Rex v. Cohen*, 1 Stark. R. 511. See now the 15 & 16 Vict. c. 76, s. 135.

(*v*) *Buxton v. Gough*, 3 Salk. 269.

(*w*) 1 Hawk. P. C. c. 69, s. 4, and the authorities there cited; and 4 Black. Com. 137, where it is said, ‘it is much to be questioned how far any magistrate is justifiable in taking a voluntary affidavit in any extra-judicial matter, as is now too frequent upon every petty occasion, since it is more than possible that by such

idle oaths a man may frequently *in foro conscientie* incur the guilt, and at the same time evade the temporal penalties of perjury.’ See the 5 & 6 Will. 4, c. 62, s. 13, *post*, p. 33.

(*x*) 1 Hawk. P. C. c. 69, s. 4. Bac. Ab. tit. *Perjury* (A).

(*y*) *Finney v. Beesley*, 17 Q. B. 86. It is submitted with much confidence that the question, on a trial for perjury, would be whether the evidence was material at the time when it was given, and that its materiality could in no respect depend on anything which occurred afterwards; and it is at least doubtful whether any step in the cause after the examination would be admissible in evidence. Every authority supports this view.

A master extraordinary in chancery has no authority, by virtue of his commission, to administer an oath in matters in the court of admiralty, and therefore an indictment for perjury cannot be supported on an oath so administered. (z) But any person making such an affidavit, with a view to its being received by the court of admiralty, knowing at the same time that it was false, would be guilty of a misdemeanor at common law. (a)

A master extraordinary in chancery has no authority to administer an oath in matters in the court of admiralty.

An indictment for perjury committed before the Insolvent Court alleged that notice of the insolvent's petition was inserted in the London Gazette, and thereby a public sitting was appointed for the first examination of the insolvent, and that that sitting was adjourned. No evidence was given in support of these allegations, although the perjury was alleged to have been committed on the day to which the sitting was adjourned; the filing of the insolvent's petition, however, was proved; and, upon a case reserved, it was held that upon the filing of the petition the court had jurisdiction to institute the examination upon which the prisoner swore falsely; and as the Insolvent Debtors Court is a court of record, it must be presumed that its sittings in a matter within its jurisdiction were lawfully and rightfully holden; and as the indictment contained the general allegation that the court had competent power to administer the oath to the prisoner, that was sufficient under the 14 & 15 Vict. c. 100, s. 20, and the allegations, of which no proof was given, might be rejected as surplusage. (b)

Jurisdiction of the Insolvent Debtors Court after the filing of a petition.

Where an affidavit of debt was sworn under the 1 & 2 Vict. c. 110, s. 8, with a view to make a trader a bankrupt, unless he paid or gave security, &c., perjury might be assigned upon it, notwithstanding the alterations introduced by the 5 & 6 Vict. c. 122, as to this mode of proceeding against a trader; and such an affidavit fell within the 5 & 6 Vict. c. 122, s. 67, and therefore might be sworn before a registrar or deputy registrar of the court of bankruptcy. (c)

Authority to take an affidavit of debt to make a trader a bankrupt.

Where an unmarried woman obtained judgment in a county court against the prisoner, and obtained a judgment summons against him under the City of London Small Debts Act, 15 & 16 Vict. c. 77, and on the hearing of the summons it appeared that the woman had married after she had recovered judgment in the county court, and thereupon the judge of the London court amended the summons by adding the name of the husband, and the prisoner was charged with perjury in his examination before the judge of the London court after the said amendment; it was held that the judge had no power to make the amendment, and consequently the false swearing was in a cause which had no existence and *coram non judice*. (d)

A judge of the London county court has no jurisdiction where a single woman has recovered judgment, and then marries, to add the husband's name.

The prisoner was tried for perjury committed before an arbitrator on an arbitration directed by order of the judge of a county court, with the assent of the parties, pursuant to the 9 & 10 Vict. c. 95, s. 77. The oath was administered in the usual form by the arbitrator appointed. It was objected that the arbitrator had no power, either under the County Court Act, or otherwise, to

An arbitrator under the 9 & 10 Vict. c. 95, s. 77, the County Court Act, had no authority to ad-

(z) Reg. v. Stone, Dears. C. C. 251.

(a) Fer Pollock, C. B., and Parke, B., *ibid.*

(b) Reg. v. Westley, Bell C. C. 193.

(c) Reg. v. Dunn, 12 Q. B. 1026.

(d) Reg. v. Pearce, 3 B. & S. 531.



minister an oath, and therefore perjury could not be committed before him.

administer the oath, and that neither by that Act or otherwise was a party sworn and giving evidence on such arbitration liable to the pains of perjury. The prisoner was found guilty; but, upon a case reserved, the conviction was held wrong. The arbitrator clearly had no authority to administer an oath, unless it was given to him impliedly by the 9 & 10 Vict. c. 95, s. 77; but that section only enables the judge to refer matters to arbitration; it gives no power to the arbitrator other than those that an arbitrator had before the passing of the 3 & 4 Will. 4, c. 42. And at that time no one had authority to administer an oath, unless it were given to him by express statute, or he was sitting judicially according to the course of the common law. (*e*)

Evidence before a grand jury.

A person may be indicted for perjury who gives false evidence before a grand jury when examined as a witness before them upon a bill of indictment, and any person, not being a grand jurymen, who hears the evidence given before the grand jury, is competent to prove the evidence so given. (*f*)

Unless a statute requires it, an information before justices need not be in writing or on oath.

The rule of law is that, unless a statute requires it, an information before a magistrate need not be on oath or even in writing. (*g*) Where therefore an information, but not on oath, was laid before a justice against a person for wilful damage to a carriage, and the prisoner was indicted for perjury committed on the hearing of that information, it was objected that by the 7 & 8 Geo. 4, c. 30, s. 30, (*h*) the information ought to have been on oath; but it was held that that section did not render an oath necessary in all cases, but was a cumulative provision in order to compel the appearance of the party charged, or to hear the case *ex parte* if he did not appear, and therefore the justices had jurisdiction. (*i*)

Justices have only jurisdiction within the district where the mother resides to make a bastardy order.

Under the 7 & 8 Vict. c. 101, s. 2, an application for an order in bastardy is to be made to the justices acting for the petty sessional division in which the mother 'may reside;' and they have no jurisdiction to entertain such an application, unless she does reside within their division, and consequently, if she do not so reside, perjury cannot be committed on such an application. (*j*)

If a person charged with being the father of a bastard appears before

upon an indictment for perjury alleged to have been committed by the prisoner upon the hearing of an application by Martha Humphreys for an order upon him for the maintenance of her bastard child, it appeared that the summons was issued by a magistrate on the personal application of M. Humphreys, who stated, but not

(*e*) Reg. v. Hallett, 2 Den. C. C. 237, Spr. Ass. 1851. The prisoner was the defendant in the suit in the county court, but it was held that that did not affect the question. But see the 14 & 15 Vict. c. 99, s. 16, passed in August, 1851, *ante*, p. 3.

(*f*) Reg. v. Hughes, 1 C. & K. 519, Tindal, C. J. See *post*, p. [912], as to whether a grand jurymen can give evidence of what passes in the grand-jury room.

(*g*) Per Parke, B., Reg. v. Millard, Dears. C. C. 166.

(*h*) The 24 & 25 Vict. c. 97, s. 62, reenacts sec. 30 of the former Act. See the clause in the appendix.

(*i*) Reg. v. Millard, Dears. C. C. 166.

(*j*) Reg. v. Hughes, D. & B. C. C. 188. In this case the mother was delivered in

March, and resided with her parents till November. She then went and lodged at D. in another petty sessional division for three weeks, and then applied to the justices of that division. Her lodging there was not for any improper or fraudulent purpose, but because the justices met in the town, and it was more convenient for her than to go a distance from her parents' house to the justices' meeting of the division in which her parents resided. After the order she went into service without returning home. The jury found that she had no other home than D., and that she was residing at D., if in point of law she could under the circumstances be considered to be so. It was held that the justices had jurisdiction to make the order, as her residence was at D.



on oath, that she had been delivered of a bastard child more than twelve months previous, and that money had been paid by the prisoner for its maintenance within twelve months of its birth. The summons alleged that the prisoner had 'paid money for its maintenance within twelve months after its birth,' instead of stating that proof thereof had been made. The prisoner appeared personally in answer thereto. He was also assisted by an attorney. No objection was made to any of the proceedings on which the summons was founded, and the case was gone into on the merits before the stipendiary magistrate, who examined M. Humphreys in support of the application, who proved the payment of money as alleged, and the prisoner in answer thereto, who swore he had never paid her any money. It was objected that, as there had been no proof on oath of money having been paid for the maintenance of the child within twelve months from its birth before the summons was issued, the magistrate had no jurisdiction to hear the case; but, upon a case reserved, it was held that the prisoner had waived the objection. The proceeding against the putative father is not a proceeding *in pœnam* to punish for a crime, but merely to impose a pecuniary obligation, and the summons is mere process to bring the defendant into court in a civil suit. According to strict regularity, before the summons issued there ought to have been evidence on oath of the payment of the money, although it is not expressly required by the statute to be on oath, as in the case where the complaint is made before the birth of the child. Further, it would have been proper that the summons should have been in the form given by the statute; but supposing that, if the prisoner had not appeared, the petty sessions could not have lawfully proceeded to hear evidence of the paternity; or that, if he had appeared, and objected to the regularity of the summons, the objection ought to have prevailed; yet when he actually appeared, and, instead of objecting to the regularity of the summons, asked the court to give judgment in his favour on the merits, and tendered evidence to absolve himself from liability, he waived any irregularity there might be in the process, and when he had thus submitted himself to the jurisdiction of the court, the court had jurisdiction to hear and decide the case. (*h*)

So where the prisoner was indicted for perjury committed on the hearing of an application for an order in bastardy upon the prisoner, and no objection was taken by the prisoner on the hearing of the summons, which was in the form given by the 8 & 9 Vict. c. 10, and alleged that the mother had given proof before the summoning justice of the payment of money for the maintenance of the child within twelve months after the birth, which took place more than a year before, but no such proof had in fact been given before the summoning justice, the justices made the order. The perjury was assigned on the following statements of the prisoner on oath: 'I never had connexion with the complainant. I have never given her a farthing. I was not present at Mrs. Griffiths' when Mrs. Lewis says I gave her money.' And the jury found these assignments against the prisoner; but also

the justices, and they hear the case without any objection on his part, any defect in the summons, or in the mode of issuing it, is waived.

Even where the jury found that no money had been paid within twelve months of the birth, it was held that the justices had jurisdiction to proceed, the father having made no objection on the hearing.

(*h*) *Reg. v. Berry*, Bell C.C. 46, *Martin, B., dissente*. See *Reg. v. Wiltshire*, 12 Ad. & E. 793.

found that he had not within twelve months next after the birth of the child paid any money for its maintenance. Upon a case reserved, it was held that this case was governed by the principle of the preceding case. The summons here is in the form pointed out by the statute, and no defect is apparent on the face of the proceedings. No defence was made on the ground that no proof had been given before the summons issued that any money had been paid within twelve months after the birth, and it was the duty of the justices in petty sessions to proceed. (*l*)

Justices have jurisdiction to hear a second application in a case of bastardy.

Upon an indictment for perjury it appeared that the perjury had been committed upon the hearing of a second application for a bastardy order, a former application having been heard by the magistrates and dismissed upon the merits. It was contended that the magistrates were *functi officio* after the first application had been dismissed on the merits, and had no jurisdiction to entertain the second application. But, upon a case reserved after conviction, the judges were unanimously of opinion that the magistrates had jurisdiction to hear the second application and administer an oath. The Court of Queen's Bench had decided that one inquiry on the merits did not make the matter a *res judicata*; but even if the previous dismissal were a defence, still the magistrates on the second application had jurisdiction to hear the application and administer an oath. (*m*)

Justices have a general jurisdiction over public-houses.

An indictment alleged that T. Horne was duly licensed to keep a beer-house, and that an information had been laid against him for that he, being duly licensed to keep a beer-house, had it open unlawfully on the morning of Sunday, the 6th of February, 1853, and charged the defendant with falsely swearing that he had not been supplied with beer in the house on that morning. Horne's license was for a year, commencing on the 11th of May, 1853; but Horne was keeping the beer-house on the 6th of February previously. It was objected that the averment that Horne was duly licensed on the 6th of February was not proved, and that if he was not so licensed the justices had no jurisdiction to hear the information. But Crompton, J., held that the justices had jurisdiction generally over the subject of keeping houses for the sale of beer and other liquors open on Sunday; and that as, in order to establish an offence, it was not necessary to prove that the keeper of the house was licensed, what was sworn on the subject of Horne's keeping the house open brought the case within the jurisdiction of the justices, even if it turned out that he was not licensed at the time. (*n*)

Information for keeping open an inn.

The 11 & 12 Vict. c. 49, is not repealed by the 18 & 19 Vict. c. 118, and therefore perjury may be committed on the hearing of an information under the former Act for keeping open an inn for the sale of beer therein to persons not being travellers, contrary to the provisions of the former Act. (*o*)

(*l*) Reg. v. Simmons, Bell C. C. 168. It is not stated whether proof of the payment had been made on the hearing of the summons; but what the prisoner sworn leads necessarily to the inference that such proof had then been given, and the justices may have believed the evidence, though the jury for some reason or other may not have been convinced

that the payment was made.

(*m*) Reg. v. Cooke, 2 Den. C. C. R. 462. See Reg. v. Briby, 1 Den. C. C. 416. *Ante*, vol. 1, p. 574.

(*n*) Reg. v. Kirtton, 6 Cox C. C. 393. Crompton, J., refused to reserve the point.

(*o*) Reg. v. Senior, L. & C. 401.

The 6 & 7 Will. 4, c. 65, s. 9, renders it necessary that an information under the 1 Will. 4, c. 32, the Game Act, should be verified on the oath of a credible witness before any proceeding is taken upon it for summoning the party accused or compelling his appearance, and if this course has not been adopted, the justices have no jurisdiction to hear the case; and, consequently, a person giving false evidence on such an occasion is not guilty of perjury. (*p*)

Information under the Game Act not properly verified.

The oath must be material to the question depending: for if it be wholly foreign from the purpose, or altogether immaterial, and neither in any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is wholly idle and insignificant; as, where a witness introduces his evidence, with an impertinent preamble of a story concerning previous facts, not at all relating to what is material, and is guilty of a falsity as to such facts. (*q*) And it appears to have been determined, that where a witness, being asked by a judge whether A. brought a certain number of sheep from one town to another all together, answered, that he did so, whereas in truth A. did not bring them all together, but part at one time and part at another; yet such witness was not guilty of perjury, because the substance of the question was, whether A. did bring them at all or not, and the manner of bringing them was only a circumstance. And that, upon the same ground, where a witness, being asked whether a particular sum of money were paid for two things in controversy between the parties, answered that it was, whereas, in truth, it was paid only for one of them by agreement, such witness ought not to be punished for perjury; because, as the case was, it was not material whether the sum were paid for one or both. And it is also said to have been resolved, that a witness who swore that a man drew his dagger, and beat and wounded J. S., whereas in truth he beat him with a staff, was not guilty of perjury, because the beating only was material. (*r*)

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The oath must be material to the question depending.

But upon these decisions it is remarked, that perhaps in all these cases it ought to be intended, that the question was put in such a manner, that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him through inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he gave a particular and distinct account of the circumstances which afterwards appears to be false; surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence,

(*p*) *Reg. v. Sco'ton*, 5 Q. B. 493. The information in this case, after alleging that O. M. informed the justices of a trespass in pursuit of game, proceeded, 'and the said information having been also verified upon the oath of W. A., another credible witness,' &c.; but it was held that it did

not show that W. A. swore to the charge contained in the previous part.

(*q*) *Rex v. Gripe*, 1 Lord Raym. 256. Bac. Ab. tit. *Perjury* (A).

(*r*) 2 Roll. 41, 42, 369. Hetl. 97. 1 Hawk. P. C. c. 69, s. 8.



If it is circumstantially material, it is sufficient.

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It need not be sufficient to prove the point in question.

Whatever affects the credit of a witness on cross-examination is material. If, therefore, a witness swears on cross-examination to the date of a receipt, it is material, if his credit would be affected by the fact of that date being false.

than his appearing to have an exact and particular knowledge of all the circumstances relating to it. (*s*) And it is spoken of as a reasonable opinion, that a witness may be guilty of perjury in respect of a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence: as if, in trespass for spoiling the plaintiff's close with the defendant's sheep, a witness swears that he saw such a number of the defendant's sheep in the close; and being asked how he knew them to be the defendant's, swears that he knew them by such a mark, which he knew to be the defendant's mark, whereas, in truth, the defendant never used any such mark. (*t*) And it appears to have been holden not to be necessary that it should be shown to what degree the point in which a man is perjured was material to the issue, and that it will be sufficient if the point were circumstantially material. (*u*) And still less is it necessary that the evidence be sufficient for the plaintiff to recover upon, since evidence may be very material, and yet not full enough to prove directly the point in question. (*v*) Where A. advanced money to B. on two distinct mortgages, upon one of which the security was insufficient, and B. assigned the equity of redemption in both to C., who assigned the insufficient estate to an insolvent, and filed a bill against A. to redeem the other, to which bill A. put in his answer, and therein denied having had notice of the assignment to the insolvent; it was holden that the notice was a material fact upon which perjury might be assigned. (*w*)

An indictment for perjury committed before commissioners of taxes on an appeal of W. Hewatt against a surcharge for a greyhound used by him on the 24th of November, averred that it was a material question whether a certain receipt produced by the prisoner on the hearing of the appeal was given to him before the 12th of September then last past, and that the prisoner falsely swore that the receipt was given to him before the said 12th day of September. At the commissioners' meeting, evidence was given that Hewatt and the prisoner were coursing, on the 24th of November, with two greyhounds, one of which had been Hewatt's, who had no certificate. Hewatt, in support of his appeal against a surcharge for this dog, said that the dog had been sold to the prisoner long before, and called the prisoner as a witness. The prisoner swore that he bought the dog on the 6th of September, and produced a receipt for the purchase money bearing that date. The surveyor asked him whether the receipt was given at the time of the sale, and he said it was not, but a few days after. On being pressed, he said it was given him before the 12th of September. The surveyor pointed out to him that the receipt bore date the 18th of November, so that the prisoner must be mistaken; but the prisoner persisted, and swore positively that it was given him before the 12th of September. Officers from the Stamps proved that the paper, on which the receipt was written, was stamped on the 18th of November, and could not have been issued from the Stamp Office before that day. It was objected

(*s*) 1 Hawk. P. C. c. 69, s. 8.

(*t*) Bac. Ab. tit. *Perjury* (A). 1 Hawk. P. C. c. 69, s. 8. See Reg. v. Gardiner, *post*, p. 57, *et seq.*

(*u*) Rex v. Grieppe, 1 Ld. Raym. 256.

(*v*) Reg. v. Rhodes, 2 Ld. Raym. 886.

(*w*) Rex v. Pepys, Peake, N. P. R. 138, Lord Kenyon, C. J.



that the materiality of the question as stated in the indictment had not been shown: that the material question was, whether the dog was the prisoner's or Hewatt's on the 24th of November, the day of the coursing. It had not been disproved that there had been a sale of the dog on the 6th of September; and, if there was, the time of giving the receipt, or even the fact of any receipt having been given, was immaterial. The objection was overruled, and on its being repeated on a case reserved, Lord Abinger, C.B., said, 'The whole matter turned on the credit of the witness, and he tries to support his credit by false evidence. The receipt is to confirm his evidence, and he swears it was given before the 12th. If that were true, the proof would be decisive.' Williams, J., 'The time when this receipt was given is a step in the proof.' Lord Denman, C.J., 'Everything is material which affects the credit of the witness.' Lord Abinger, C.B., 'Every question, in cross-examination, which goes to the credit of the witness, is material. If a witness were asked, in cross-examination, whether he was in such a place at such a time, and he denied it, that would be material if it went to his credit. In the present case, if they could not have contradicted the prisoner by the date of the stamp, the receipt confirming his evidence would have made out the case before the commissioners.' (x)

The prisoner was indicted for perjury before a court of requests, in a proceeding, under the interpleader clause of the Act establishing the court, to ascertain whether a certain pig, which had been seized under an execution issued against him on the 26th of September, had been sold by him on the 5th of August to his brother. The prisoner had sworn that he had sold the pig to his brother on the 5th of August, and the allegation of perjury was, that the pig was not sold by the prisoner to his brother on the said 5th day of August. It was contended that whether or not the pig was sold on the 5th of August was not the material question; the material question was whether or not, at any time before the issuing of execution, there had been a sale of the pig by the prisoner to his brother. It was quite immaterial whether the sale took place on a particular day, if it took place at some time prior to the execution. Maule, J., 'I think that the ultimate question to be decided is one thing, and yet that a material question may be raised upon a matter collateral to that question. I do not at all think that I can confine the law of perjury by making that only perjury which is material to the only question to be tried, otherwise persons might perjure themselves with impunity. It might be a material question in a case of murder what coloured coat a man had on: the colour of the pig, as I put it, might be most material; for suppose a person swore that this was a black pig, and another witness swore it was white, it would have been a material question whether the pig was black or white, although the ultimate question would have been whether it was sold at the time when it was alleged to have been sold.' (y)

The day on which a sale took place may be material.

(x) Reg. v. Overton, C. & M. 655 2 M. C. C. R. 263, A.D. 1842. See this case on another point, *post*, p. 60.

(y) Reg. v. Altass, 1 Cox C. C. 17, A.D. 1843. A case once occurred at Glou-

cester where on an indictment for stealing a rabbit the question turned on whether a rabbit found in the prisoner's possession was a buck or doe rabbit, and numerous witnesses were called on each

Materiality of evidence as to entering a close in pursuit of game.

On the hearing of an information against Robinson, under the 1 Will. 4, c. 32, s. 30, for committing a trespass in pursuit of game on a close in the occupation of T. Warren, a witness having proved that he saw Robinson in Warren's field, and saw him commit the offence there, the prisoner swore, on behalf of Robinson, that he went with Robinson into a lane adjoining the field, and that Robinson shot into the field, but did not enter it, and that he himself went into the field, and fetched off what Robinson killed. It was contended that this evidence was not material; because Robinson was equally guilty of an offence within the 1 Will. 4, c. 32, s. 30, whether he went into the field and shot there, or whether he shot from the lane, and the prisoner in his company went in and brought away the game. But Williams, J., held that the evidence was material. (*z*)

Materiality of passing by a different name.

An indictment alleged that a cause of divorce or separation was pending in the Court of Arches, which was promoted by E. Kelly against her husband J. Kelly, and that J. Worley was examined as a witness on behalf of E. Kelly, and that interrogatories were exhibited to Worley on behalf of J. Kelly, and that Worley falsely swore that he never passed by the assumed names of Abbott or Johnson, and it was proved that Worley was a witness on the part of the wife in the suit, and that interrogatories on behalf of the husband, by way of cross-examination, were exhibited to him, and that one of the questions put to him, with the view of impeaching his credit, was 'Have you not passed by the name of Abbott and also of Johnson?' He answered, 'I never passed by the assumed name of Abbott or Johnson.' He had, however, for several years gone by the name of Abbott, and lived with a woman who took that name, and two of his children by her were christened in that name. Lord Denman, C. J., 'I do not think that the evidence of materiality is sufficient. I do not mean to say that a false answer given, under such circumstances as those proved, might not support a charge of perjury; but I am of opinion that in this case enough has not been shown on the part of the prosecution to connect the false answer with the issue on which the evidence was given. It might have been material, but we cannot clearly see that it was so.' (*a*)

Evidence by a woman on a trial for rape as to a letter sent by her to the prisoner.

Where on a trial for rape the prosecutrix swore that she had never got one Williams to write a letter for her, which was shown to her, and on a trial for perjury in so swearing, it was proved that she had got Williams to write a letter to the person she had charged with the rape, saying, 'I will do all I can to clear you.' 'I should not have went to the police about the matter at all, if I had not been persuaded by' two persons whom she named, &c.; it was held that the evidence relating to the writing of this letter was clearly material. (*b*)

side, and the verdict was, 'We find it was a buck rabbit'—a case well illustrating Mr. J. Maule's remarks.

(*z*) Reg. v. Scotton, 5 Q. B. 493, A.D. 1844. The question was argued in the Q. B., but not decided, the case going off on another point. See *ante*, p. 11.

(*a*) Reg. v. Worley, 3 Cox C. C. 535,

A.D. 1849. As no part of the evidence, except the single question and answer, is stated, it is impossible to see what this decision amounts to.

(*b*) Reg. v. Bennett, 2 Den. C. C. 240, A.D. 1851. Talfourd, J., on the trial, and approved by the judges on a case reserved on other points.

Upon the trial of *Doe d. Richard v. Griffiths*, a copy of the will of William Joseph was tendered, and on objection to its admissibility, the prisoner, who was then attorney for the lessor of the plaintiff, swore that he had examined the copy produced with the original will in the registry at Llandaff; and upon further objection that the original will was inoperative in respect of a chattel interest, and that, therefore, either the probate ought to be produced, or the Act Book be proved, the prisoner further deposed that he had examined the memorandum at the foot of the copy of the will, with the entry in the Act Book at the same registry. Upon this evidence the judge offered to receive the document in evidence, but the plaintiff's counsel withdrew it. Upon the trial for perjury, it was proved that the defendant had not made either of the examinations which he had so deposed to, and he was found guilty of perjury; but Erle, J., reserved the question, whether the false oath was relevant and material to the issue then being tried, so as to amount to perjury; as to which the following were the facts:—On the trial of the ejectment, the lessor of the plaintiff claimed to be entitled to a term, which had been granted to William Joseph and Rees Morgan jointly; and his title was that Morgan had survived Joseph, and assigned the term to Catherine, the widow of Joseph, who married Saunders, and on her marriage made a settlement, under which the term vested in him. The will of Joseph was irrelevant to this title; but the time of his death was a material fact, in order to prove that Morgan survived him, and proof of the probate of the will of Joseph would thus have been relevant evidence towards establishing the plaintiff's title. The purpose of the plaintiff's counsel in tendering the evidence, was to clear a doubt respecting the interest of Joseph in the term, which was expected to be raised by the defendant, and after the document was withdrawn, the survivorship of Morgan to Joseph was clearly proved by other evidence for the plaintiff; but the purpose for which the document was offered was not stated on the trial of the ejectment. In the registry at Llandaff it was the practice to indorse the act of probate on the original will, and the book called 'The Act Book' contained a daily account of the matters of business completed in the registry, and the memorandum at the foot of the document in question was a copy of the entry in this book relating to the probate of the will of Joseph, and not a copy of the act of probate indorsed on the original will. It follows that the examination of the document tendered with the entry in the book called 'The Act Book' at Llandaff, did not render the document legally admissible as an examined copy of the act of probate. For the prisoner, it was contended before the judges, that the question was simply whether if a witness swears that he has examined a document, *not receivable in evidence*, with a certain book, that can be said to be material to the issue? The time of Joseph's death was in issue; how could the fact that the witness swore that he had examined a paper, not receivable in evidence, with a certain book be material to the *issue* then being tried? It is not enough that the evidence has relation to the matter in issue; it must be material to the issue. It was contended, when the defendant was tried, that what he had sworn was material for the jury, who

If a witness gives false evidence as to a document in order that it may be admitted in evidence, this evidence is material, though the document be inadmissible, or not put in evidence.



were to act on the evidence before them; and, secondly, that it was material for the judge, who was to say whether it was to be put to the jury or not. But it could not be material for the jury; for it was withdrawn from their consideration, and they could not legitimately act upon it; and here the judge was not a judge of fact. This evidence was not on any issue of fact which the judge had to try. It was merely evidence to be given to the jury through the judge. Lord Campbell, C.J., 'I am of opinion that the conviction was right. There was false swearing in a judicial proceeding. How can it be said not to have been material? It was necessary to prove that Joseph died before Morgan. Although the fact of Joseph's death had been proved by parol testimony, if evidence was given to show that probate had been granted of Joseph's will while Morgan was still living, it would have been material in corroboration. With a view to have the copy of the will received in evidence, the defendant swore falsely that he had examined the paper produced with the original will at Llandaff, and the entry on it with the entry in the Act Book; and thereupon the judge said, I will admit it, and if it had been read, it would have gone to the jury with the rest of the evidence in the case. Afterwards the document is withdrawn, but that cannot purge the false swearing committed by the defendant. It has been said that if the judge were wrong in admitting the document in evidence, the defendant could not be convicted, making the offence of perjury depend upon whether a judge were right or wrong in his decision on a question of law, and upon the decision of some nice point in a bill of exceptions, which might ultimately go to the House of Lords. We are all of opinion, as the evidence was given in a judicial proceeding, with the view to the reception in evidence of a document, which was material, and as that evidence was false, that all the ingredients necessary to constitute the crime of perjury are present.' (c)

Reading over  
a bond before  
execution.

Where a count stated that it was a material question whether a bond was obtained by the fraud of the prisoner, and that the prisoner falsely swore that he read over and explained it to the obligor; it was objected that the omission to read over the bond was no evidence of fraud, and therefore the statement was not material; but Erle, J., overruled the objection, as the reading over the bond would be strong evidence to negative fraud. (d)

Evidence of  
the destruction  
of accounts on  
a charge of  
larceny.

The prisoner was indicted for having falsely sworn before justices, on a charge against the prosecutor for stealing three books of account, that she saw him destroy another book of accounts, the prosecutor being also charged with embezzlement; and Watson, B., held that the evidence was not material. Its being calculated to influence the minds of the magistrates would not be sufficient. It would be merely bad conduct in one instance, inducing a probability of bad conduct in another. On

(c) *Reg. v. Phillpotts*, 2 Den. C. C. 302. 3 C. & K. 135, A.D. 1851. In the course of the argument Maule, J., said, 'Here the defendant by means of a false oath endeavours to have a document received in evidence; it is, therefore, a false oath in a judicial proceeding; it is material to that judicial proceeding; and

it is not necessary that it should have been relevant and material to the issue being tried.' In *Reg. v. Gibbon*, *infra*, Pollock, C. B., said that there was a great deal of very good sense in Lord Campbell's judgment in this case.

(d) *Reg. v. Smith*, 1 F. & F. 98, A.D. 1858.



the charge for embezzlement it would have been material evidence. (e)

An indictment alleged that a cause came on to be tried at the Assizes, and that the cause and all matters in difference between the parties were referred to an arbitrator, and assigned perjury before him as to the signature of a paper. The arbitrator said that it was impossible for him so to distinguish between the matters in the cause and the other matters in difference between the parties, as to say definitively to which head the questions put to and the answers given by the prisoner referred, and there was no other evidence on the point. Gurney, Q. C., 'In all these cases it is necessary to show that the matter alleged to be falsely sworn was material, and that cannot be done in this case without proof that it was material either to the action or to the other matters in difference. The evidence failing to show this distinctly, the defendant must be acquitted.' (f)

Materiality of evidence on a reference of a cause and all matters in difference.

An indictment for perjury, committed before a coroner while holding an inquest on the body of J. Conolly, alleged that it was a material question whether the deceased, the prisoner, or another person had drank any intoxicating liquor after they had left a police barrack and before they had arrived at a guard-room, and that the prisoner falsely swore that none of them had tasted any intoxicating liquor during that interval. This statement was clearly shown to be false, but there were no grounds for supposing that the deceased came to his death from anything except from the effects of having been exposed to the night air. It was objected that the matter so falsely sworn was not material, and Monahan, C. J., was inclined so to hold; but he left the question of materiality to the jury, and they convicted; and, upon a case reserved, it was held that the evidence was material. It was the duty of the coroner to inquire into all the circumstances attending, or which might have caused, the death of the person upon whom the inquiry was held. That being so, it at once became material to ascertain whether or not death had not been caused to some extent by the deceased having been tipping in a public-house, and therefore in a state to render it more probable that he should have lost his way. It was material for the coroner to ascertain, not alone the actual cause of death, as murder, *felo de se*, or otherwise, but also all the circumstances attending it, and therefore it was a necessary part of his duty to ascertain the way in which the evidence spent the evening before his death. (g)

Materiality of evidence before a coroner.

An indictment for perjury alleged that the prisoner falsely swore at a petty sessions that D. Rees was the father of her illegitimate child, and that her master, who was the uncle of D. Rees, had promised to raise her wages if she would swear the child to a man other than the said D. Rees, and if she would do so he

Evidence of mother on an application in bastardy.

(e) Reg. v. Southwood, 1 F. & F. 356, A.D. 1858.

(f) Reg. v. Ball, 6 Cox C. C. 360, A.D. 1854. Gurney, R., is far too good a criminal lawyer to have made such a decision as this, and I have the best authority for saying that he never did so decide. Probably the evidence failed to show that the evidence was material in

any respect upon the hearing of the matters referred. It is obvious that the paper in this case might have been material both to the matter in issue in the cause, and to the other matters referred, and yet according to this report the evidence would not have been material.

(g) Reg. v. Courtney, 7 Cox C. C. 111, A.D. 1856.

would permit her to lie in at his house. Martin, B., expressed a strong opinion that this evidence as to the promises made to her by her master was not sufficiently material to the issue before the justices so as to amount to the crime of perjury; but he left the case to the jury. (*h*)

Materiality of payment of money to the mother of a bastard.

The prisoner was indicted for perjury alleged to have been committed by him on the hearing of an application of M. Humphreys, the mother of a bastard child, for an order in bastardy to be made upon the prisoner. Upon the hearing M. Humphreys swore that on the day after the birth of the child the prisoner paid her £1 7s. 6d., and that he paid her a weekly sum for several weeks after; in answer thereto the prisoner swore that he never paid M. Humphreys any money at all upon any account whatsoever, and on this statement perjury was assigned; it was objected that this assignment of perjury was upon a matter immaterial on the hearing; but, upon a case reserved, it was held that it was clearly material; for it was necessary to prove at the hearing the payment of the money; and further, the payment of the money for the maintenance of the child was corroborative evidence of the paternity. (*i*)

Evidence which ought not to have been admitted held to be immaterial.

Brennan being charged before justices of the peace with a robbery in a railway carriage, cross-examined the prosecutor after he had given his evidence in support of the charge, as to whether he had been in company with himself and the prisoner at Manchester on the previous day, and then called the prisoner, who swore that the prosecutor had accosted him, whilst in company with Brennan, and proposed that he should assist him to break into his uncle's house; and it was held that this evidence was in a matter immaterial to the inquiry before the justices. (*j*)

If a witness is cross-examined as to a matter on which his answer ought to be held conclusive, but another witness is permitted to contradict him as to such matter, this evidence is immaterial, and if false is the subject of perjury.

The prisoner was indicted for falsely swearing on the hearing of an application in bastardy that he had had connection with the mother of the child. The mother in support of the application had made a deposition before the magistrates, and she was then cross-examined as to whether she had not had connection with the prisoner in the September previous to the birth of the child, which was on the 29th of March, and she denied it. The prisoner was called for the alleged father, and swore that he had had connection with her as imputed by the question put to her. It was objected that the evidence given by the prisoner was not material to the issue raised on the application for the affiliation order, as the question put to the mother as to her having had connection with the prisoner merely went to affect her credit, and her answer to it ought to have been regarded as conclusive, and the evidence given by the prisoner was inadmissible. But, on a case reserved, it was held that the prisoner was liable to be convicted. 'It is now clearly established that a cross-examination going to a witness's credit is material, and that perjury may be assigned upon it.' (*k*)

(*h*) Reg. v. Owen, 6 Cox C. C. 105, A.D. 1852. The report does not show how any such evidence was admitted before the justices. Acquittal.

(*i*) Reg. v. Berry, Bell C. C. 46, A.D. 1859.

(*j*) Reg. v. Murray, 1 F. & F. 80, A.D. 1858. Martin, B., after consulting

Byles, J. This case seems to be overruled by Reg. v. Gibbon, *infra*. On its being cited in that case, Martin, B., said, 'That case should not be looked upon as any authority. It was only my impression of what was material formed hastily on circuit.'

(*k*) Per Crompton, J.

Here, therefore, the mother might have been indicted if she had sworn falsely on cross-examination upon this matter. 'Although it did not refer to the main issue, which was the paternity of the child, it had a bearing upon what was indirectly in issue; namely, how far the complainant was deserving of credit.' (l) 'Then, as the question only affected her credit, as soon as she had answered it, all should have been bound by her answer. That is an established rule of our law. Notwithstanding that, the magistrates admitted the evidence of the prisoner, which legally was inadmissible. Then, although not legally admissible, yet, being admitted, it had a reference to what was indirectly in issue—the credibility of the complainant. The evidence having been admitted, although wrongly, *Reg. v. Phillpotts (m)* is an authority directly in point that perjury may be assigned upon it. Although the evidence was open to objection, yet it does not lie in the witness's mouth to say that it was not a question on which he was bound to speak the truth.' (n)

Upon an indictment for perjury in an answer to a bill filed against the defendant in chancery, stating that the defendant promised to pay Martin £1,000 as a marriage portion, when he was about to marry the defendant's niece: the defendant, by his answer, insisted that as there was no promise in writing, he was entitled to the benefit of the Statute of Frauds, but as to the fact, denied that he had ever made any such promise, on which denial perjury was assigned. Lord Kenyon, C.J., said, that 'he thought this was not such a material fact as would support the indictment. This promise was absolutely void, and, supposing it in fact to have taken place and acknowledged by the defendant, could not be enforced either at law or in equity; that court had no power to decree a performance of it. It might be a false swearing, but did not amount to what the law denominated perjury.' (o)

Perjury cannot be assigned on an answer in chancery, denying a promise absolutely void by the statute of frauds.

So where upon an indictment for perjury, alleged to have been Perjury cannot

(l) Per Cockburn, C. J.

(m) *Supra*.

(n) *Reg. v. Gibbon, L. & C. 109*, by eleven judges, Crompton, J., and Martin, B., doubting. It was stated in the argument that the child was a full-grown child. The cases where it has been held on a trial for rape that the woman may be proved to have had connection with other men, were distinguished by Williams, J., on the ground that 'the character of the prosecutrix in those cases may be so mixed up with the facts as to be material, not only to her credit, but to the cause.' By the counsel for the prosecution they were distinguished on the ground that voluntary intercourse with others was very material on the question whether she consented; and this distinction was not denied by any judge. The cases where in an action for seduction such evidence has been held admissible were distinguished on the ground that such evidence affected the damages. But although Alderson, B., in *Verry v.*

*Watkins*, 7 C. & P. 308, left such evidence to the jury in mitigation of damages, he first left the question to them whether the defendant was the father of the child, and my recollection of the case (in which I was counsel for the defendant) is that the evidence was given chiefly with a view to that question. And in *Grinnell v. Wells*, Gloucester Spr. and Sum. Ass. 1843, the mother on the first trial swore to connection with the defendant on one occasion only; and on the second trial before Williams, J., evidence of an *alibi* was given, and also evidence that the mother had had connection with others at such a time that one of them might have been the father of the child; and this evidence was given only with a view to the paternity of the child. The new trial had been obtained on the affidavit (amongst others) of the defendant expressly negating any connection with the mother.

(o) *Rex v. Benesech, Peake, Add. C. 93*.



be assigned  
in swearing as  
to a parol  
contract for  
the sale of  
land.

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committed in an answer to a bill filed in chancery, it appeared that the bill was filed against the defendant and Robinson, in order to compel the specific performance of a contract for the purchase of a freehold estate, and it was not stated in the bill that the contract was in writing, but it was alleged that the defendants had frequently since the contract was entered into admitted that the plaintiffs were interested in the purchase; and the defendants in their answer pleaded that the alleged agreement, not being in writing, was within the fourth section of the Statute of Frauds, and could not be enforced, and also denied the agreement as set forth in the bill, and denied that they ever admitted that the plaintiffs were interested in the purchase as stated: and upon these denials perjury was assigned. It was admitted that the agreement was not in writing, and that there was not any memorandum or declaration of trust respecting it. It was objected that the alleged perjury was not material or relevant to the matter in issue in chancery; the agreement not being in writing, the defendant relied on the Statute of Frauds as a good ground of defence. The denial therefore of an agreement which the court had no power to enforce was immaterial and irrelevant to the investigation of the several matters in the bill. The counsel for the prosecution cited *Bartlett v. Pickersgill*, (*p*) where a party was convicted of perjury for the denial of a parol agreement for the purchase of an estate, which parol agreement a court of equity had refused to enforce. Abbott, C. J., 'It does not appear from the short statement of the case which has been cited, and which is not very distinctly reported, whether the Statute of Frauds was there pleaded and relied on. But in the present case the defendants have in their answer pleaded the statute, and insisted that this agreement not being in writing, and relating to the sale of land, is within the fourth section of that statute, and cannot be enforced. As a judge of a court of common law, it is competent for me to form my opinion upon the construction of this statute, although I cannot be presumed to know how a court of equity might deal with it. The statute, for the wisest reasons, declares that agreements of this description shall not be enforced unless they are reduced into writing. These defendants, therefore, having insisted upon the statute in their answer, the question is, whether under such circumstances the denial of an agreement, which by the statute is not binding upon the parties, is material; I am of opinion that it was utterly immaterial. It is necessary that the matter sworn to and said to be false should be material and relevant to the matter in issue: the matter here sworn is in my judgment immaterial and irrelevant, and the defendant must be acquitted.' (*q*)

But where a bill is filed to set aside a written contract on the ground of fraud, a party may be guilty of perjury in

But where an indictment stated that a bill was filed in chancery against the defendant, stating an agreement to purchase certain wheat, to be paid for by draft at three months, which agreement was not reduced into writing, and that afterwards a bought note was delivered to the defendant, which note did not contain fully the terms of the agreement; that the defendant brought an action and recovered a verdict; and that he was enabled

(*p*) 4 Burr. 2255. 4 East, 577, *in notis*.

(*q*) *Rex v. Dunston*, R. & M. N. P. R. 109.



to obtain such verdict by reason of his fraudulently concealing the true terms of the agreement, and the bill prayed that one of the terms of the contract might be declared to be that the purchase money should be paid by a bill of exchange, payable three months after date; and the defendant by his answer denied the parol agreement stated in the bill, and the bill was dismissed, and the denial by the defendant was the subject of the indictment for perjury. It was contended that the indictment could not be sustained. The only legitimate evidence of the contract was the bought and sold notes. The contract by parol was void by the Statute of Frauds, and a false answer to a bill for the discovery of such a contract would not subject a person to an indictment for perjury; and *Rex v. Dunston* (r) was relied upon. Coleridge, J., 'In that case, the bill in chancery was to enforce the performance of a parol contract, which could not be enforced by reason of the Statute of Frauds: and the case of *Rex v. Benesech* (s) proceeded on the same ground. Though it is true that a party cannot vary the terms of a written contract, by parol evidence, he may show by such evidence that he was induced to sign the written contract inadvertently and by fraud. In this case the object of setting up the parol terms of the contract is for the purpose of avoiding the contract on the ground of fraud.' 'I think that the principle, that parol evidence is inadmissible to contradict or vary the terms of a written contract, does not apply where the object of that evidence, as in this case, is to impeach the transaction on the ground of fraud. I think that the assignment of perjury on the denial in the answer of the parol terms, which the bill prayed to have established, is material and relevant; and I think therefore that the objection cannot be sustained.' (t)

swearing falsely as to terms of the contract not contained in writing.

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Perjury may be committed on the trial of an indictment, which is afterwards held bad upon a writ of error. An indictment charged the defendant with having committed perjury on the trial of a previous indictment for perjury, upon which a party had been convicted and sentenced, but the judgment reversed on a writ of error on the ground that the assignment of perjury was insufficient; (u) and it was objected that the evidence of the defendant never could have been material, as the former indictment was held bad upon a writ of error; but the objection was overruled, on the ground that, whether a witness had committed wilful and corrupt perjury or not, could not depend on the validity in point of form of the indictment as to which he gave evidence. (v)

Perjury on the trial of an indictment reversed upon error.

But it must be observed that any false oath is punishable as perjury which tends to mislead a court in any of their proceedings relating to a matter judicially before them, though it in no way affect the principal judgment which is to be given in the

Any oath is perjury which tends to mislead a court in any judicial proceeding.

(r) *Supra*.

(s) *Supra*, note (o).

(t) *Reg. v. Yates*, C. & M. 132.

(u) See *Reg. v. Burraston*, *post*, p. 65.

(v) *Reg. v. Meek*, 9 C. & P. 513, Williams, J. Mullett v. Hunt, 1 Cr. & M. 752, was cited in support of the objection. See also *Davis v. Lovell*, 4 M. & W. 678. See 1 Hawk. P. C. c. 69, s. 4, cited,

*post*, p. 36. 'If judgment be arrested in a civil action for a defect in the declaration, it has never been said that that circumstance would prevent a witness, who had been guilty of false swearing at the previous trial, from being indicted for perjury;' per Pollock, C. B., *Reg. v. Cooke*, 2 Den. C. C. 462.

cause; (*w*) as where a person who offers himself to be bail for another wilfully swears that he is a subsidy man and assessed at four pounds in the subsidy book, when he is not a subsidy man at all. (*x*) So also perjury may be committed in evidence given to the judge in order that he may decide whether a document is admissible. (*y*)

The question of materiality was left to the jury in this case.

An indictment for perjury alleged that the defendant, as executrix of her husband, was plaintiff in a cause in the county court, and that she falsely swore that she had never been tried at the Central Criminal Court for any offence, and had never been in custody at the Thames police station; it was proved that she had been in custody at the station, and had been tried at the Central Criminal Court, and acquitted by the direction of the judge; the cause in the county court was an action for goods sold by the testator, and was tried by the judge without a jury; and the verdict was for the plaintiff; and the evidence in question was given by the plaintiff during her cross-examination; it was objected that the evidence given by the defendant was not material. It could not be material on the question whether the testator in his lifetime sold the goods for which the action was brought; and as the trial in the county court was before a judge, and not before a jury, it did not weigh as to the result of that trial whether she had been tried or not; and as giving a true answer that she had been acquitted by the direction of the judge would have equally cleared her character, it could not have been material that she denied having been taken into custody and tried on that charge. Lord Campbell, C. J., 'I think that there is evidence of materiality,' and (the counsel for the prisoner having addressed the jury) he left that question to the jury, and directed them to consider whether her evidence on the two points in question might not influence the mind of the judge of the county court in believing or disbelieving the other statements she made in giving her evidence. (*z*)

But the preceding case has been questioned, and it seems that materiality is a question of law.

But where on an indictment for perjury before a coroner a question was raised as to the materiality of the matter sworn, and that question was left to the jury, who convicted; it was held, on a case reserved, that the matter was material: and all the judges except one, after fully considering the preceding case, expressed a very strong opinion that it was for the judge to determine whether the matter was material or not. (*a*)

The question of materiality

An indictment alleged that on the hearing of an application for an order in bastardy it became material to inquire whether the

(*w*) 1 Hawk. P. C. c. 69, s. 3.

(*x*) *Reyson's case*, Cro. Car. 146.

(*y*) *Reg. v. Phillpotts*, *ante*, p. 16.

(*z*) *Reg. v. Lavey*, 3 C. & K. 26, A.D. 1850. In every previous case materiality has been treated as a question of law, and it is submitted that it is clearly so; otherwise all the cases in which it has been held that an averment of materiality is unnecessary where the materiality appears on the face of the indictment, are erroneous. In *Reg. v. Gibbon*, L. & C. 109, Channell, B., said he never could understand *Reg. v. Lavey*, 'unless on the ground that there was a question

whether the defendant in the County Court action meant to plead or admit the claim. That point having been ascertained, the question of materiality was no longer for the jury.'

(*a*) *Reg. v. Courtney*, 7 Cox C. C. 111, A.D. 1856. Ball, J., doubted. It is to be observed that in this case all the judges held the evidence to be material; they did, therefore, treat the question as a matter of law. If they had held it to be a question for the jury, the question would have been whether the evidence warranted the verdict. See this case more fully stated, *ante*, p. 17.

prisoner had ever kissed the prosecutrix or had familiarity with her; the prisoner being examined in answer to the evidence given by the prosecutrix, swore that he never had any connection or familiarity with her, and never kissed her. It was objected that the evidence was not material, as it was far too wide in the form in which it was given. Wightman, J., consulted Erle, C. J., and declined to stop the case, and after pointing out the necessity for two witnesses to prove the falsehood of the prisoner's evidence, told the jury: 'Then the question arises whether the parts of his evidence which are assigned as perjury were material to the investigation. It seems to me that they were so, but that is for you. Were they material and wilfully false?' (b)

It should be observed, that a man may be as much perjured by an oath taken by him in his own cause, either in an answer in chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit, &c., as by an oath taken by him as a witness in the cause of another person. (c) But the oath must be taken by a person sworn to depose the truth; and a false verdict does not come under the notion of perjury, because the jurors do not swear to depose the truth, but only to judge truly of the depositions of others. (d)

A further point of general application may be mentioned, namely, that it appears not to be important whether the false oath were credited or not, or whether the party in whose prejudice it was taken were in the event any ways damaged by it; for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. (e)

In some cases, where a false oath has been taken, the party may be prosecuted by indictment at common law, though the offence may not amount to perjury. Thus it appears to have been holden, that any person making or knowingly using any false affidavit taken abroad (though a perjury could not be assigned on it here) in order to mislead our courts of justice, is punishable by indictment as for misdemeanor; and Lord Ellenborough, C. J., said, 'that he had not the least doubt that any person making use of a false instrument in order to pervert the course of justice was guilty of an offence punishable by indictment.' (f)

We may now proceed to consider the 5 Eliz. c. 9, and other statutes which relate to the offence of perjury.

By the 5 Eliz. c. 9, (g) s. 3, 'all and every such person and persons which shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever now depending, or which hereafter shall depend in suit and variance, by

was, however, left to the jury in this case.

A man may be perjured by an oath taken in his own cause.

But a false verdict does not come under the notion of perjury.

It is not necessary that the false oath were credited.

False oath indictable in some cases, though not assignable as perjury.

Statutes relating to perjury.

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5 Eliz. c. 9, s. 3. Procuring any witness to commit perjury in any matter in suit, by writ, &c., concerning

(b) Reg. v. Goddard, 2 F. & F. 361, A.D. 1861. No authority was referred to in this case. Acquittal.

(c) 1 Hawk. P. C. c. 69, s. 5. Bac. Abr. tit. *Perjury* (A).

(d) Id. *ibid.*

(e) 1 Hawk. P. C. c. 69, s. 9. Bac. Abr. tit. *Perjury* (A). In *Rex v. Nicholls*, Gloucester Sum. Ass. 1838, *cor.* Patteson, J., the prisoner had on the trial

of one Pitt for larceny sworn that he had not given the stolen property to Pitt, but he was contradicted by other witnesses, and the jury disbelieved him, and acquitted Pitt, and he was convicted of perjury in so swearing, and transported for seven years. C. S. G.

(f) *Omealy v. Newell*, 8 East, 364.

(g) Made perpetual by the 29 Eliz. c. 5, s. 2, and 21 Jac. 1, c. 28, s. 8.



any lands, goods, &c., or when sworn in *perpetuam rei memoriam* punishable by forfeiture of 40*l.*

any writ, action, bill, complaint, or information, in any wise touching or concerning any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the courts before mentioned, (*h*) or in any of the Queen's Majesty's courts of record, or in any leet, view of frank-pledge or law-day, ancient demesne court, hundred court, court baron, or in the court or courts of the stannary in the counties of Devon and Cornwall; or shall likewise unlawfully and corruptly procure or suborn any witness or witnesses, which shall be sworn to testify in *perpetuam rei memoriam*; that then every such offender or offenders shall for his, her, or their said offence, being thereof lawfully convicted or attainted, lose and forfeit the sum of forty pounds.'

Such offender not having goods, &c., to the value of 40*l.*, to suffer imprisonment.

Sec. 4. 'If it happen any such offender or offenders, so being convicted or attainted as aforesaid, not to have any goods or chattels, lands, or tenements, to the value of forty pounds, that then every such person so being convict or attainted of any of the offences aforesaid, shall for his or their said offence suffer imprisonment by the space of one half-year, without bail or mainprize, and to stand upon the pillory (*i*) the space of one whole hour, in some market town, next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed.'

Persons convicted not to be received as witnesses until judgment reversed.

Sec. 5. 'No person or persons, being so convicted or attainted, be from thenceforth received as a witness to be deposed and sworn in any court of record (within England, Wales, or the Marches of the same), until such time as the judgment given against the said person or persons shall be reversed by attain (*j*) or otherwise; and that, upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be first given against them, or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm.'

Persons committing perjury to forfeit 20*l.* and to be imprisoned for six months; and their oath not to be received in any court of record until judgment reversed.

[605]

Sec. 6. 'If any person or persons, either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts before mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or persons so offending, and being thereof duly convicted or attainted by the laws of this realm, shall for his or their said offence lose and forfeit twenty pounds, and to have imprisonment by the space of six months without bail or mainprize; and the oath of such person or persons so offending from thenceforth not to be received in any court of record within this realm of England or Wales, or the

(*h*) Viz. (as in sec. 1) 'the King's Courts of Chancery, the Star Chamber, the Whitehall, or elsewhere within any of the King's dominions of England or Wales, or the marches of the same, where any person or persons have or from thenceforth should have authority by virtue of the King's commission, patent, or writ, to hold plea of land, or to examine, hear, or determine any title of lands, or any matter or witnesses con-

cerning the title, right, or interest of any lands, tenements, or hereditaments.'

(*i*) The 1 Vict. c. 23, abolishes the punishment of pillory in all cases, but does not 'change, alter, or affect any punishment whatsoever which may now by law be inflicted in respect of any offence, except only the punishment of the pillory.'

(*j*) Abolished by the 6 Geo. 4, c. 50, s. 60, and *Evidence*, post, p. [973], et seq.



Marches of the same, until such time as the judgment given against the said person or persons shall be reversed by attain (k) or otherwise; and that upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be given against them or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm.'

Sec. 7. 'If it happen the said offender or offenders so offending not to have any goods or chattels to the value of twenty pounds, that then he or they to be set on the pillory (l) in some market-place within the shire, city, or borough, where the said offence shall be committed, by the sheriff or his ministers, if it shall fortune to be without any city or town corporate; and if it happen to be within any such city or town corporate, then by the said head officer or officers of such city or town corporate, or by his or their ministers, and there to have both his ears nailed, and from thenceforth to be discredited and disabled for ever to be sworn in any of the courts of record aforesaid, until such time as the judgment shall be reversed, (k) and thereupon to recover his damages in manner and form before mentioned.'

The statute further enacts, that one moiety of the said forfeitures shall be to the King, and the other moiety to such person as shall be grieved, hindered, or molested by reason of any of the offences before mentioned, that will sue for the same, &c.; and that as well the judge and judges of every such of the said courts where any such suit shall be, and whereupon any such perjury shall be committed, as also the justices of assize and gaol delivery, and justices of peace at their quarter sessions, both within the liberties and without, may inquire of, hear, and determine all offences against the said Act. (m) And it is provided, that the said Act shall no way extend to any spiritual or ecclesiastical court, but that every such offender, as shall offend in term as aforesaid, shall be punished by such usual and ordinary laws as are used in the said courts. (n) And it is also provided, that the said statute shall not restrain the authority of any judge having absolute power to punish perjury before the making thereof; but that every such judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done and used to do to all purposes, so that they set not on the offender less punishment than is contained in the said Act. (o)

An important statute relating to the punishment of perjury is the 2 Geo. 2, c. 25, s. 2, which, in order the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, enacts, 'that besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge, before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county for a

And if such offenders have not goods to the value of 20*l.*, they are to be set in the pillory, and have their ears nailed; and to be disabled from being witnesses until judgment reversed.

Disposal of forfeitures.

Trial of offences.

The Act is not to extend to spiritual courts.

Not to restrain other punishment of perjury.

2 Geo. 2, c. 25, s. 2. Perjury and subornation of perjury made further punishable by imprisonment and hard labour in the house of correction, or by trans-

(k) See the last note.

(l) See note (i), *supra*.

(m) Secs. 8, 9. But see the 5 & 6

Vict. c. 38, *post*, p. 77.

(n) Sec. 11.

(o) Sec. 13.

portation for  
seven years.

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Offenders so  
committed or  
transported,  
escaping or  
breaking pri-  
son, or re-  
turning from  
transportation.

Statutes relat-  
ing to perjury  
committed  
in particular  
proceedings,  
&c., and by  
particular  
persons.

False affirma-  
tions of Qua-  
kers.

22 Geo. 2.  
c. 46, s. 36.

time not exceeding seven years, there to be kept to hard labour (*p*) during all the said time, or otherwise to be transported to some of his Majesty's plantations beyond the seas, for a term not exceeding seven years, (*q*) as the court shall think most proper; and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly over and beside such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be ordered to be transported as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended.

Besides these statutes, there are a great number relating to perjury committed in particular proceedings and transactions, and by particular persons, some of which it will be proper to notice in this place. Enactments of this description are to be met with in so many and such various statutes that it is not presumed but that many of them have not come within the Editor's observation.

It should first be mentioned that the false affirmation, or declaration, of any of the people called *Quakers*, made instead of an oath, will subject the party to the penalties of perjury, by the enactments of several statutes, 7 & 8 Will. 3, c. 34; 8 Geo. 1, c. 6; and 22 Geo. 2, c. 46. The latter statute by sec. 36 enacts, 'that in all cases wherein by any Act or Acts of Parliament now in force, or hereafter to be made, an oath is or shall be allowed, authorized, directed, or required, the solemn affirmation or declaration of any of the people called Quakers, in the form prescribed by the said Act made in the eighth year of his said late Majesty's reign, (*r*) shall be allowed and taken instead of such oath, although no particular or express provision be made for that purpose in such Act or Acts; and all persons who are or shall be authorized or required to administer such oath shall be and are hereby authorized and required to administer the said affirmation or declaration; and the said solemn affirmation or declaration so made as aforesaid shall be adjudged and taken, and is hereby enacted and declared to be of the same force and effect, to all intents and purposes, in all courts of justice and other places where by law an oath is or shall be allowed, authorized, directed, or required, as if such Quaker had taken an oath in the usual form: and if any person making such affirmation or declaration shall be lawfully convicted of having wilfully, falsely, and corruptly affirmed and declared any matter or thing, which if the same had been deposed in the usual form would have

(*p*) The 3 Geo. 4, c. 114, provides that any person convicted of perjury or subornation of perjury may be sentenced to imprisonment with hard labour for any term not exceeding the term for which the court may imprison for such offences, in addition to or in lieu of any other punishment.

(*q*) Penal servitude for any term not exceeding seven and not less than five years by the 20 & 21 Vict. c. 3, and 27 & 28 Vict. c. 47, *ante*, vol. 1, p. 4.

(*r*) That form was as follows:—'I, A. B., do solemnly, sincerely, and truly declare and affirm.'

amounted to wilful and corrupt perjury, every person so offending shall incur and suffer the like pains, penalties, and forfeitures, as by the laws and statutes of this realm are to be inflicted on persons convicted of wilful and corrupt perjury.' But by sec. 37 it is provided, 'that no Quaker shall by virtue of this Act be qualified or permitted to give evidence in any criminal cases, or to serve on juries, nor to bear any office or place of profit in the government.'

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The 9 Geo. 4, c. 32, s. 1, reciting that 'it is expedient that Quakers and Moravians should be allowed to give evidence upon their solemn affirmation in all cases, criminal as well as civil,' enacts that 'every Quaker or Moravian, who shall be required to give evidence in any case whatsoever, criminal or civil, shall, instead of taking an oath in the usual form, be permitted to make his or her solemn affirmation or declaration in the words following, that is to say: "I, A. B., do solemnly, sincerely, and truly declare and affirm;" which said affirmation or declaration shall be of the same force and effect in all courts of justice, and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form; and if any person making such affirmation or declaration shall be convicted of having wilfully, falsely, and corruptly affirmed or declared any matter or thing, which if the same had been sworn in the usual form would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures to which persons convicted of wilful and corrupt perjury are or shall be subject.'

9 Geo. 4,  
c. 32, s. 1.  
False affirmations of Quakers and Moravians.

The 3 & 4 Will. 4, c. 49, s. 1, enacts that 'every person of the persuasion of the people called Quakers and every Moravian be permitted to make his or her solemn affirmation or declaration, instead of taking an oath, in all places and for all purposes whatsoever where an oath is or shall be required, either by the common law, or by any Act of Parliament already made, or hereafter to be made;' and provides that 'if any such person making such solemn affirmation or declaration shall be lawfully convicted, wilfully, falsely, and corruptly to have affirmed or declared any matter or thing, which if the same had been(s) in the usual form would have amounted to wilful and corrupt perjury, he or she shall incur the same penalties and forfeitures as by the laws and statutes of this realm are enacted against persons convicted of wilful and corrupt perjury.'

3 & 4 Will. 4,  
c. 49.  
Quakers and Moravians.

By the 1 & 2 Vict. c. 77, 'it shall be lawful for any person who shall have been a Quaker or Moravian to make solemn affirmation and declaration in lieu of taking an oath, as fully as it would be lawful for any such person to do if he still remained a member of either of such religious denominations of Christians,' and persons guilty of making false affirmations or declarations are liable to the same punishments as persons guilty of perjury, in the same manner as in the preceding statute. (t)

1 & 2 Vict.  
c. 77. Persons who have been Quakers and Moravians.

By the 1 & 2 Vict. c. 105, 'in all cases in which an oath may lawfully be and shall have been administered to any person either

1 & 2 Vict.  
c. 105. All persons bound

(s) The word 'sworn' seems omitted here.

quence of Reg. v. Doran, 2 M. C. C. R. 37. 2 Lew. 37.

(t) This statute was passed in conse-



by the oath  
taken.

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Affirmation  
instead of oath  
in certain  
cases.

Persons mak-  
ing a false  
affirmation to  
be subject to  
punishment as  
for perjury.

Persons re-  
fusing from  
conscientious  
motives to be  
sworn in  
criminal pro-  
ceedings to be  
permitted to  
make a solemn  
affirmation or  
declaration.

Punishment  
for making  
false affirma-  
tion.

as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the united kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered: provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.'

By the 17 & 18 Vict. c. 125, s. 20, 'if any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following; viz., "I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare," &c., which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.'

Sec. 21. 'If any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.'

By the 24 & 25 Vict. c. 66, s. 1, 'if any person called as a witness in any court of criminal jurisdiction in England or Ireland, or required or desiring to make an affidavit or deposition in the course of any criminal proceeding, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration, in the words following; viz., "I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare," &c., which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.'

Sec. 2. 'If any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury.'

The Bribery Act, 2 Geo. 2, c. 24, gives the form of an oath to

be taken by the returning officer; and then enacts, by sec. 5, 'that if any returning officer, elector, or person taking the oath or affirmation hereinbefore mentioned, shall be guilty of wilful and corrupt perjury, or of false affirming, and be thereof convicted by due course of law, he shall incur and suffer the pains and penalties which by law are enacted or inflicted in cases of wilful and corrupt perjury.' (u)

The 2 Will. 4, c. 45, entitled 'An Act to amend the representation of the people in England and Wales,' by sec. 58 enacts that in all elections whatever of members to serve in Parliament, 'no inquiry shall be permitted at the time of polling as to the right of any person to vote, except only as follows (that is to say):—that the returning officer or his respective deputy shall, if required on behalf of any candidate, put to any voter at the time of his tendering his vote, and not afterwards, the following questions, or any of them, and no other:—

- '1. Are you the same person whose name appears as A. B. on the register of voters now in force for the county of (or for the riding, parts, or divisions, &c., or for the city, &c., as the case may be)?
- '2. Have you already voted, either here or elsewhere, at this election for the county of (or for the riding, parts, or division of the county of or for the city or borough of as the case may be)?
- '3. Have you the same qualification for which your name was originally inserted in the register of voters now in force for the county of, &c. (or for the riding, &c., or for the city, &c., as the case may be, specifying in each case the particulars of the qualification as described in the register)?

'And if any person shall wilfully make a false answer to any of the questions aforesaid, he shall be deemed guilty of an indictable misdemeanor, and shall be punished accordingly, (v) and the returning officer or his deputy, or a commissioner or commissioners to be for that purpose by him or them appointed, shall (if required on behalf of any candidate at the time aforesaid) administer an oath (or in case of a Quaker or Moravian, an affirmation) to any voter in the following form (that is to say):—

'“ You do swear (or being a Quaker or Moravian, do affirm) that you are the same person whose name appears as A. B. on the register of voters now in force for the county of (or for the riding, parts, or division of the county of or for the city or borough of as the case may be), and that you have not before voted, either here or elsewhere, at the present election for the said county (or for the said riding, parts, or division of the said county, or for the said city or borough, as the case may be).

“ So help you God.” (w)

(u) The 17 & 18 Vict. c. 102, s. 1, repeals this Act, except sec. 3, and so much as relates to oaths of returning officers.

(v) See the cases, *post*, p. 109.

(w) Although the statute does not ex-

pressly make the falsely taking this oath either perjury or a misdemeanor, yet it is conceived that it would be a misdemeanor at common law. See *Rex v. De Beauvoir*, 7 C. & P. 17, *post*, p. 113.

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Perjury by  
returning  
officers, &c.,  
2 Geo. 2, c. 24.

2 Will. 4,  
c. 45, s. 58.  
False answers  
by voters at  
elections.

[613]

‘And no elector shall hereafter at any such election be required to take any oath or affirmation except as aforesaid, either in proof of his freehold or of his residence, age, or other qualification or right to vote, any law or statute, local or general, to the contrary notwithstanding.’

Perjury before  
revising bar-  
risters.

The same statute by secs. 41 & 50 provides that the Revising Barristers shall hold open courts for the purpose of revising the lists of voters for counties and boroughs, and sec. 52 enacts, that ‘every barrister holding any court under this Act as aforesaid shall have power to adjourn the same from time to time, and from any one place to any other place or places within the same county, riding, parts, or division, or within the same city or borough, or within any place sharing in the election for such city or borough, but so as that no such adjourned court shall be held after the 25th day of October in any year; and every such barrister shall have power to administer an oath (or in the case of a Quaker or Moravian, an affirmation) to all persons making objection to the insertion or omission of any name in any of such lists as aforesaid, and to all persons objected to, or claiming to be inserted in any of such lists, or claiming to have any mistake corrected or any omission supplied in any of such lists, and to all witnesses who may be tendered on either side, and that, if any person taking any oath or making any affirmation under this Act shall wilfully swear or affirm falsely, such person shall be deemed guilty of perjury, and shall be punished accordingly.’ (x)

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Certain in-  
quiries of a  
voter at a  
municipal  
election, and  
no other.

By the Municipal Corporation Reform Act, 5 & 6 Will. 4, c. 76, s. 34, ‘no inquiry shall be permitted at any election as to the right of any person to vote as a burgess in any borough except only as follows (that is to say):—that the mayor or other presiding officer shall, if required by any two burgesses entitled to vote in the same borough, put to any voter at the time of his delivering in his voting paper, and not afterwards, the following questions, or any of them, and no other:—

- ‘1. Are you the person whose name is signed as A. B. to the voting paper now delivered in by you?
- ‘2. Are you the person whose name appears as A. B. on the burgess roll now in force for this borough, being registered therein as rated for property described to be situated in  
? [Here specify the street, &c., as described in the burgess roll.]
- ‘3. Have you already voted at the present election?

A false answer  
is indictable.

‘And no person required to answer any of the said questions shall be permitted or qualified to vote until he shall have answered the same; and if any person shall wilfully make a false answer to any of the questions aforesaid, he shall be deemed guilty of a misdemeanor, and may be indicted and punished accordingly.’ (y)

4 & 5 Vict.  
c. 58, s. 75.  
Perjury before  
election com-  
mittees.

The 4 & 5 Vict. c. 58, entitled ‘An Act to amend the law for the trial of controverted elections, by sec. 75 enacts, ‘that where in this Act anything is required to be verified on oath to the House of Commons, it shall be lawful for the clerk or clerk assistant of

(x) See *Reg. v. Thornhill*, *post*, p. 75.

(y) See vol. I, p. 92, for this punishment; and the cases, *post*, p. 112.



the House of Commons to administer an oath for that purpose, or an affidavit for such purpose may lawfully be sworn before any justice of the peace or master of the High Court of Chancery.'

By sec. 76, 'every person who shall wilfully give any false evidence before the House of Commons, or any committee or examiner of recognizances, under the provisions of this Act, or who shall wilfully swear falsely in any affidavit authorized by this Act to be taken, shall, on conviction thereof, be liable to the penalties of wilful and corrupt perjury.'

The Marriage Act, 6 & 7 Will. 4, c. 85, s. 38, enacts, that 'every person who shall knowingly and wilfully make any false declaration, or sign any false notice or certificate required by this Act, for the purpose of procuring any marriage, shall suffer the penalties of perjury.' (z)

6 & 7 Will. 4,  
c. 85.  
Perjury as to  
marriages.

The 5 & 6 Will. 4, c. 62, which was passed for the purpose of abolishing unnecessary oaths, by sec. 2 enacts, 'that in any case where, by any Act or Acts made or to be made relating to the revenues of customs or excise, the post-office, the office of stamps and taxes, the office of woods and forests, land revenues, works, and buildings, the war office, the army pay-office, the office of the treasurer of the navy, the accountant-general of the navy, or the ordnance, his Majesty's treasury, Chelsea Hospital, Greenwich Hospital, the board of trade, or any of the offices of his Majesty's principal secretaries of state, the India board, the office for auditing the public accounts, the national debt office, or any office under the control, direction, or superintendence of the Lords Commissioners of his Majesty's Treasury, or by any official regulation in any department, any oath, solemn affirmation, or affidavit might, but for the passing of this Act, be required to be taken or made by any person on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever, it shall be lawful for the Lords Commissioners of his Majesty's Treasury, or any three of them, if they shall so think fit, by writing under their hands and seals, to substitute a declaration to the same effect as the oath, solemn affirmation, or affidavit which might, but for the passing of this Act, be required to be taken or made; and the person who might under the Act or Acts imposing the same be required to take or make such oath, solemn affirmation, or affidavit, shall, in presence of the commissioners, collector, other officer or person empowered by such Act or Acts to administer such oath, solemn affirmation, or affidavit, make and subscribe such declaration, and every such commissioner, collector, other officer or person is hereby empowered and required to administer the same accordingly.'

[615]  
5 & 6 Will. 4,  
c. 62, s. 2.  
Lords of the  
Treasury em-  
powered to  
substitute a  
declaration in  
lieu of an oath,  
&c., in certain  
cases.

Sec. 3. 'The declaration so substituted is to be published in the *Gazette*, and after twenty-one days from the date of the *Gazette* the provisions of this Act are to apply.'

[616]  
Declaration to  
be published.

(z) The 3 Geo. 4, c. 75, s. 10, contained a clause making persons wilfully swearing any false oath in order to procure a marriage license guilty of perjury, but that clause seems to be repealed by the 4 Geo. 4, c. 17, which is repealed by the 4 Geo. 4, c. 76, s. 1, and that Act

contains no provision making such false swearing perjury; but by sec. 23 provides that where a marriage is procured by false swearing, the party may be caused to forfeit the property obtained thereby in the manner therein provided. See the cases, *ante*, p. 4.

No oath afterwards.

Sec. 4. 'After the expiration of the said twenty-one days it shall not be lawful for any commissioner, collector, officer, or other person to administer or cause to be administered, or receive or cause to be received, any oath, solemn affirmation, or affidavit, in the lieu of which such declaration as aforesaid shall have been directed by the Lords Commissioners of his Majesty's treasury to be substituted.'

False declarations a misdemeanor.

Sec. 5. 'If any person shall make and subscribe any such declaration as hereinbefore mentioned in lieu of any oath, solemn affirmation, or affidavit by any Act or Acts relating to the revenues of customs or excise, stamps and taxes, or post-office, required to be made on the doing of any act, matter, or thing, or for verifying any book, account, entry, or return, or for any purpose whatsoever, and shall wilfully make therein any false statements as to any material particular, the person making the same shall be deemed guilty of a misdemeanor.'

By sec. 6, the oath of allegiance is to be required in all cases as before the Act passed.

By sec. 7, oaths in courts of justice are to be taken in the same manner as if the Act had not passed.

Universities of Oxford and Cambridge, and other bodies, may substitute a declaration in lieu of an oath.

Sec. 8. 'It shall be lawful for the universities of Oxford and Cambridge, and for all other bodies corporate and politic, and for all bodies now by law or statute, or by any valid usage, authorized to administer or receive any oath, solemn affirmation, or affidavit, to make statutes, bye-laws, or orders authorizing and directing the substitution of a declaration in lieu of any oath, solemn affirmation, or affidavit now required to be taken or made: provided always that such statutes, bye-laws, or orders be otherwise duly made and passed according to the charter, laws, or regulations of the particular university, other body corporate and politic, or other body so authorized as aforesaid.'

Churchwardens and sidesman's oath abolished, and a declaration to be made in lieu thereof.

Sec. 9. 'In future every person entering upon the office of churchwarden or sidesman, before beginning to discharge the duties thereof, shall, in lieu of such oath of office, make and subscribe, in the presence of the ordinary or other person before whom he would, but for the passing of this Act, be required to take such oath, a declaration that he will faithfully and diligently perform the duties of his office, and such ordinary or other person is hereby empowered and required to administer the same accordingly: provided always, that no churchwarden or sidesman shall in future be required to take any oath on quitting office, as has heretofore been practised.'

Declaration substituted for oaths and affidavits by persons acting in turnpike trusts.

Sec. 10. 'In any case where, under any Act or Acts for making, maintaining, or regulating any highway, or any road, or any turnpike road, or for paving, lighting, watching, or improving any city, town, or place, or touching any trust relating thereto, any oath, solemn affirmation, or affidavit might, but for the passing of this Act, be required to be taken or made by any person whomsoever, no such oath, solemn affirmation, or affidavit shall in future be required to be or be taken or made, but the person who might under the Act or Acts imposing the same be required to take or make such oath, solemn affirmation, or affidavit shall, in lieu thereof, in the presence of the trustee, commissioner, or other person before whom he might under such Act or Acts be required

to take or make the same, make and subscribe a declaration to the same effect as such oath, solemn affirmation, or affidavit, and such trustee, commissioner, or other person is hereby empowered and required to administer and receive the same.'

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Sec. 11. 'Whenever any person or persons shall seek to obtain any patent under the Great Seal for any discovery or invention, such person or persons shall, in lieu of any oath, affirmation, or affidavit which heretofore has or might be required to be taken or made upon or before obtaining any such patent, make and subscribe, in the presence of the person before whom he might, but for the passing of this Act, be required to take or make such oath, affirmation, or affidavit, a declaration to the same effect as such oath, affirmation, or affidavit; and such declaration, when duly made and subscribed, shall be to all intents and purposes as valid and effectual as the oath, affirmation, or affidavit in lieu whereof it shall have been so made and subscribed.'

Declaration substituted for oaths and affidavits heretofore required on taking out a patent.

Sec. 12. 'Where by any Act or Acts at the time in force for regulating the business of pawnbrokers, any oath, affirmation, or affidavit might, but for the passing of this Act, be required to be taken or made, the person who by or under such Act or Acts might be required to take or make such oath, affirmation, or affidavit, shall in lieu thereof make and subscribe a declaration to the same effect; and such declaration shall be made and subscribed at the same time, and on the same occasion, and in the presence of the same person or persons, as the oath, affirmation, or affidavit in lieu whereof it shall be made and subscribed would by the Act or Acts directing or requiring the same be directed or required to be taken or made; and all and every the enactments, provisions, and penalties contained in or imposed by any such Act or Acts, as to any oath, affirmation, or affidavit thereby directed or required to be taken or made, shall extend and apply to any declaration in lieu thereof, as well and in the same manner as if the same were herein expressly enacted with reference thereto.'

Declaration substituted for oaths and affidavits required by Acts as to pawnbrokers.

Penalties as to such oaths, &c., to apply to declarations.

Sec. 13, reciting that 'a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace, or other person by whom such oaths or affidavits have been administered or received,' and that 'doubts have arisen whether or not such proceeding is illegal, for the more effectual suppression of such practice and removing such doubts,' enacts, 'that from and after the commencement of this Act, it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being (a): provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses

Justices not to administer oaths, &c., touching matters whereof they have no jurisdiction by statute.

Proviso.

(a) See *Reg. v. Nott, C. & M.* 288, *post*, p. 113.



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Declaration substituted for oaths and affidavits required by Bank of England on the transfer of stock.

of Parliament or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.' (b)

Sec. 14. 'In any case in which it has been the usual practice of the Bank of England to receive affidavits on oath to prove the death of any proprietor of any stocks or funds transferable there, or to identify the person of any such proprietor, or to remove any other impediment to the transfer of any such stocks or funds, or relating to the loss, mutilation, or defacement of any bank-note or bank post bill, no such oath or affidavit shall in future be required to be taken or made, but in lieu thereof the person who might have been required to take or make such oath or affidavit shall make and subscribe a declaration to the same effect as such oath or affidavit.'

By sec. 15, declarations are substituted in lieu of the oaths required by the 5 Geo. 2, c. 7, 'An Act for the more easy recovery of debts in his Majesty's plantations and colonies in America,' and the 54 Geo. 3, c. 15, 'An Act for the more easy recovery of debts in his Majesty's colony of New South Wales.'

Declaration in writing sufficient to prove execution of any will, codicil, &c.

Sec. 16. 'It shall and may be lawful to and for any attesting witness to the execution of any will or codicil, deed, or instrument in writing, and to and for any other competent person, to verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed, or instrument in writing, by such declaration in writing made as aforesaid, and every such justice, notary, or other officer shall be and is hereby authorized and empowered to administer or receive such declaration.'

Suits on behalf of his Majesty to be proved by declaration.

Sec. 17. 'In all suits now depending or hereafter to be brought in any court of law or equity by or in behalf of his Majesty, his heirs and successors, in any of his said Majesty's territories, plantations, colonies, possessions, or dependencies, for or relating to any debt or account, that his Majesty, his heirs and successors, shall and may prove his and their debts and accounts, and examine his or their witness or witnesses by declaration, in like manner as any subject or subjects is or are empowered or may do by this present Act.'

Voluntary declaration in the form in the schedule may be taken.

Sec. 18, reciting that 'it may be necessary and proper in many cases not herein specified to require confirmation of written instruments or allegations, or proof of debts, or of the execution of deeds or other matters,' enacts that 'it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this Act annexed; and if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor.' (c)

Making false declaration a misdemeanor.

(b) There are some cases where a justice may administer an oath out of his county, and the distinction seems to be between voluntary and compulsory proceedings. See *Helier v. The Hundred of Benhurst*, Cro. Car. 211.

(c) See *ante*, vol. 1, p. 92, for the punish-

ment, and see the cases on this section, *post*, p. 113. By sec. 19, the same fees are payable on declarations as on the oaths, in lieu of which they are made. By sec. 19, the declaration is to be in the form following:—'I, A. B., do solemnly and sincerely declare, that and I make

Sec. 21. 'In any case where a declaration is substituted for an oath under the authority of this Act, or by virtue of any power or authority hereby given, or is directed and authorized to be made and subscribed under the authority of this Act, or by virtue of any power hereby given, any person who shall wilfully and corruptly make and subscribe any such declaration, knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor.' (d)

Persons making false declaration deemed guilty of a misdemeanor.

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With respect to the first of the statutes above set forth, namely, the 5 Eliz. c. 9, as it is but little resorted to at the present time, on account of prosecutions upon it being more difficult than at the common law, and as it did not alter the nature of the offence, but merely enlarged the punishment, (e) a brief statement of some of the principal points decided upon its construction will probably be deemed sufficient.

Construction of the 5 Eliz. c. 9.

In many instances an indictment will lie at common law, when it will not lie upon this statute. Thus where a witness for the King swears falsely, he cannot be indicted on the statute. (f)

It has been adjudged that a man cannot be guilty of perjury within this statute, in any case wherein he may not possibly be guilty of subornation of perjury within it; on the ground that it is reasonable to give the whole statute the same construction; and that it cannot well be intended that the makers of it meant to extend its purview farther as to perjury, which they appear to have considered as the less crime, than to subornation of perjury, which they seem to have esteemed the greater: and, therefore, since the clause concerning subornation of perjury, mentioning only matters depending by writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, &c., does not extend to perjury on an indictment or criminal information, the clause concerning perjury, though penned in more general words, has been adjudged to come under the like restriction. (g) And it has also been resolved, that as the clause concerning subornation of perjury relates only to perjury by *witnesses*, that concerning perjury extends to no other perjury than that of a *witness*; and, therefore, not to perjury in an answer in chancery; or in swearing the peace against a man; or in a presentment by a homager in a court baron, or in a wager of law, or in swearing before commissioners of the King's title to lands. (h) And by the opinions of some, a false affidavit against a man, in a court of justice, is not within the statute. (i) But it is observed that if such affidavit be by a third person, and relate to a cause depending in suit,

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this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the        year of the reign of his present Majesty, entitled an Act' [here insert the title of this Act].

(d) See *ante*, vol. 1, p. 92, for the punishment. The number of statutes, which contain clauses making persons giving false evidence, making false affidavits, &c., either liable to the punishment of perjury or guilty of a misdemeanor, is so large that it is conceived they would occupy

more space than the infrequency of the occasions, on which it may be necessary to consult them, warrants devoting to their insertion; all of them, therefore, have not been inserted. C. S. G.

(e) *Buxton v. Gouch*, 3 Salk. 269.

(f) *Id. ibid.*

(g) *Bac. Ab. tit. Perjury* (B). 1 Hawk. P. C. c. 69, s. 19.

(h) 1 Hawk. P. C. c. 69, s. 20. *Bac. Abr. tit. Perjury* (B).

(i) 2 Roll. Abr. 77. 1 Roll. 79. 3 Keb. 345.



before the court, and either of the parties in variance be grieved, hindered, or molested, in respect of such cause, by reason of the perjury, it may be strongly argued that it is within the purview of the statute. (*j*) It seems to be the better opinion that a false oath before the sheriff on a writ of inquiry of damages is within the statute. (*k*)

It has been collected from the clause giving an action to the party grieved, that no false oath is within the statute, which does not give some person a just cause of complaint; and, therefore, that if the thing sworn be true, though it be not known by him that swears it to be so, the oath is not within the statute, because it gives no good ground of complaint to the other party, who would take advantage of another's want of sufficient evidence to make out the justice of the cause. (*l*) And upon the same ground no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it: therefore, in every prosecution on the statute, it is necessary to set forth the record wherein the perjury is supposed to have been committed, and to prove at the trial that there is such a record, either by actually producing it, or by an attested copy; and it is necessary not only to set forth in the pleadings the point wherein the false oath was taken, but to show also how it conduced to the proof or disproof of the matter in question. (*m*) And if an action on the statute be brought by more than one, it is necessary to show how the perjury was prejudicial to each of the plaintiffs. (*n*) But it seems that a perjury, which tends only to aggravate or extenuate the damages, is as much within the statute as a perjury that goes directly to the point in issue; and that perjury committed in a cause wherein an erroneous judgment is given, is a good ground of a prosecution upon the statute till the judgment be reversed. (*o*)

Indictment on  
the 5 Eliz.  
c. 9.

[621] It has been holden that every indictment or action upon this statute must exactly pursue the words of it; and, therefore, if it allege that the defendant deposed such a matter *falso et deceptivè*, or *falso et corruptè*, or *falso et voluntariè*, without saying *voluntariè et corruptè*, it is not good, though it conclude that *sic voluntarium et corruptum commisit perjurium contra formam statuti*, &c. Also it is said to be necessary expressly to show that the defendant was sworn; and that it is not sufficient to say that *tacto per se sacro evangelio deposuit*. But there is no need to show whether the party took the false oath through the subornation of another, or of his own act, though the words of the statute are, 'If persons by subornation, &c., or their own act, &c., shall commit wilful perjury;' for there being no medium between the branches of this distinction, they seem to be put in *ex abundanti*,

(*j*) 1 Hawk. P. C. c. 69, s. 21.

(*k*) Bac. Abr. tit. *Perjury* (B). 1 Hawk. P. C. c. 69, s. 21.

(*l*) 1 Hawk. P. C. c. 69, s. 22. Bac. Abr. tit. *Perjury* (B). We have seen that this is otherwise at common law. *Ante*, p. 2.

(*m*) Bac. Abr. tit. *Perjury* (B). 1 Hawk. P. C. c. 69, s. 23.

(*n*) *Id.* *ibid.*

(*o*) 1 Hawk. P. C. c. 69, s. 23. Bac. Abr. tit. *Perjury* (B). In 1 Hawk. P. C. c. 69, s. 4, there is a *qu.* whether perjury in a court, whose proceedings are afterwards reversed by error, may not still be punished as perjury, notwithstanding such reversal? See *Reg. v. Meek*, *ante*, p. 21.



and to express no more than the law would have implied, and, therefore, operate nothing. (p)

It seems that if perjury be committed that is within this statute, but the indictment concludes not *contra formam statuti*, yet it is a good indictment at common law, but not to bring the offender within the corporal punishment of the statute. (q)

For the purpose of facilitating prosecutions for perjury, and of preventing great offenders from escaping punishment by reason of the expense attending such prosecutions, the 23 Geo. 2, c. 11, s. 3, enacts, ‘that it shall and may be lawful to and for any of his Majesty’s justices of assize, or *nisi prius*, or general gaol delivery, or of any of the great sessions of the principality of Wales, or of the counties palatine; and they are hereby authorized (sitting the court, or within twenty-four hours after) to direct any person examined as a witness upon any trial before him or them to be prosecuted for the said offence of perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and that it shall appear to him or them proper so to do; and to assign the party injured, or other person undertaking such prosecution, counsel, who shall and are hereby required to do their duty without any fee, gratuity, or reward for the same; and every such prosecution, so directed as aforesaid, shall be carried on without payment of any tax or duty, and without payment of any fees in court, or to any officer of the court who might otherwise claim or demand the same. And the clerk of assize, or his associate or prothonotary, or other proper officer of the court (who shall be attending when such prosecution is directed) shall, and is hereby required, without any fee or reward, to give the party injured, or other person undertaking such prosecution, a certificate of the same being directed, together with the names of the counsel assigned him by the court, which certificate shall in all cases be deemed sufficient proof of such prosecution having been directed as aforesaid: provided that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.’

The same statute also makes provision for the more easy framing of indictments for perjury and subornation of perjury. The first section, reciting that by reason of the difficulties attending prosecutions for perjury and subornation of perjury, those heinous crimes had frequently gone unpunished, enacts, ‘that in every information or indictment to be prosecuted against any person for wilful and corrupt perjury, *it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken* (averring such court or person or persons to have a competent authority to administer the same), together with the proper averment or averments to falsify the matter or matters, wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court, or person

Facilities given to prosecutions for perjury. 23 Geo. 2, c. 11, s. 3. The judges of assize, &c., may direct any witness to be prosecuted for perjury, and assign counsel, &c.

Provision for the more easy framing of indictments.

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(p) 1 Hawk. P. C. c. 69, ss. 17, 18. Bac. Abr. tit. *Perjury* (B), and the authorities there cited.

(q) 2 Hale, 191, 192. See the cases cited, vol. 1, p. 882.

or persons before whom the perjury was committed.' And the second section enacts, 'that in every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed, or was agreed or promised to be committed.'

The provisions of this statute should be attended to in drawing indictments.

It was lamented by a very great judge, that the party prosecuting for perjury did not more frequently avail himself of this excellent law, made for the purpose of obviating difficulties in drawing the indictments. (*r*) In the case in which this remark was made, the commission at the admiralty session had been unnecessarily set forth in the indictment; and it was admitted that where a prosecutor undertakes to set out in the indictment more of the proceedings than he need under this statute, he must set them forth correctly; but it was holden that the commission at the admiralty session being set forth as directed to A., B., and C., and others not named, of which number A., B., and C., amongst others, *should always be one*, the court must take it to mean that if either of the persons named of the quorum were present, it would be sufficient. (*s*)

Any court, judge, justice, &c., may direct a person guilty of perjury in any evidence, &c., to be prosecuted,

The provisions of the 23 Geo. 3, c. 11, and 31 Geo. 3, c. 3 (I), are extended by the 14 & 15 Vict. c. 100. By sec. 19 of this Act, 'it shall and may be lawful for the judges or judge of any of the superior courts of common law or equity, or for any of Her Majesty's justices or commissioners of assize, nisi prius, oyer and terminer, or gaol delivery, or for any justices of the peace, recorder, or deputy recorder, chairman, or other judge holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy judge of any county court, or any court of record, or for any justices of the peace in special or petty sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties,

and commit the party, unless he enter into recognizance to appear and take

(*r*) By Lord Kenyon, C. J., in *Rex v. Dowlin*, 5 T. R. 317. And a case is mentioned in which the Court of K. B. referred an indictment for perjury, which had been removed from Hick's Hall to the master, to see what part of the record was unnecessary; and made an order

that the clerk of the peace should pay the expense incurred by such unnecessary part. The indictment was drawn to an exorbitant length, by stating all the continuances on the former prosecution, &c. 1 Leach, 201.

(*s*) *Rex v. Dowlin*, 5 T. R. 311.



conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the court without leave, and to require any person he or they may think fit to enter into a recognizance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned court shall specially otherwise direct; and when allowed by any such court in Ireland such sum as shall be so allowed shall be ordered by the said court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland: provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.'

Sec. 20. 'In every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding, either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed.'

Sec. 21. 'In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit; and wherever such perjury or other offence aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore

his trial, and bind persons to give evidence;

and give certificate of prosecution being directed, which shall be sufficient evidence of the same.

Extending the 23 Geo. 2, c. 11, s. 1, to other offences, and simplifying indictments for perjury and other like offences.

Extending the 23 Geo. 2, c. 11, s. 2, as to form of indictments for subornation of perjury and other like offences.



rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.’

On trials for perjury and subornation a certificate of the trial of the indictment on which the perjury was committed sufficient evidence of such trial.

Several persons not to be joined in an indictment for perjury.

Venue.

Sec. 22. ‘A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of six shillings and eightpence and no more shall be demanded or taken), shall upon the trial of any indictment for perjury or subornation of perjury be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.’

It has been holden, on motion in arrest of judgment, that several persons cannot be joined in one indictment for perjury, the crime being in its nature several. (t) But this does not apply to subornation of perjury. (u)

With respect to the *venue* in an indictment for perjury, it may be briefly observed that the parish or place, unless used as giving some specific local description, will not be material, and that it will be sufficient to show the offence committed anywhere within the county. But an indictment was formerly holden to be bad for laying the offence to have been committed ‘at the Guildhall of the city of London,’ without stating any parish or ward. (v) The venue in the margin would now, however, be sufficient. (w) In a case where perjury had been committed in the booth-hall within the limits of the city of Gloucester, which is a county of itself, on the trial of a cause before a jury of the county at large, it was holden that the indictment might be found and tried by juries of the county at large. (x) And where perjury had been committed on the trial of an indictment at the Worcester quarter sessions, which were held in the Guildhall at Worcester, which is situate in the county of the city of Worcester, it was held that the indictment, which was found by the grand jury of the county of the city of Worcester, was good, as it was preferred in the county where the oath was actually taken. (y) A sufficient venue was holden to be laid on the act of taking the false oath in a case where perjury was assigned on an affidavit of an attorney of the court made in answer to a summary application against him, and where it was objected that it was not stated where the court was holden when the original application was made, or when the rule was made, calling upon the defendant to answer the charge, it

(t) *Rex v. Phillips*, 2 Str. 921.

(u) *Reg. v. Rhodes*, 2 Ld. Raym. 886. In *Reg. v. Goodfellow*, C. & M. 569, one defendant was indicted for perjury, and the other for suborning him to commit the perjury, and no objection taken to both being included in the same indictment; and it should seem none could have been successfully taken on that ground, as it is like the case of principal and accessory before the fact, included in the same indictment. C. S. G.

(v) *Harris's case*, 2 Leach, 800. But see *Rex v. Woodward*, R. & M. C. C. R.

323, *ante*, vol. 2, p. 1054. C. S. G.

(w) See the 14 & 15 Vict. c. 100, s. 23, *ante*, vol. 2, p. 323.

(x) *Rex v. Gough*, Dougl. 791. In this case a charter had made Gloucester a county of itself, reserving only the trial of matters arising in the county at large within Gloucester as before. The judges intimated their opinions that the indictment might be in either county, but they were clear it might be in the county at large.

(y) *Rex v. Jones*, 6 C. & P. 137, Tindal, C. J.

being expressly averred that the defendant ‘then and there before the said court was duly sworn.’ (z) In the instance of making an affidavit in the country, the party is not to be indicted where the affidavit may happen to be used, but in the county where the offence was completed, by making the false oath. (a)

The indictment must also contain an allegation of *time*, which is sometimes material and necessary to be laid with precision, and sometimes not. (b) Where it is not material, it need not be positively averred; and if under a *videlicet*, it may be rejected. (c) In a case where an indictment for perjury, charged to have been committed in the defendant’s answer to a bill of discovery filed in the Court of Exchequer, alleged that the bill was filed on a day specified, it was holden that the day was not material, as it was not alleged as part of the record: and, therefore, that it was no variance, though the bill, when produced, appeared to be entitled generally of a preceding term. (d) But in the same case where an assignment of perjury alleged that the defendant, at the time of effecting a policy of insurance purporting to have been underwritten by A., B., C., and others, on a day specified, well knew, &c., and it appeared on producing the policy that A. underwrote it on a different day, the defect was holden to be fatal, although it appeared that B., C., &c., did underwrite the policy on that day. (e) Where the perjury was assigned in answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term, by order of the court, it was held to be no variance, the amended bill being part of the original bill. (f) So it has been held on an indictment for perjury committed on the trial of a cause at *nisi prius* to be no variance that the *nisi prius* record states the trial to have been on a day different from that stated in the indictment, there being no express reference in the indictment to the record. (g)

It is proper to make such a statement by way of inducement as will be sufficient to explain the assignment of perjury, and make it intelligible and consistent. And the statements in the indictment must, in general, be made with great accuracy. An indictment for perjury stating a bill of Middlesex as ‘issuing out of the office of the chief clerk assigned to *inrol* pleas in the court,’ &c., has been holden to be bad. (h) And a misrecital of the judgment-roll of the cause, at the trial of which the perjury is alleged to have been committed, is also fatal. (i) And if the indictment

Allegation of  
time in the  
indictment.

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Necessary  
statement in  
the indictment.

Variances.

(z) *Rex v. Crossley*, 7 T. R. 315, ante, p. 4.

(a) By Lord Kenyon, C. J. Id. *ibid*.

(b) *Rex v. Aylett*, 1 T. R. 69. In *Reg. v. Kimpton*, 2 Cox C. C. 296, Parke, B., doubted whether an averment of the materiality of a thing occurring on ‘Monday, the 29th of June, in the year 1846,’ was sufficient after verdict, as the proper course is either to state the year of our Lord, or the year of the monarch’s reign; and he left the prisoner to his writ of error.

(c) *Rex v. Aylett*, 1 T. R. 70, 71.

(d) *Rex v. Hucks*, *cor.* Lord Ellenborough, C. J., 1 Stark. R. 521. And see *Rastall v. Straton*, 1 H. B. 49. *Woodford v. Ashley*, 2 Campb. 193, and 1 Stark. Crim. Plead. 122.

(e) *Rex v. Hucks*, 1 Stark. R. 521.

(f) *Rex v. Waller*, Mich. 6 Geo. 1. 3 Stark. Evid. 856.

(g) *Rex v. Coppard*, Moo. & M. 118. 3 C. & P. 59, per Lord Tenterden, C. J., on the authority of *Purcell v. Macnamara*, 9 East, 156, where in an action for a malicious prosecution it was held to be no variance that the record of acquittal stated the acquittal to have been on a different day from that laid in the declaration, as the day named in the declaration was not laid as part of the description of the record of acquittal.

(h) *Rex v. Scole, Peake*, N. P. R. 112. Lord Kenyon, C. J.

(i) *Rex v. Eden*, 1 Esp. R. 97. Lord Kenyon, C. J. The indictment alleged that the cause came on to be tried before Lloyd,

state that at the assizes, holden before justices assigned to take the said assizes, the oath was taken before A. B., one of the said justices, the said justice then and there having power, &c., it will be a fatal variance if the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery. (*j*)

A trial for rape alleged to have taken place at the assizes.

An indictment for perjury alleged that at the assizes holden for the county of Stafford, on &c., at &c., before Sir J. P., &c., 'justices assigned to take the assizes in and for the said county,' one Corns was tried for a rape, and that the prisoner on that trial swore, &c. The record of the former trial stated it to have taken place 'at the assizes and general session of oyer and terminer.' It was objected that the indictment was bad, as an indictment for rape could not be tried under the commission of assize. Greaves, Q. C., doubted whether the indictment was necessarily bad; as the indictment for rape might have been removed by *certiorari*, and tried on the civil side; in which case the allegation that it was tried at the assizes might suffice. (*k*)

It was further objected that there was a variance, as the record produced showed that the trial had taken place in the crown court, and thereupon an amendment of the indictment was prayed. Greaves, Q. C., consulted Williams, J., and they agreed that there was a variance, but that there was no power to amend the indictment under the 9 Geo. 4, c. 15, as the allegation was the statement of a fact, viz. the court before which the trial took place, and was not the 'recital or setting forth' of 'any matter in writing or print' within that Act. (*l*)

Imperfect statement of the authority of judges of gaol delivery.

An indictment alleged that a trial took place at a session of gaol delivery before Lord Campbell, chief justice of our lady the Queen, assigned to take pleas before the Queen herself, and Sir E. V. Williams, knight, one of the justices of our said lady the Queen of her Court of Common Pleas, assigned to deliver the said gaol of the prisoners therein. It was objected that the words 'assigned to deliver, &c.' did not apply to Lord Campbell, but only to Mr. J. Williams; but on its appearing that the record had 'and others their fellow justices assigned to deliver,' &c., Talfourd, J., directed the indictment to be amended. (*m*)

Lord Kenyon, &c., William Jones being associated, &c.; and from the judgment-roll it appeared that Roger Kenyon was associated, &c.; and the variance was held to be fatal.

(*j*) *Rex v. Lincoln*, MS. Bayley, J., and R. & R. 421.

(*k*) See the precedents, 2 Chitt. C. L. 366, 367 (*a*), of indictments for perjury on the trial of causes at the assizes, which are in the form of this indictment; though, according to 3 Bl. C. 60, the commission of assize is to take the verdict of a peculiar species of jury, called an assize. Blackstone also speaks of a commission of assize being issued each circuit; but no such commission is now issued, and the cases tried on the civil side are tried under the commission of assize. And this is according to what Lord Holt said (*Bullock v. Parsons*, 2

Salk. 454), 'The authority of the judge of nisi prius is not by the *distringas*, but by the commission of assize; for it is the 13 Ed. 3, c. 30, which gives the trial by nisi prius, and by that statute the trial by nisi prius is given before justices of assize.' It is clear, therefore, that where perjury is committed either on a civil or criminal trial at nisi prius on circuit the trial ought to be alleged to have taken place before the justices assigned to take the assizes.

(*l*) *Reg. v. Fairburn*, Stafford Sum. Ass. 1850. MSS. C. S. G. The prisoner was acquitted, or the points would have been reserved. It seems clear that the amendment in such a case might now be made under the 14 & 15 Vict. c. 100, s. 1, *post*, Evidence.

(*m*) *Reg. v. Child*, 5 Cox C. C. 197. Spr. Ass. 1851.



Where an indictment for perjury alleged the former trial to have taken place 'at the assizes and general session of the delivery of the gaol,' it was objected that this was an impossible combination of civil and criminal jurisdiction, and Talfourd, J., ordered the word assizes to be struck out of the indictment. (*n*)

Assizes and  
gaol delivery  
incorrect.

Where an indictment for perjury, committed in a written deposition before a magistrate, in which deposition a word necessary to the sense had been omitted, set out the *substance and effect* of the deposition, and supplied a word which the sense required, as though it were actually in the deposition, the variance was holden to be fatal. (*o*) And where a count in an indictment undertakes to set out continuously the substance and effect of what the defendant swore upon his examination, it must be proved that in *substance* and effect he swore the whole of what is set out, though several distinct assignments of perjury are made thereon. (*p*)

Substance  
and effect.

Where perjury is assigned upon several parts of an affidavit, and such parts are set out continuously, it is no variance if such parts are separated by other intervening matter, provided what intervenes does not vary the effect of what is set out. An indictment for perjury alleged to have been committed in an affidavit, set out various matters deposed to as if they had been continuous in the affidavit, but on the production of the affidavit, it appeared that the parts set out in the indictment were not continuous, but were separated by the introduction of other matter. It was contended that there was clearly a variance between the affidavit set out in the indictment and that given in evidence. The proper mode of stating it was, 'in one part whereof the defendant swore such and such things, and in another part whereof he swore certain other things.' In actions or indictments for libel such a variance would clearly be fatal. Abbott, C. J., 'In actions or indictments for libel the tenor must be set out; in indictments for perjury it is sufficient to state the substance and effect of the false oath; the variance pointed out is therefore immaterial.' (*q*) And the same has been held as to evidence given upon a trial. An indictment for perjury committed on the trial of an action for assault and battery, charged the defendant with having sworn that the plaintiff spit in the defendant's face before the defendant struck him, and that he, the defendant in the indictment, had not said certain words, and assigned perjury on both statements. The

False state-  
ments whether  
in an affidavit  
or in evidence  
may be set  
out continu-  
ously, though  
matter inter-  
vene, if such  
matter do not  
vary their  
effect.

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(*n*) Reg. v. Child, 5 Cox C. C. 197. The copy of the record described the court as a general session of oyer and terminer and gaol delivery, and Talfourd, J., ordered the indictment to be amended accordingly.

(*o*) Rex v. Taylor, 1 Campb. 104. Ellenborough, C. J. The deposition should have been set out literally, and the meaning explained by an *innuendo*. The indictment stated that the defendant went before a justice of the peace, and swore in substance to the effect following, that is to say, &c., and part of the deposition so set forth was that a person therein named assaulted the deponent with an umbrella, and, at the same time,

threatened to shoot her with a pistol; but when the deposition was produced it appeared that, after stating the assault with the umbrella, it proceeded thus, 'and at the same threatened to shoot,' &c., omitting the word *time*.

(*p*) Rex v. Leefe, 2 Campb. 134. Lord Ellenborough, C. J., *post*, p. 87. It appears, however, that in Reg. v. Rhodes, 2 Lord Raym. 886, it was holden, upon an indictment containing only one count, that although all the assignments of perjury but one were bad, judgment should not be arrested. And see *Compagnon v. Martin*, 2 Black. R. 790.

(*q*) Rex v. Callanan, 6 B. & C. 102.

evidence given by the defendant on the former trial contained all the matter charged as perjury, but other matter intervened between the statement as to the spitting and that as to the words. It was objected that this was a variance, as the evidence charged as perjury in the indictment appeared to have been given continuously; but Abbott, C. J., held it was immaterial, as what intervened did not vary the effect of what was stated. (*r*)

Mode of stating election returns.

In an indictment for perjury committed before a select committee of the House of Commons, it was averred that the election was held by virtue of a certain precept of the high sheriff, by him duly issued to the bailiff of the borough of New Malton; and it was holden that this was not matter of description, and that the production of a precept, which in fact issued to the bailiff of the borough of New Malton, though directed to the bailiff of the borough of Malton, was sufficient. But the indictment also stated that A. and B. were *returned* to serve as burgesses for the said borough of New Malton; and this was considered as a description of the indenture of return, in which the borough was described as the borough of Malton; and the variance was holden to be fatal. (*s*) But where an information for perjury committed before a select committee of the House of Commons, stated that the committee was chosen to try and determine the merits of an election, and that the committee were sworn 'to try the merits of the petition referred to them;' it was held that the committee was well described, although by the 10 Geo. 3, c. 16, s. 13, they were to be a committee 'to try and determine the merits of the return or election.' (*t*)

Committee of the House of Commons.

Proceedings in chancery.

An indictment may be supported upon an answer in a court of equity, though the answer is not correctly entitled and the name of one of the parties be mistaken. Thus where an indictment alleged that Francis Cavendish Aberdeen and others exhibited their bill in the exchequer, &c., and, on the production of the bill, the complainants on the face of it purported to be *J. C. Aberdeen*, and others, it was holden that this was not a variance, and that it was competent to the prosecutor to prove, by other means than by the bill itself, the allegation that *Francis Cavendish Aberdeen* did, in fact, exhibit his bill. (*u*) And it was further holden not to be a variance, although after the allegation in question, and after setting out such parts of the bill as were necessary, these words were added, 'as appears by the said bill, &c., filed of record;' on the ground that these words referred to the last antecedent, and could not be considered as incorporated with the prefatory allegation that Francis Cavendish Aberdeen exhibited his bill. (*v*) And in an indictment for perjury committed in an answer to a bill in chancery, where the bill was stated to have been filed by A. against B. (the defendant in the indictment) and another, though in fact it was filed against B., C., and D., the variance was holden not to be fatal; the perjury being assigned on a part of the answer which was material between A. and B. (*w*) So where an

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(*r*) *Rex v. Solomon*, R. & M. N. P. R. 252.

(*s*) *Rex v. Leefe*, 2 Campb. 134.

(*t*) *Rex v. Dunn*, 1 Dowl. & R. 10.

(*u*) *Rex v. Roper*, 6 M. & S. 327. 1

*Stark. R.* 518. Lord Ellenborough, C. J.

(*v*) *Id. ibid.*

(*w*) *Rex v. Benson*, 2 Campb. 508. Lord Ellenborough, C. J.

indictment for perjury in answer to a bill in chancery described the bill as 'exhibited against three persons only, viz., A., B., and C., and the bill when produced appeared to be against A., B., and D.; Abbott, C. J., held that this was not a fatal variance, and that the bill produced must be considered as the same described in the indictment. If the indictment had professed to set forth the title of the bill, such a variance would have been fatal, but the bill was substantially described, and that was sufficient. (x) So if an indictment for perjury state that there was a suit depending in the Ecclesiastical Court between W. Peacock and R. Miles, and the proceedings in that court state that the suit was between W. Peacock and R. Miles, *the elder*, this is no variance. (y)

Ecclesiastical Court.

Where an indictment alleged that an action was pending 'in the Whitechapel county court of Middlesex, holden at the court-house in Osborn-street, Whitechapel, in the county of Middlesex, &c., before J. M., then and there being the judge of the said court;' and it was objected that the description ought to have been 'the county court of Middlesex holden at Whitechapel, in the county of M.,' in pursuance of the 9 & 10 Vict. c. 95; the Court of Exchequer Chamber held that it did sufficiently appear that the court was held in pursuance of that statute; for it was alleged to be a county court, and held before a single judge. (z)

A county court.

It has been holden that, though there be two counts in the original proceeding, an averment that an *issue* came on to be tried is not a variance. (a) And where an indictment for perjury alleged that a certain issue in a plea of debt came on to be tried, and that, upon the trial of the said issue so joined between the parties, certain questions became material, &c., but by the record it appeared that three issues had been joined on three pleas; it was objected that it was impossible to know to which of them the averment of materiality referred; but Erle, J., held that 'issue' was *nomen collectivum*, and overruled the objection. (b)

Issue is *nomen collectivum*.

And a variance between the affidavit actually sworn, and in which the perjury was charged to have been committed, and the affidavit stated in the indictment, by leaving out the letter *s* in the word *understood*, was holden to be immaterial. (c) In a subsequent case, the defendant was tried on an indictment for perjury, committed in giving evidence as the prosecutor of an indictment against A. for an assault; and it appeared that the indictment for the assault charged that the prosecutor had received an injury, '*whereby his life was greatly despaired of*;' but that in the indictment for *perjury*, the indictment for *the assault*, being introduced in these words, '*which indictment was presented in manner and form following, that is to say,*' and then set forth at length, did not recite the above-mentioned passage correctly, but omitted the word '*despaired*;' upon which the counsel for the

Variance in spelling words.

(x) *Rex v. Powell*, R. & M. N. P. R. 101.

(y) *Rex v. Bailey*, 7 C. & P. 264, Williams, J. See *Rex v. Peace*, 3 B. & A. 579.

(z) *Lavey v. Reg.* 2 Den. C. C. 504. See the indictment, 3 C. & K. 26.

(a) *Peake's N. P. C.* 37.

(b) *Reg. v. Smith*, 1 F. & F. 98.

(c) *Beech's case*, 1 Leach, 133. The inspection of a record is within the peculiar province of the court; and, therefore, if a doubt arise as to any word upon a record, the court and not the jury must resolve that doubt. By Lord Ellenborough, C. J., in *Rex v. Hucks*, 1 Stark. R. 521.



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defendant admitted that it was not necessary to have recited the indictment for the assault; but he contended that the prosecutor, by the words ‘*in manner and form following, that is to say,*’ had undertaken to recite it; and that, having so done, he was bound to set it forth *verbatim*. But the learned judge overruled the objection, and said, that the word ‘*tenor*’ had so strict and technical a meaning as to make a literal recital necessary; but that by the words ‘*in manner and form following, that is to say,*’ nothing more was made requisite than a substantial recital; and that the variance, therefore, in the present case was only matter of *form*, and did not vitiate the indictment. (*d*)

The substance of evidence given in Welsh may be set out in English in the indictment.

An indictment for perjury alleged that the prisoner falsely swore ‘in substance and to the effect following,’ and then set out *in totidem verbis* and in the first person a deposition of the prisoner in the English language, but it appeared that the prisoner was examined in Welsh through an interpreter, and that his examination was translated into English, taken down in writing, and signed by the prisoner; and this written deposition was set out in the indictment. It was submitted that the evidence ought to have been set out in Welsh with a translation in English. Williams, J., ‘In perjury it is only necessary to prove “the substance and effect.”’ The indictment charges that the prisoner deposed and swore in substance and to the effect there stated. It was not necessary in this indictment to have set forth the deposition *in totidem verbis*; still the substance and effect of what the prisoner swore in the Welsh language may be proved; and if that is in substance and to the effect the same as is stated in this indictment, that will be sufficient.’ (*e*)

Variance in substance and effect.

Where an indictment for perjury in setting out the substance and effect of a bill in equity, to which the defendant put in an answer, and upon which the perjury was assigned, stated an agreement between the prosecutor and defendant concerning *houses*, and upon the original bill being read it appeared that the word was ‘*house*’ in the singular number; Abbott, C. J., held that, although the indictment professed to describe the substance and effect of the bill, and not to set out the tenor, yet this was a difference in substance, and consequently a fatal variance. (*f*)

Where an indictment for perjury stated that on an inquiry before two justices of the peace on an information under an excise statute, it became a material question where a certain individual was at 4 A.M. on the 2nd of July, and that the defendant swore she had been in his company from 2 in the same morning until 4, and on the trial for perjury the evidence was that she had said she had been in his company from 11 until 4.30; Parke, J., doubted whether the evidence supported the allegation, but on conference with Bolland, B., he inclined to think it did. (*g*)

(*d*) May’s case, *cor.* Buller, J., 1799. The learned judge cited Beech’s case, *ante*, note (*c*).

(*e*) Reg. v. Thomas, 2 C. & K. 806.

(*f*) Rex v. Spencer, R. & M. N. P. R. 97. 1 C. & P. 260. In the latter report it is stated that the indictment alleged the agreement to be that the defendant would execute a lease of a certain piece of

ground adjoining the *new houses*, whereas the agreement set out in the bill stated that the defendant would execute a lease of certain ground adjoining the *new house*, and Abbott, C. J., held the variance fatal, because ‘in the bill the land is said to be contiguous to one house, in the indictment to more than one.’

(*g*) Anonymous, 1 Lew. 271.

If an indictment charge that the defendant swore in substance and effect in a deposition, and the deposition be made jointly by him and his wife, his statement following that of his wife, it will not be a variance. The indictment stated that upon a certain information upon oath, entitled ‘the information,’ &c., the defendant wilfully deposed in substance and to the effect following: ‘the defendant (meaning C. D.) I am certain is one of the persons that assaulted and ill-treated my wife,’ &c. The information began, ‘The information and complaint of Jane, the wife of C. E. Grindall, and of the said C. E. Grindall, made on oath,’ &c. ‘And first, the said J. Grindall for herself saith that the defendant is one of the persons who assisted W. J. S. and others in handcuffing and otherwise assaulting me on, &c.’ (Signed) ‘J. Grindall.’ ‘And the said C. E. Grindall sworn says, the defendant, I am sure, is one of the persons that assaulted and ill-treated my wife,’ &c. It was objected that there was a variance, as the indictment set forth the deposition as sworn by the defendant alone; but it was held that, as what the defendant swore was set out in substance, it was sufficient. (*h*)

Mode of charging matter sworn in a joint deposition.

Where an indictment alleged that the defendant committed perjury on the trial of one B., and that B. was convicted, and it appeared by the record when produced that the judgment against B. had been reversed upon error after the bill of indictment against the defendant had been found, it was held that this was no variance. (*i*)

Averment of a conviction.

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Where an indictment for perjury alleged that an officer of excise went before two justices of the peace, and gave the said justices to understand and be informed that ‘W. Stock, victualler, *being a brewer of beer or ale for sale*,’ did neglect to make a declaration of the quantity of beer brewed; and the words in italics were not found in the information when produced; it was held that this was a fatal variance, as the meaning of the indictment was that ‘Stock *being a brewer* neglected.’ (*j*)

Variance between information set out and that produced.

If an indictment use a word of equivocal meaning, the meaning in which it is used must be collected from the context of the sentence in which it occurs. An indictment for perjury alleged that a commission of bankrupt was issued against the defendant, under which he was duly declared bankrupt, and that afterwards he preferred a petition to the chancellor, stating (amongst other things) that a commission had issued, that the petitioner, on the 1st of March, 1821, was declared bankrupt, and that at the several meetings *before the commission* the petitioner declared that the bill of exchange (on which the commission had issued) was not due, &c. But the allegation in the petition was that at the several meetings *before the commissioners* the petitioner declared that the bill was not due. It was contended that the words ‘commission’ and ‘commissioners’ were not convertible terms; that the word ‘commission’ denoted the authority under which the parties acted, and therefore the variance was fatal. Abbott, C. J., ‘The objection is that there is a variance between the petition set forth in the

Variance. Where an indictment uses an equivocal term, its meaning is to be collected from the context, and by that it is to be determined whether or not there be a variance.

(*h*) Rex v. Grindall, 2 C. & P. 563. Abbott, C. J.

Reg. v. Burraston, *post*, p. 65.

(*j*) Rex v. Leech, 2 Man. & Ry. 119.

(*i*) Reg. v. Meek, 9 C. & P. 513. See

indictment and that which was given in evidence at the trial. Now, in a proceeding of this kind it was not necessary to set out in the indictment *verbatim* the tenor of the petition; it is sufficient if it be set out truly in substance and effect. The petition, as set out in the indictment, purports that at the several meetings before the commission, the petitioner declared in the hearing of the said assignee that the bill of exchange given to G. Drowley for the debt was not due at the time when he struck the docket. Now the allegation in the petition, which was proved in evidence, was that at the several meetings before the commissioners the petitioner declared so and so, and the question is whether that is a fatal variance. The word commission is one of equivocal meaning; it is used either to denote a trust or authority exercised, or the instrument by which the authority is exercised, or the persons by whom the trust or authority is exercised. And if it may denote the persons exercising the authority, we must collect from the context of the sentence in which the words “before the commission” occur, and of the other parts of the petition, whether it was used in that sense or not.’ After stating the indictment the very learned chief justice proceeded, ‘Now, if the word commission as there used was intended to denote the commission itself, it would follow that the several meetings took place before any commission issued; but that is impossible, because in that case the petitioner could not have made his declaration in the hearing of the said assignee. Then, if that cannot be the meaning of the word commission, we must construe it in the other sense, which it is capable of bearing, namely, as denoting the persons to whom the authority was given; and if it be so construed, there was no variance between the petition set forth in the indictment and that which was given in evidence; the consequence is, that there must be judgment for the crown.’ (*h*)

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The court may order variances to be amended.

The 9 Geo. 4, c. 15, s. 1, authorizes the court to cause the record in any indictment for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, to be amended. This Act and the cases upon it, as well as the 14 & 15 Vict. c. 100, will be found in a later part of this work. (*l*)

Averment that the complaint was heard, &c.

In a case where a complaint having been made *ore tenus* by a solicitor, before the chancellor in the Court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stated that, ‘at and upon the hearing of the said complaint,’ the defendant deposed, &c.; and this was holden to be a sufficient averment that the complaint was *heard*. (*m*) And it has been holden that an indictment for perjury, assigned on an affidavit sworn before the court, need not state that the affidavit was filed of record, or exhibited to the court, or in any manner used by the party. (*n*)

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(*h*) *Rex v. Dudman*, 4 B & C. 850.

(*l*) *Post*, r. [798].

(*m*) *Rex v. Aylett*, 1 T. R. 70.

(*n*) *Rex v. Crossley*, 7 T. R. 315. Nor is it necessary to prove such facts. *Id.* *ibid.* And see the cases, *post*, p. 104. But it is otherwise when the proceeding is under

the statute of Eliz. Stark. Crim. Plead. 121. And see 3 Stark. Evid. 857, citing *Rex v. Taylor*, Skin. 403, where it was held that the bare making of the affidavit without producing or using it is not sufficient.



An indictment for perjury may state the trial to have taken place either before the judge, who in fact tried the case, or before the judges before whom it is considered in point of law to have taken place. Therefore an indictment for perjury, stating the trial to have been before two judges, but the oath to have been taken before one of them, is good. The indictment alleged the trial before both judges then in commission, and then alleged that the prisoner was sworn before one of the justices aforesaid; and, on a case reserved on the question whether the oath ought not to have been alleged to have been taken before both justices, the judges were unanimously of opinion that the conviction was right. (o) So an indictment for perjury on the trial of a cause at the sittings after term, stating the trial to have been before the puisne judge, who in fact tried the cause, is good, although the *postea* states the trial to have been before the chief justice. An indictment for perjury, charged to have been committed on a trial at the sittings after term in London, alleged the trial to have taken place before Littledale, J.; and on producing the record it did not appear before whom the trial took place, but the *postea* stated it to have been before the lord chief justice; in point of fact, however, the trial took place before Littledale, J.; and it was objected that this was a variance; it was answered that there was no reference in the indictment to the record, and no *prout patet per recordum*: it was merely stated that the trial took place before Littledale, J., and that was proved. Lord Tenterden, C. J., ‘On a trial at the assizes the *postea* states the trial to have taken place before both justices; it is considered in law before both, though in fact it is before one only, and I am not aware that the *postea* is ever made up here differently when a judge of the court sits for the chief justice. I cannot stop the case upon such an objection; you may have leave to move upon this point in case it shall become necessary.’ (p)

Before whom a trial may be alleged to have taken place.

Formerly where a trial was had in a county court it was necessary to allege that the trial was had before the suitors, and to set out the names of the suitors; and therefore it was erroneous to allege that the trial took place before the sheriff and suitors. (q) So where the first count of an indictment for perjury alleged that the trial was had before the sheriff, the second before the county clerk of the sheriff, and the last before the county clerk and the suitors, who were named; Wightman, J., held that the indictment was bad, for it was of the essence of the offence that the court before which perjury was committed should have been properly constituted. (r)

Trial before the former county courts.

The indictment alleged that an issue was tried before the sheriff of the county of Durham, by virtue of a writ to him directed, and that upon the trial of that issue the prisoner was duly sworn before the said sheriff. By the writ of trial, return, and the record, the issue did appear to have been tried before the sheriff of Durham; but by the parol evidence it appeared that the issue was not tried before the sheriff or under-sheriff, and that neither of them

Where a trial is had before a deputy of a sheriff, it may be averred to have been had before the sheriff.

(o) *Rex v. Alford*, 1 Leach, 150. See this case, *post*, p. 51.

(p) *Rex v. Coppard*, Moo. & M. 118.

3 C. & P. 59. Acquittal.

(q) *Jones v. Jones*, 5 M. & W. 523.

(r) *Reg. v. Fellowes*, 1 C. & K. 115.

was present, but that it was in fact tried before Mr. S., who was stated to be the deputy of the high sheriff; but no appointment of Mr. S. was put in, nor was his office more particularly described. Wightman, J., was disposed to direct an acquittal, on the ground that the variance was fatal; but, upon being informed that it was the invariable practice when writs of trial were directed to the sheriff, to make up the record as if the trial had been before him, though in fact it was before some deputy, he thought it better to allow the trial to proceed, and the prisoner was convicted; and, upon a case reserved, the majority of the judges held that the conviction was right. (*s*)

A trial before the sheriffs of London.

So where an indictment for perjury alleged that upon the execution of a writ of trial directed to the sheriffs of the city of London, certain issues came on to be tried and were tried before the sheriffs of London, and that the defendant came before the said sheriffs, and before the said sheriffs was duly sworn, and it appeared that the trial took place before the secondary and not before the sheriffs, the Court of Queen's Bench held, on the authority of the preceding case, (*t*) that the trial was properly alleged to have taken place before the sheriffs. (*u*)

A trial for felony took place before a Q.C. in a grand-jury room; the copy of the record stated the trial before two judges and others, their fellows, &c.

Where an indictment alleged a trial for felony to have taken place at a session of oyer and terminer and gaol delivery, before Lord Campbell and Mr. J. Williams, and the trial had in fact taken place before Greaves, Q.C., in the grand-jury room at Stafford during the assizes, and his name was not mentioned in the copy of the record which was produced; but the usual words 'and others their fellows, justices assigned, &c.,' were therein, and it appeared that Greaves, Q.C., was a justice of the peace for Staffordshire. It was objected that there was nothing to show that Greaves, Q.C., had jurisdiction to try the case. Talfourd, J., said that if the trial had taken place in this court before a person in the robes of a judge of assize, and acting as a judge of assize, he would not require any proof of his authority; but Mr. Greaves sat in the grand-jury room, and being a magistrate for the county, might, it was just possible to suppose, have acted in that capacity. There was nothing on the face of the documents to show that he had any authority; he therefore thought the objection so formidable that he would, if necessary, reserve the point. (*v*)

How an application to the Queen's Bench must be stated.

An indictment alleged that a cause was depending, and that an application was made to Lord Denman, the Lord Chief Justice of Her Majesty's Court of Queen's Bench, and the other judges of the said court, and the said judges granted a rule *nisi*, which rule, or an office copy thereof, was set out; and Parke, B., held that the indictment was bad, as the application could only be made to the court, and it ought to have been so stated, and it did not appear by this indictment that the application was made to a tribunal having jurisdiction to grant it. (*w*)

Variance in stating the

If an indictment for perjury committed on a trial before the sessions alleges an adjournment to have been made by certain

(*s*) Reg. v. Dunn, 2 M. C. C. R. 297. 1 C. & K. 730.

(*t*) Reg. v. Dunn.

(*u*) Reg. v. Schlesinger, 10 Q. B. 670.

(*v*) Reg. v. Child, 5 Cox C. C. 197. But see Reg. v. Dunn, *supra*.

(*w*) Reg. v. White, 2 Cox C. C. 232. It was suggested that the rule ended as usual 'By the court;' which cured the defect. But Parke, B., held that that was not so; what was set out was the 'rule or an office copy thereof.'

justices, and the record states it to have been made by other justices, this is a variance; but the defect may be cured by proving that in fact the adjournment was made by the justices named in the indictment. An indictment for perjury on the trial of an indictment for an assault alleged an adjournment to have been made by Const, and A. B., and others their fellows, justices, &c. The examined copy of the record of the conviction stated the adjournment to have been made by Const, and E. F., and others, their fellows, justices, &c. It was contended that this was a fatal variance; and Abbott, C. J., held that it was; but that the defect might be cured by other evidence, as by calling some person who could state that he was present and saw the justices named in the indictment present on the day in question. (x)

adjournment  
of a quarter  
sessions.

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It is sufficient to state in the indictment that the defendant was *duly* sworn. (y) In a case where it was averred that he was *sworn on the Gospels*, and he appeared to have been sworn according to the custom of his own country, without kissing the book, it was considered as a fatal variance; though it was holden that the averment was proved by its appearing that he was *previously* sworn in the ordinary mode. (z) An indictment for perjury in a cause tried at the assizes was holden good, although it alleged the oath to have been taken before one only of the judges in the commission, and the *nisi prius* record imported that the trial was before the two judges of assize. (a)

The indictment must state that the defendant was duly sworn, &c.

An indictment at common law, which charged that the defendant, 'falsely, maliciously, wickedly, and corruptly swore, &c.,' was holden sufficiently to imply that the offence was committed

Wilfully and corruptly.

(x) *Rex v. Bellamy*, R. & M. N. P. R. 171. In order to remedy the defect, a witness from the office of the clerk of the peace produced a minute book, which contained an entry, not drawn up in any formal manner, of the names of the particular justices who were present at the day of adjournment mentioned in the indictment, and amongst whom were all the names mentioned in the indictment; these minutes were made by a clerk in the same office, of the name of Richards, whose duty it appeared to be to attend at the quarter sessions, for the purpose of making these entries at the time; but Richards was not called as a witness, and there was no evidence to show whether he was present on the particular day further than the entry itself. In the same book, on the opposite page to the entry already stated, was another, drawn up by the witness who produced the book; this was in the form of a record, and was in fact a summary of all the names of the justices attending upon the quarter sessions upon each day during the sessions, but it did not distinguish who was present upon any particular day; amongst these names also were the justices mentioned in this indictment. But Abbott, C. J., held that this evidence was not sufficient to supply the defect; the minutes made by Richards were not a record, or in the nature of a record, and

the entry on the opposite page was insufficient, as it did not give the names of the justices who were present on the particular day.

(y) *Rex v. McCarthur*, Peake's N. P. C. 155. Lord Kenyon, C. J.

(z) *Id. ibid.*

(a) *Rex v. Alford*, 1 Leach, 150. MS. Bayley, J. Eyre, B., doubted on the trial whether one commissioner of assize alone had competent authority to administer the oath, and conceived the indictment ought to have alleged the oath to have been taken before both the judges in the commission, but on a case reserved the judges were unanimous that the indictment was right. See this case, *ante*, p. 49. But as to a record in the Crown Court, see *Rex v. Lincoln*, *ante*, p. 42. In *Reg. v. Deman*, 2 Ld. Raym. 1221, an exception was taken to an indictment; that it stated the trial at which the oath was taken to have been before the Lord Chief Baron and the associate, but stated the oath to have been before the Chief Baron, without the associate; and also, that the assignment of perjury differed from the oath, being before the Chief Baron and associate. But the objections were overruled; and the court held that the associate need not be mentioned in every part of the indictment where the Chief Baron was mentioned.



The indictment should state that the defendant swore *wilfully and corruptly*, and every count should aver that the defendant was sworn.

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*wilfully*; (b) but it was considered at the same time that, in an indictment on the 5 Eliz. c. 9, the offence must be laid expressly to have been wilfully committed. (c)

The indictment should aver that the defendant '*wilfully and corruptly*' swore, and every count should expressly state that the defendant was sworn, and the fact of his having been sworn cannot be taken by intendment. The first count stated that the defendant on the trial of an indictment against J. H., intending to injure J. H., and to cause him to be wrongly convicted, appeared as a witness and was sworn, and 'then and there falsely and maliciously gave false testimony against J. H., by then and there deposing and giving evidence,' &c. The fifth count, the only one that differed materially from the first, alleged that by means of the false testimony in the first count mentioned, J. H. was found guilty; that a rule *nisi* for a new trial was granted; that the defendant, intending to hinder the said rule from being made absolute, came before a commissioner and was sworn, and being so sworn, wickedly, wilfully, and corruptly did depose, swear, and make affidavit in writing, in substance that the evidence which he, J. S., had given on the said trial was true; whereas the evidence which the said J. S. had given on the said trial was not true, but was false in the particulars in the said first count of this inquisition assigned and set forth. The defendant having been convicted, a rule was obtained for arresting the judgment, and after argument Abbott, C. J., delivered the judgment of the court as follows:—'I am of opinion that this rule must be made absolute. As to the first class of counts the objection is that they do not charge that the defendant swore wilfully or corruptly. Every definition of perjury is swearing wilfully and corruptly that which is false. Whether the word maliciously might supply the place of either wilfully or corruptly, it is not necessary to determine, for neither of those words is found in the counts in question, and *Cox's case*, (d) which has been referred to, proves at all events that such counts are insufficient. I now come to the consideration of the last count. It is in a form perfectly novel; it was intended to allege perjury in an affidavit made in this court. In the ordinary course of pleading, the first step would have been to charge that there had been a trial, and that the defendant was sworn as a witness; the second, that he swore such and such things; the third, that the matter was false; and so on. Here there is no distinct averment that the defendant was sworn as a witness, or of what he swore. But the fact of his having been sworn must be taken by intendment. Were we to do that, as we are desired to do, in support of this indictment, we should furnish a precedent for a very loose and insufficient mode of charging a very serious offence, which has always hitherto been required to be charged with great certainty and particularity. I think that these novel attempts in pleading are not to be encouraged, and that the judgment must be arrested.' (e)

(b) As to the offence being *wilful*, see *ante*, p. 2.

(c) *Cox's case*, 1 Leach, 71.

(d) *Supra*, note (c).

(e) *Rex v. Stevens*, 5 B. & C. 246.

The 5 Eliz. c. 9, s. 6, *ante*, p. 23, uses both the words '*wilfully and corruptly*,' and therefore it should seem that both these words must be used in an indictment on that statute. C. S. G.

Where an indictment for perjury alleged that the prisoner ‘feloniously’ swore to the matter on which the perjury was assigned instead of ‘falsely,’ it was held that the indictment was bad in substance, and that the words ‘corruptly, knowingly, wilfully, and maliciously,’ did not supply the defect: a man might swear ‘corruptly’ under some corrupt influence, and yet swear the truth; so with respect to the word ‘knowingly;’ and he might swear ‘wilfully and maliciously’ to gratify some malicious feeling, but yet it might not be ‘falsely.’ Nor did the conclusion that the prisoner ‘in manner and form aforesaid did commit wilful and corrupt perjury’ cure the defect; for the meaning of that was, that the prisoner committed the offence in the manner stated, and, that statement being defective, the indictment was bad. (f)

It must appear or be alleged in the indictment that the person by whom the oath was administered had competent power to administer it. Thus upon an indictment for perjury before a justice in swearing that I. S. had sworn twelve oaths, where the charge as stated did not import that the oaths were sworn in the county for which the justice acted, Eyre, J., arrested the judgment; because as the charge did not so import, the justice had no jurisdiction to administer the oath in question to the defendant. (g)

Where an indictment for perjury alleged that two judges had ‘sufficient authority’ to administer the oath, it was doubted whether it was sufficient, as the 23 Geo. 2, c. 11, s. 1, has only ‘competent authority.’ (h)

An indictment for perjury alleged that W. U. had done business as an attorney for the defendant and J. I. on the retainer of the defendant, and that afterwards, to wit, on the 7th of August, 1844, the said W. U. delivered a bill of costs to the defendant and J. I., and that no application was made to the court, in which the said business was done, by the defendant or J. I. within one month after the delivery of the bill, nor did the said court or any judge within one month next after the delivery of the said bill refer the said bill to taxation; and that after the expiration of one month, to wit, on the 25th of April, 1845, W. U. applied to one of the judges of the said court to refer the said bill to be taxed, and thereupon on the said 25th day of April the said judge issued a summons, requiring the defendant and J. I. to show cause why the said bill should not be referred to the master to be taxed; and that before showing cause the defendant went before a commissioner and made an affidavit denying the retainer of the said W. U. It was objected that ‘month’ in the indictment meant lunar month; and as the jurisdiction to tax the bill on the application of the attorney did not arise under the 6 & 7 Vict. c. 73, ss. 37 & 48, until after one calendar month after the delivery of the bill, the indictment did not show jurisdiction to issue the summons. But the Court of Exchequer Chamber held that the objection ought not to prevail; and Parke, B., in giving the judgment, said, ‘Although the word “month” would, in our opinion, if unexplained,

‘Feloniously’ swore is bad.

That the person had authority to administer the oath.

Is ‘sufficient’ equivalent to ‘competent authority?’

A judge of one of the superior courts at Westminster has general jurisdiction by statute as to the taxation of costs. It is not, therefore, a condition precedent to the legality of a summons calling on a client to show cause why an attorney’s bill should not be referred to taxation, that the judge should ascertain whether there had been a previous application by the party chargeable; that may be ascertained afterwards. If

(f) Reg. v. Oxley, 3 C. & K. 317. Cresswell, J., after consulting Alderson, B.

(g) Rex v. Wood, Exeter, 1723. MS. Bayley, J.

(h) Reg. v. Child, 5 Cox C. C. 197. Talfourd, J., declined to stop the case, but would have reserved the point had not the prisoner been acquitted.



therefore an indictment for perjury, committed in an affidavit made in answer to such a summons, merely states that the judge had issued the summons, that would be sufficient.

signify lunar month, enough is stated to show the judge's jurisdiction; for, as the dates are material, they may be taken without the videlicet, and taken to be true. But I do not think the indictment would be bad even if it contained nothing to show that a calendar month had elapsed before the summons issued; for the judge had general jurisdiction, and must be taken to have had jurisdiction in the particular case unless the contrary appear. I think in such a case the jurisdiction would be intended: but it is not necessary to decide the point. (i) The third and fourth counts of the same indictment omitted to allege that no application had been made to the court or a judge to tax the bill by the defendant or J. I., and it was urged that these counts were bad by reason of such omission, as by sec. 37 of the 6 & 7 Vict. c. 73, the jurisdiction of the courts to refer such a bill to taxation upon the application of the attorney depended on the fact that no application had been made within the month by the party chargeable; but the Court of Queen's Bench held that the judge had jurisdiction, after the expiration of the month which was alleged in the counts, to issue a summons at the instance of the attorney, calling on the party chargeable to show cause why the bill should not be taxed, although it might be true that if it had appeared on showing cause that a previous application within the month had been made by the party chargeable, the judge might not have had jurisdiction to make an order for taxation. Therefore the affidavit of the defendant, made after such summons, was made in the course of a judicial proceeding. (j)

Perjury at a petty sessions of justices acting for a particular division of a county.

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Where a statute requires an act to be done by justices of the peace acting for a particular division in petty sessions, an indictment for perjury committed before two such justices must allege that they were acting for such division, but need not aver that they were assembled in petty sessions. An indictment for perjury on the hearing of an information for selling beer at improper hours, stated that the proceeding was before two justices, but not that they were assembled in petty sessions, or that they were acting for the division in which the house was situated; and it was held that the indictment was defective for want of an allegation that the justices were acting for the division in which the house was situated; but it was held not necessary to aver that they were assembled in petty sessions, for the meeting of the two justices was in itself a petty sessions. (k)

Indictment held bad for not showing that there was a charge made

Where an indictment for perjury stated that the prisoner, maliciously intending to subject W. Mortiboy to the punishments of felony and larceny, went before J. C. and H. H., two justices of the peace, and was sworn (J. C. and H. H. having competent

(i) *Ryalls v. The Queen*, 11 Q. B. 781. The Court of Queen's Bench had held that as all the counts referred to the Act of Parliament, the word 'month' in the indictment must be construed according to the clause in the Act to mean calendar month.

(j) *Ibid.*

(k) *Reg. v. Rawlins*, 8 C. & P. 439, Park, J. A. J., and Patteson, J., after time taken to consider the points. Patteson, J., intimated that he had not given

particular consideration to the question as to the necessity of a written information, but the inclination of his opinion was that it was not necessary. The 1 Will. 4, c. 64, s. 15, provides that 'all penalties, &c., may be recovered upon the information of any person whomsoever before two justices acting in petty sessions,' &c., and that every person 'who shall be convicted before two justices so acting in and for the division or place in which shall be situate the house kept,' &c.



power, &c.) and deposed in substance that on Wednesday last he (the prisoner) was in W. M.'s Peg Alley, and that he (the prisoner) put his hand into his watch fob, and took out a £5 note to make a bet with W. M., and put it into his breeches pocket. That W. M. collared him, and knocked him down, and put his knee on him, and then put his hand into his (the prisoner's) pocket, and took the said £5 note, &c. It was submitted that the indictment was bad, as it did not show that there was any proceeding pending before the magistrate, or that this was a deposition on any charge of felony. Coleridge, J., 'There might be cases of an affidavit, where there was no charge, and no prosecution, and, indeed, no cause in hand. It might have been averred that the defendant made a charge, and that in support of that charge the deposition was made. If the defendant had merely come before the magistrates to swear this, without more, it would not be perjury. I think that the indictment is not sufficient.' (1)

The first count stated that the prisoner, meaning to subject C. F. E. to the punishment provided for persons guilty of felony, &c., went and was sworn before a justice of the peace for the county having competent authority to administer the oath, and being so sworn then upon a certain information and examination, entitled 'County of Oxford to wit: the information and examination of R. G. taken upon oath before me, &c.,' falsely, &c., did depose, &c. The whole of the information was then set out; it contained the following passage:—'I then went and got over Mrs. Calcut's wall into the close, and went and looked over the wall between her close and Mr. E.'s ox-pens. I then saw the donkey standing with its side towards and near to the manger of the second pen, with her head towards Mrs. Calcut's close. Mr. C. E. was standing behind her. I saw that he had the flap of his trowsers unbuttoned and hanging down. I saw the corner of the inside of it; he was rather on the move; he appeared to be on the donkey (meaning that he appeared to the said R. G. to be in the actual commission of that detestable crime, &c.). He remained in that position about five minutes, when the donkey kicked Mr. C. E.'s leg, upon which he moved aside, turning his back rather more towards me than it had been, and stooped down to rub his leg; he then lifted himself up again, and turned round with his face towards me. I then saw his private parts exposed: I saw him tuck up his shirt and button up his trowsers: the upper part

before a justice.

An indictment for perjury, stating that the prisoner came before a magistrate, and maliciously deposed, swore, charged, and gave him to be informed that C. F. E. had a venereal affair with a donkey, shows sufficiently a proceeding before a magistrate to make the false swearing perjury.

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(1) Reg. v. Pearson, 8 C. & P. 119. When the objection was first made, Coleridge, J., said, 'This might have been the original information. Might it not be that this statement to the magistrates was the charge?' And it is conceived that this was the correct view of the case. In cases of felony and misdemeanor it is a very common practice for the party complaining to state the facts to the magistrate's clerk, who takes them down in the shape of an information; such information is then taken to the magistrate, and the complainant sworn to the truth of it: in such cases it is conceived the making the charge before the magistrate, and the making the deposition, is one and the same thing; it could not, therefore, be averred and proved that the party made

the charge, and in support of it made the deposition. See *Caudle v. Seymour*, 1 Q. B. 889, where some strong observations were made against the propriety of such a practice. It may, however, be questionable whether such a mode of taking the information would afford any ground of defence to the party who was sworn to its truth. It may be observed, also, that although it may admit of doubt whether this deposition disclosed a felony, yet as it clearly showed an assault, the magistrate had jurisdiction to administer an oath. In *Reg. v. Bradley*, Stafford Spr. Ass. 1844. MSS. C. S. G. Coleridge, J., said, that in the discussion of *Reg. v. Gardiner*, *infra*, considerable doubts were entertained among the judges whether *Reg. v. Pearson* was rightly decided.

of them as well as the flap had been unbuttoned.' This count contained no averment as to the materiality of any of the matters deposed to. It contained several assignments of perjury. Those on which the prisoner was found guilty were as follows:— 'Whereas in fact the said C. F. E. then and there had not the flap of his trowsers unbuttoned or hanging down. And whereas the said C. F. E. had not then and there, or at any other time or place whilst standing behind the said donkey, or any other donkey, the flap of his trowsers unbuttoned, and hanging down, nor had the trowsers the said C. F. E. then wore any flap whatsoever. And whereas the said C. F. E. did not appear to the said R. G. to be, nor was he, then and there, or at any other time, or at any other place, in the actual commission of that detestable crime, &c., with the female donkey aforesaid, or with any other animal, or in any other manner whatsoever. And whereas the said C. F. E. did not remain in that situation for about five minutes, nor did the said donkey kick the said C. F. E.'s leg, nor did, &c. &c.' Here followed a number of other averments, which were not proved for want of two witnesses. The third count was the same as the first, except that it stated the prisoner's intention to be, to subject C. F. E. to the punishment inflicted on persons guilty of misdemeanors, and the innuendo was, that C. F. E. was attempting to commit the offence. The seventh count stated, that the prisoner, intending to aggrieve C. F. E., 'came before Mr. Rawlinson, and was sworn (he having authority), and falsely, &c., did depose, swear, charge, and give the said justice to be informed that the said C. F. E. upon, &c., had a venereal affair with a certain animal called a donkey, and feloniously and against the order of nature did commit and perpetrate that detestable and abominable crime, &c., with the said donkey. And further (it being then and there material to the inquiry into the said charge and information to know the state of the said C. F. E.'s dress at the time the alleged offence was so charged to have been committed as aforesaid) that he, the said R. G., then and there saw that the said C. F. E. then and there had the flap of his trowsers unbuttoned and hanging down, and that he, the said R. G., then and there saw the inside of the said flap; whereas the said R. G. did not then and there, or at any time, or at any place, see the said C. F. E. at any time in the act of having a venereal affair with a donkey, or with any other animal whatsoever, nor did the said C. F. E. then, or at any time, or at any place, or in any manner commit, nor was the said C. F. E. at any time, or at any place, or in any manner in the act of committing that detestable and abominable crime. And whereas the said R. G. did not then and there see the flap of his, the said C. F. E.'s, trowsers unbuttoned or hanging down, nor was the flap of the said C. F. E.'s trowsers then and there unbuttoned or hanging down, nor did the said R. G. then and there see the inside of the flap of the said trowsers. The information signed by the prisoner was put in, and it was proved that he was duly sworn, and that the charge was dismissed. The two witnesses, produced to the facts, were C. F. E., a lad of fifteen, and his elder brother, J. H. E. They swore that they went together to the field, J. H. E. having a gun; that they spoke of going to Chipping Norton, and that Charles went to see

whether the donkey was able to go to Chipping Norton, and parted from his brother for that purpose—that he was absent three minutes—that the trowsers he had on, which were produced in court, had no flap. These were the only facts to which they both spoke. C. F. E. fully negatived what the prisoner had sworn to, in a manner quite satisfactory to the jury. J. H. E. also stated that he was about forty yards from the ox-pens—that he had his back towards them—that if he had turned round he could have seen them and the wall, and must have seen if any one was looking over it, but he did not turn round. It was objected, first, that the first and third counts did not distinctly show any proceeding pending before the magistrate; that they ought to have averred directly that a charge was pending. *Reg. v. Pearson. (m)* But Patteson, J., thought that case distinguishable, because of the words ‘upon an information and examination,’ &c. *(n)* Second, that the flap of the trowsers being unbuttoned did not appear on the face of the counts to be material, and there was no averment of its materiality. The same objection applied to the precise time of five minutes. Third, that the assignment of perjury as to the main charge was too large, because it denied all animals, and all times and places. Fourth, as to the first count, that the language used by the prisoner as there set out, did not import that a felony was committed, but only an attempt. These objections were urged in arrest of judgment. Fifth, as to the seventh count, the first objection to the first and third counts was urged. Sixth, to the same count it was urged that, although in that count the state of C. F. E.’s dress was averred to be material, yet, that by such averment was meant—not whether the flap of his trowsers was unbuttoned—but the trowsers generally. Seventh, that the seventh count alleged, that the prisoner charged the capital offence, whereas, by his information, he appeared to have charged only an attempt. The sixth and seventh objections were taken before the verdict, and did not apply in arrest of judgment, as was also the objection, whether the evidence of J. H. E. went to any material fact sufficient to satisfy the rule as to two witnesses in cases of perjury. On all these questions, the learned judge requested the opinion of the judges, and all the judges present held the conviction good on the seventh count, and most of them appeared to think it good on all the others. *(o)*

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Where an indictment stated that ‘heretofore, to wit, on, &c., at, &c., before M. G. and T. H. H., two of the justices, &c., came one J. Osborne, and then and there exhibited to and before the said M. G. and T. H. H., so being such justices as aforesaid, a certain information upon oath, and then and there informed the said justices’ that certain quantities of stolen silk were found in a certain house; it was held, that this allegation did not sufficiently show that the oath was taken before the said justices, as it was consistent with the allegation that the oath might have been taken before some other justices. *(p)*

Insufficient allegation of making an information on oath.

Where a count, which charged perjury in an affidavit to hold Affidavit to

*(m)* *Ante*, p. 55.

95. 8 C. & P. 737.

*(n)* The present indictment is in the same form as the one in 4 Wentw. 244. 2 Chitty’s Crim. Law, 443.

*(p)* *Reg. v. Goodfellow*, MSS. C. S. G. and C. & M. 569. *Patteson, J.*, and *Cresswell, J.*

*(o)* *Reg. v. Gardiner*, 2 M. C. C. R.



hold to bail before issuing the writ.

Indictment for perjury in an affidavit under an interpleader rule, must allege that there was an application to the court.

Writ of inquiry issued out of B. R., returnable in C. P.

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Indictment for perjury before commissioners of bankrupt.

to bail, did not state that a writ of summons had been issued when the affidavit was sworn, it was held good; for the affidavit may be sworn before the issuing of the writ. (*q*)

Where an indictment for perjury committed under the Interpleader Act set out the issues joined in the Court of Exchequer between A. B. and C. D., the trial at Westminster, the verdict for the plaintiffs, the judgment, the writ of *fieri facias* consequent thereon to the sheriff of Somersetshire, dated the 5th of June, 1841, the warrant, the seizure of the goods of C. D., and the notice on the part of the prisoner to the sheriff not to sell the goods so seized, but to deliver them up to him, the same being his property; and then charged that the prisoner came before a commissioner, and produced an affidavit in writing, and swore to the truth of the matter contained in it; and the affidavit was, that the prisoner having heard that C. D. had certain goods (those seized under the *fieri facias* of the 5th of June), bought them and paid for them on the 1st of June. The sale and purchase were then negatived, and this was the perjury charged. It was submitted that, as there was no allegation that any application had been made under the Interpleader Act, it did not appear that the affidavit was made in a judicial proceeding; and Coleridge, J., held the objection fatal; as for anything that appeared this was a voluntary oath, and not made in any judicial proceeding. (*r*)

Where an indictment for perjury alleged that a certain cause had been depending in the King's Bench, and that such proceedings were had, that a writ of inquiry was duly issued out of the said court, directed to the sheriffs of London to inquire, &c., and that the said sheriffs should make appear the inquisition which they should take thereof before the justices of our said Lord the King at Westminster, and then assigned perjury on the taking of the said inquisition before the secondary; the Court of King's Bench seem to have been of opinion that the indictment was bad, as it appeared that the perjury was committed *coram non iudice*; for the writ of inquiry was issued out of the King's Bench, and made returnable in the Common Pleas, and therefore the secondary had no jurisdiction to administer the oath. (*s*)

It should seem that an indictment for perjury committed before commissioners of bankrupt in an examination touching the estate of the bankrupt, should allege that there was a trading, petitioning creditor's debt, and act of bankruptcy. (*t*) But if the indictment were for perjury committed in the preliminary proceedings before the commissioners to ascertain whether the party should be adjudged bankrupt or not, it should seem that an indictment would be good, although it omitted to state that there was a good petitioning creditor's debt. (*u*)

(*q*) King v. Reg. 14 Q. B. 31. 3 Cox C. C. 561.

(*r*) Reg. v. Bishop, C. & M. 302.

(*s*) Pippet v. Hearn, 5 B. & A. 634. The question arose in an action for a malicious prosecution for perjury, and the first count set out the indictment for perjury as stated in the text, and the court held that the count was good, for where a man maliciously prefers an indictment for a crime he is liable to an action for it,

although the indictment be defective.

(*t*) Rex v. Jones, 4 B. & Ad. 345, ante, vol. 2, p. 528. Reg. v. Ewington, C. & M. 319, post, p. 92. The second count in this case alleged that a fiat 'duly issued' against the bankrupt, and it was objected that it was bad because it did not allege any petitioning creditor's debt or act of bankruptcy, and Rex v. Jones was relied upon, but the point was not decided.

(*u*) Reg. v. Ewington, *supra*.

In an indictment for perjury in an affidavit it is sufficient to state that the defendant was sworn before A. B. (A. B. having power to administer an oath) without stating the nature of A. B.'s authority. An indictment for perjury in an affidavit alleged that the defendant did take his corporal oath before F. J. Chell (he the said F. J. Chell then and there having sufficient and competent power and authority to administer the said oath to the defendant in that behalf) and that the defendant did before the said F. J. Chell, as such commissioner as aforesaid, depose, &c. It was contended, in arrest of judgment, that the indictment was bad, as it did not describe the official station of the person before whom the defendant was sworn. It was, indeed, stated that he made affidavit of certain matters before F. J. Chell, as such commissioner as aforesaid; but he had not been before mentioned as a commissioner, and therefore that averment could not cure the defect. The 23 Geo. 2, c. 11, made it unnecessary to set out the commission of the person before whom the oath was taken, but that did not dispense with the necessity of showing the nature of his office. Abbott, C. J., 'Looking at the Act of Parliament, 23 Geo. 2, c. 11, we find that all that is required to be set out in indictments for perjury is the substance of the offence charged, and by what court or before whom the oath was taken, averring such court or person to have competent authority to administer the same, without setting forth the commission or authority of the court or person before whom the perjury was committed. It is, therefore, to be considered whether the present indictment has set forth all that is required by the statute. It sets forth the substance of the matter sworn, the person before whom the oath was taken, and avers that he had authority to administer it. The indictment does, therefore, contain all that is required by the words of the statute; and taking into consideration the object of the Act, which was framed to remove the difficulties before felt by reason of the averments and matters which were usually set out in indictments for perjury, we ought not to require more than the words of the legislature have made necessary. When a case of this sort comes on for trial, the prosecutor must prove the situation of the person before whom the oath was taken, and the nature of his authority. I am, therefore, of opinion, that the indictment is sufficient if it contains the name of the person, if the defendant was sworn before a person, or of the court, if he was sworn before a court. There is not, then, any reason for granting this application.' (c)

If an indictment state that the party had authority to administer the oath, it is sufficient without showing the nature of the authority.

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(c) *Rex v. Callanan*, 6 B. & C. 102. 9 D. & R. 97. This case having been much relied upon in the following case, and the record examined, I have thought it right to insert the following statement of the first court, which I took from the record. The indictment stated that C. C., contriving and intending to injure one T. Stevens, and in order to obtain a rule of the court of B. R., whereby it might be ordered by the said court that the said T. S. should show cause why a certain judgment signed on a warrant of attorney in a cause in the said court of Stevens against Callanan, and the execution issued thereon should not be set aside, and the

said warrant of attorney be delivered up to be cancelled, and why the proceeds of the said execution should not be restored to the said C. C., and why the said T. S. should not pay the costs of that application, and that in the meantime the said proceeds should remain in the hands of the sheriff of the county of Middlesex, came in his proper person, &c., on, &c., at, &c., before F. J. Chell, gentleman, and the said defendant then and there, to wit, on, &c., at, &c., was duly sworn, and did take his corporal oath upon the Holy Gospel of God before the said F. J. Chell (he the said F. J. Chell then and there having sufficient and competent power



Indictment for perjury on an appeal before commissioners of the assessed taxes must show that the appeal was one they had jurisdiction to try, in order to show they had authority to administer the oath.

This case was reconsidered in the following case:—The indictment stated that at the time of the taking of the false oath by J. O. hereinafter mentioned, R. L., F. D. P., and H. S. G., were commissioners acting in the execution of certain Acts of Parliament relating to the duties of assessed taxes in and for the district of the hundred of Knighton, in the county of W., and thereupon heretofore, to wit, on, &c., at, &c., in the district and county aforesaid (at a meeting then and there held by the commissioners aforesaid for the purpose of hearing and determining appeals against the certificate or supplementary charges made by one J. L., crown surveyor in pursuance of the said Acts), a certain appeal of one W. H. of C., in the district and county aforesaid, in due form of law came on to be heard. The indictment then averred that the defendant on, &c., at, &c., appeared before the said commissioners as a witness for and on the behalf of the said W. H., on the hearing of the said appeal, and was then and there sworn, &c., before the said R. L., F. D. P., and H. S. G., so being such commissioners as aforesaid, that the evidence which he the defendant should give upon the hearing of the said appeal should be the truth and nothing but the truth (they the said commissioners then and there having authority to administer the said oath, &c.). The indictment then proceeded to aver the materiality, the giving the evidence, &c. The defendant having been convicted, a writ of error was brought, and one of the errors assigned was, that it did not appear that the said appeal was an appeal against such a certificate as in the said indictment mentioned, or that the same appeal was such an appeal as the said commissioners or any of them had power, authority, or jurisdiction to determine, and if they had no such power, &c., they had no jurisdiction to administer the said oath; and the Court of Queen's Bench held that the indictment was bad upon this ground, and the judgment was reversed. (w)

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It is sufficient to allege that a county court judge had competent authority to administer the oath without alleging that the cause was within the jurisdiction of the judge.

Where an indictment alleged that 'a certain action of contract' was pending in a county court, and then alleged that the defendant was duly sworn before the judge of the said court 'then and there having sufficient and competent authority to administer the said oath to her in that behalf,' it was objected that there was no averment that the said action of contract was one over which the county court had jurisdiction, and that no intendment could be made in favour of an inferior court that the action pending in it was one over which the court had jurisdiction; but the Court of Exchequer Chamber held that it did appear by necessary implication that the action was one over which the judge of the county court had jurisdiction; for unless he had, he could not have had

and authority to administer the said oath to the said C. C. in that behalf), and the said C. C. being so sworn as aforesaid, falsely, &c., did then and there before the said F. J. Chell, assuch commissioner as aforesaid, depose, swear, and make affidavit in writing, amongst other things, in substance, &c. The indictment then set out the affidavit, which stated, amongst other things, that C. C. had applied to the said T. S. for a loan of £150, which T. S. had agreed to let C. C. have upon having a mortgage upon his, C. C.'s, house, and as a

collateral security a warrant of attorney to accompany the said mortgage, that the mortgage and warrant of attorney were prepared for £250, although no more than £150 was advanced, &c.: 'all which said several matters and things so deposed and sworn by the said C. C. as aforesaid were, and each of them was material for the obtaining and supporting the said rule.' C. S. G.

(w) *Reg. v. Overton*, 4 Q. B. 83. Many other errors were assigned, but not determined by the court.



power to administer the oath, so as to be valid and binding, which is the true meaning of the phrase. The alleged defect, therefore, in the averment of the substance of the charge was supplied by necessary implication by the averment of the competency of authority in the judge to administer the oath. (x)

So where an indictment for perjury at a quarter sessions in Ireland alleged that a certain civil bill came on to be tried in due form of law before an assistant barrister, and alleged the oath to have been taken before the said assistant barrister, he having sufficient and competent authority to administer the said oath; it was objected that the indictment ought to have stated that the civil bill was for a cause of action within the jurisdiction of the court. But, on a case reserved, it was held, on the authority of the preceding case, that the indictment was good. (y)

An indictment for perjury alleged that a petition for protection from process was, under and in pursuance of the 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, and 10 & 11 Vict. c. 102, filed and presented in the county court of Staffordshire at W. by the prisoner; and that the prisoner afterwards duly received an order for protection from process, and that afterwards, whilst the proceedings upon and in respect of the said insolvency were pending in the said county court, to wit, at the time of filing the said petition and schedule, the prisoner came before H. K., at the court at W., and within the jurisdiction aforesaid, for the purpose of making an affidavit and verifying on oath his said petition and schedule (H. K. being a commissioner to administer oaths in chancery, and duly empowered to act in the matter of the said insolvency, and to take the oath of the prisoner), and was duly sworn and took his oath that the affidavit he then made was true (H. K. having competent authority to administer the said oath). The indictment then alleged the materiality of certain matter, and that the prisoner falsely swore in the usual way. It was objected on error that the indictment did not show that there was jurisdiction to administer the oath, as it did not allege that the prisoner had resided within the jurisdiction of the court for six calendar months next preceding the filing of his petition, according to the 10 & 11 Vict. c. 102, s. 6. But it was held that the indictment was good. (z)

An indictment for perjury alleged to have been committed on the hearing of an appeal against a surcharge under the Game Acts before commissioners of assessed taxes, stated that a notice of appeal had been given to the assessors, and averred that the commissioners were 'duly authorized and empowered to hear and determine' the appeal. It was objected that the commissioners had no jurisdiction unless a notice of appeal had been given to the

An indictment for perjury against an insolvent was sufficient, though it did not allege that he had resided for six months before the filing of his petition within the jurisdiction of the court.

Indictment bad for not showing that a valid notice of appeal had been given under the Tax Acts.

(x) *Reg. v. Lavey*, 2 Den. C. C. 504. 17 Q. B. 496. See the indictment, 3 C. & K. 26. *Reg. v. Overton*, *supra*, was mainly relied on, in support of the objection, and the court observed, 'If it were necessary for us to say how we should decide the present case if it were not distinguishable from that, we should require further time for consideration,' and that 'in that case the court considered that there was no averment that the oath was administered in the course of any judicial

proceeding.'

(y) *Reg. v. Lawlor*, 6 Cox C. C. 187.

(z) *Walker v. Reg.* 8 E. & B. 439.

*Wightman, J.*, said, 'Suppose the petitioner, not so residing, had sworn in his petition that he did; would that be perjury?' It was admitted that it would. *Lord Campbell, C. J.*, 'Then such a petition would give the court jurisdiction to inquire into the truth of the petition in that respect.'

surveyor or commissioners; it was answered that the indictment alleged that the commissioners had authority, and that the want of notice might have been waived; but Patteson, J., held that the want of notice could not be waived; for the 43 Geo. 3, c. 29, enabled the commissioners to hear the appeal, 'unless such notice shall not have been given, &c.,' 'when they *shall* dismiss the appeal.' Without such notice, therefore, the commissioners had no authority to hear the appeal, and it could not make the indictment good to show by evidence that the proper notice was given, when the indictment itself showed the notice to have been an improper one. (*a*)

It must appear on the face of the indictment that the oath was *material* or it must be alleged that it was.

It is necessary that it should appear on the face of the indictment that the oath taken was *material* to the question depending. (*b*) But it is not necessary to set forth in the indictment so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned, and it will be sufficient to allege generally that the particular question became a material question. (*c*) Thus statements, that, at a court of admiralty session, J. K. was 'in due form of law tried upon a certain indictment then and there depending against him' for murder, and that 'at and upon the said trial it then and there became and was made a material question,' whether, &c., were holden to be sufficient averments that the perjury was committed upon the trial of J. K. for the murder, and that the question on which the perjury was assigned was material on that trial. (*d*) If the materiality of the question evidently appears upon the record, as where the falsehood affects the very circumstance of innocence or guilt, or where the perjury is assigned on documents from the recital of which it is evident that the perjury was important, the express allegation may, it seems, be omitted. (*e*) And where, upon an indictment for perjury on a trial for felony, it did not appear that the matter sworn was material, nor was it alleged that it was so, the judges held, upon a case reserved, that if the original indictment had been set out, and it could plainly have been collected that the matter was material, it would have been sufficient without an averment of materiality, but that as this was not the case, the indictment was bad. (*f*) So where upon an indictment for perjury committed in an answer in chancery, the perjury was assigned in defendant's denial in the answer of his having agreed, upon forming an insurance company of which he was director, &c., to advance £10,000 for three years to answer any immediate calls, and there was no averment that this was material, nor did it appear for what purpose the bill was filed, or what was the prayer, the judgment was arrested. (*g*)

The indict-

It seems to be fully settled that either it must appear upon the

(*a*) *Anonymous*, 1 Cox C. C. 50.

(*b*) *Rex v. Aylett*, 1 T. R. 69.

(*c*) *Rex v. Dowlin*, 5 T. R. 311.

(*d*) *Id. ibid.*

(*e*) 2 Chit. Crim. L. 307 *a*, citing *Trem. P. C.* 139, &c., and *Rex v. Crossley*, 7 T. R. 315. *Ryalls v. Reg.* 11 Q. B. 781. *Reg. v. Cart's*, 4 Cox C. C. 435.

(*f*) *Rex v. McKeron*, East. T. 1792, MS. Bayley, J. 5 T. R. 316, S. C.

(*g*) *Rex v. Bignold*, Trin. T. 1824.

MS. Bayley, J. The indictment was shown to Lord Gifford, M. R., and Mr. Bell, K. C., who both thought that upon the face of the indictment it could not be said whether the question was material or not; and the materiality of all questions in a chancery suit depending upon the purpose for which the suit is instituted, the court held that the indictment could not be supported. MS. Bayley, J.

indictment that the matter in respect of which the perjury is assigned was material, or it must be expressly alleged to have been so. An indictment for perjury alleged that on the trial of a certain issue the defendant was sworn as a witness, and that on such trial certain questions became material, that is to say, 'whether one J. Kenworthy had been arrested by one J. Lister; whether the said J. L. had on the occasion of the said alleged arrest touched the person of the said J. K.; and whether the said J. L. had on the occasion of the said alleged arrest put his arms round the said J. K. and embraced him.' The indictment then charged that the defendant swore falsely to the following effect. 'Lister (meaning the said J. L.) put his arms round him (meaning the said J. K.) and embraced him (meaning the said J. K., and meaning thereby that the said J. L. had on the occasion to which the said evidence applied, touched the person of the said J. K.).' It was further alleged that in answer to a question put to the defendant, 'whether the said J. L. did not put his arms round him (meaning the said J. K.) and embrace him,' the defendant falsely swore as follows: 'he (meaning the said J. L.) did' (meaning that the said J. L. did on the occasion to which the said evidence applied put his arms round and embrace the said J. K. and did touch the person of the said J. K.). The defendant having been convicted, a writ of error was brought, and the error specially assigned was that the materiality of the evidence alleged to have been false was not sufficiently averred in the indictment; and it was contended that in the evidence, on which the perjury was assigned, there appeared neither time, place, nor circumstance to connect the statement with the alleged arrest. The whole might have turned upon some former and entirely different transaction. And the innuendos did not remove the difficulty: for there was no averment in them that it was on the occasion of the alleged arrest; it merely imported that the evidence was given concerning an occasion, which was not identified with that in question. Bayley, J., 'An indictment must be good without the help of argument or inference. In the case of perjury the indictment must show, either by a statement of the proceedings or by other averments, that the question to which the offence related was material. That is not shown here in either way. The words on which perjury is assigned, if taken without the innuendos, have no necessary reference to the occasion of an alleged arrest; nor is there anything in the indictment to connect them with it. It is contended that the inquiry, to which part of the evidence was an answer, would not have been relevant if applicable to any other matter and occasion than those now in question; but we know nothing of the merits of the case except from the indictment. The innuendos rather introduce greater doubt than greater certainty, and lessen the force of the argument that only one occasion could have been contemplated. I am, therefore, of opinion that the indictment is defective, and the judgment ought to be reversed.' (h)

Where an indictment stated that a suit was pending in the Hewins's case.

(h) *Rex v. Nicholl*, 1 B. & Ad. 21. Littledale, J., and Parke, J., concurred, and Parke, J., added, 'It is part of the definition of perjury that the false swearing is on some point material to the ques-

tion in issue. In an indictment this may appear either from the matter of the suit, as shown on the record, or by direct averment.'

ment must show either by a statement of the proceedings, or by express averment, that the matter sworn was material.

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Imperfect  
allegation of  
materiality.

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Goodfellow's  
case.

Burraston's  
case.  
Insufficient  
averments of  
materiality  
and of the  
falsity of the  
matter sworn.

Court of Chancery, and that a commission was issued to certain commissioners to examine witnesses upon interrogatories, and then set out the ninth interrogatory, and averred that, 'upon the examination of the defendant upon the said interrogatories, it became, and was, material to ascertain the truth of the matters hereinafter alleged to have been sworn to and deposed by the defendant, upon his oath, in answer to the said ninth interrogatory;' it was objected that the averment of materiality was insufficient, there being no statement of the alleged perjury being material to the chancery suit, or to any question in that suit; and Coleridge, J., expressed some doubt whether the averment of materiality was sufficient, and would have reserved the point if it had become necessary. (i) And where an indictment for perjury, after alleging that an information was exhibited before two magistrates, and that the same information came on to be heard before M. G. and J. S., two justices, and that 'upon the hearing of the said information before the said M. G. and J. S., so being such justices as aforesaid, it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to and stated by the said J. S. upon his oath;' it was held that this averment of materiality was insufficient. (j)

An indictment stated that, on the trial of an action of *Meek v. Knight*, 'it became and was a material question, whether a certain bill of exchange, bearing date, &c.' (here the bill was described) 'was accepted by the said J. Meek, for the accommodation of the said W. Knight, and without valuable consideration to the said J. Meek from the said W. Knight; and whether a certain paper writing or memorandum, then and there produced, by and in the handwriting of the defendant, J. Burraston, was really and truly executed by the said W. Knight, by affixing his mark thereto, at the time of the making of the said bill of exchange. (The indictment then set out the memorandum.) And whether the said memorandum was read over by the said J. Burraston to the said W. Knight, at the time of making the said bill of exchange as aforesaid.' The indictment then alleged that the defendant swore that the said paper writing or memorandum was duly executed by the said W. Knight, by affixing his mark to the same, in the presence of the said J. Burraston, on the day on which the same bears date, and at the time of the making of the said bill of exchange, and that the said memorandum was then and there read over by the said J. Burraston to the said W. Knight. 'Whereas, in truth and in fact, the said W. Knight did not execute the said paper writing or memorandum by affixing his mark thereto, in the presence of the said J. Burraston, on the day on which the same bears date, nor was the said memorandum read over by the said J. Burraston to the said W. Knight at the time of the making of the said bill of exchange, nor was the said memorandum produced or shown to the said W. Knight by the said J. Burraston, at the time of making the said bill of exchange. Upon a writ of

(i) Reg. v. Hewins, 9 C. & P. 786. The defendant was acquitted. The form of the averment in this and the following case was taken from 2 Chitty's Cr. L. p. 207 a; where it is said that this 'concise statement would, it should seem, in all

cases suffice.'

(j) Reg. v. Goodfellow, Patteson, J., after consulting Cresswell, J., C. & M. 569. See the averment of materiality in Rex v. Callanan, ante, p. 59, note (c).

error, brought after a general verdict of guilty, the errors assigned were, that no perjury was assigned upon the question alleged to have been a material question upon the trial, and that no perjury was assigned upon any question alleged to have been a material question upon the trial; and the Court of Queen's Bench held that the indictment was bad. The assignment of perjury, that the bill was not executed on the day on which the same bears date, departed from the statement of the evidence, and the allegation of the materiality. And the assignment of perjury, that the paper was not executed at the time of the making of the bill, bore no relation to the allegations of the evidence of the defendant. The statement of the evidence of the defendant, as well as the allegation of the falsehood, were uncertain. The words 'then and there' might refer to the two dates, the date of the memorandum and the day of the making of the bill, and it might consist with the fact that it never was read over on both days, or the defendant might never have intended to say that it was. (k)

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An averment that 'it then and there became material' is insufficient.

An indictment alleged that E. S. filed his bill in chancery against the prisoner, J. S. S., and J. S., whereby he prayed that a purchase by the prisoner might be declared fraudulent and void, and that he might be decreed to deliver up the contract to be cancelled, and then averred that it *then and there* became a material question whether the prisoner did advise the said J. S., E. S., and J. S. S., that certain real estate, including the premises described in the said bill, should be sold. It was held that the averment of materiality was insufficient. There might be very good reasons for setting aside the sale as fraudulent, quite independently of any advice given by the prisoner; and that being so, the question was whether there was a sufficient averment of materiality, and the words 'then and there' were not sufficient to supply the omission of the words 'in the said suit,' or words to the same effect. (l)

An indictment for perjury alleged that H. L. stood charged before T. Scott, a justice of the peace, with having on the 12th of August committed a trespass by entering in the daytime on certain land in pursuit of game, and that upon the hearing of the said charge, the prisoner appeared as a witness for the said H. L., and was duly sworn to speak the truth touching the said charge; and that the prisoner upon the hearing of the said charge, falsely swore that he did not see the said H. L. during the whole day of the 12th of August, and that '*at the time he the said prisoner swore as aforesaid* it was material and necessary for the said T. Scott, so being such justice as aforesaid, to inquire of and be informed by the said prisoner whether he did see the said H. L.

An averment that a question was material at the time the prisoner swore is insufficient.

(k) Reg. v. Burraston, 4 Jurist, 697. The court expressed strong doubts whether it was possible to separate the three propositions, which were said to have formed one question; and Littledale, J., said that if it was one assignment of perjury, and part was bad, the whole was vitiated. It was also doubted whether where a matter was stated to be a material question the prosecutor could abstain from stating any swearing as to such matter, or assigning any perjury

upon it. But it became unnecessary for the court to decide either of these points, as the indictment was held bad on the grounds stated in the text.

(l) Reg. v. Cutts, 4 Cox C. C. 435. Q. B. Lord Campbell, C. J., said, 'An indictment for perjury must either show that the evidence alleged to be false was necessarily material to the issue, or there must be a positive averment that it was material.'

at all during the said 12th day of August,' and it was held that the indictment was bad; for 'it is not stated that it was a material and necessary question in the inquiry before the said T. Scott, to which the false and corrupt answer was given. It may have been, therefore, consistently with the averments in the indictment, material and important for T. Scott in some other matter, and not in the matter stated to be in issue before him, to have put this question and received this answer. Now as the offence of perjury consists in taking a false oath in a matter stated to be in judgment before a court or person having competent authority to decide it, and as this indictment does not clearly and distinctly charge that, it does not charge the offence of perjury.' (*m*)

Averments as to the materiality of a letter, and identification of a person named in the averments with one named in the assignments of perjury.

An indictment for perjury committed on a trial for rape alleged that it was a material question whether the prisoner ever got one M. Williams to write a letter for her, and whether or not she saw the said M. Williams at the house of S. Lewis's father when the said letter was written; and that the prisoner falsely swore that she never got a Mr. M. Williams (he being then present in court during the said trial) to write a letter for her, and that she did not see the said Mr. M. Williams at the said house of the said father of the said S. Lewis. Whereas the prisoner did get the said M. Williams to write a letter for her, &c. At the trial for rape, the prisoner was asked whether she ever got Mr. M. Williams (who was pointed out to her in court) to write a letter for her. She replied, 'No, I did not.' The letter was shown to her and the question repeated, and she repeated her denial, and she also denied having ever seen M. Williams at S. Lewis's father's house. The falsity of what she so swore was clearly proved and the letter produced. It was objected, 1st, that the materiality of the matters assigned as perjury was not sufficiently alleged; 2nd, that the reference to the letter was too vague and general, and not properly pointed to the particular letter; 3rd, that the reference to M. Williams and Lewis's father's house were not properly introduced by an averment; 4th, that the letter produced was not sufficiently identified with the statements on the record to support them. The objections were overruled, and, on a case reserved, it was urged that all the assignments of perjury were defective in not identifying the M. Williams spoken of in them with the M. Williams spoken of in the allegation of materiality; but it was held that the indictment was sufficient: it averred that it was a material question whether the prisoner got any M. Williams to write a letter. That averment comprehended every person of the name of M. Williams. The description therefore in this averment was larger than the description in the assignments of perjury, and comprehended the M. Williams there spoken of. As to the objection relating to the letter, it was contended that it could not possibly be material that the prisoner got Williams to write a letter. But it was held that, as there was an express averment that it was material, that let in evidence to prove that it was so, and when the evidence was looked at it was clear that the letter was material. (*n*)

(*m*) Reg. v. Bartholomew, 1 C. & K. 566. All the judges.

(*n*) Reg. v. Bennett, 2 Den. C. C. 240.

3 C. & K. 124, 5 Cox C. C. 207. It is trusted that the text represents substantially the grounds of the decision on the



An indictment for giving false evidence before a commissioner of bankruptcy alleged that upon the examination of the prisoner it was material to inquire what was the extent of the dealings of the prisoner with 'one Mr. Marshall, and how long he had known the said Mr. Marshall,' &c., and then alleged that the prisoner solemnly declared that 'Mr. Marshall is the landlord of No. 4, York-terrace,' &c. 'I have known Mr. Marshall two or three years,' &c. Whereas the said person so described was the same person as one S. Marshall Legge, and was the father of the prisoner, &c. It was objected, in arrest of judgment, that there was nothing to connect the allegation of materiality with the assignment of perjury, as there was no innuendo that Mr. Marshall meant S. Marshall Legge; and the judgment was arrested as the averment of materiality was insufficient to connect it with the other parts of the indictment. (*o*)

Averment of materiality as to a person insufficiently connected with a person named in the matter sworn.

An indictment for perjury alleged that a cause came on to be tried before a county court judge, and that it became a material question on the trial whether J. H. Bridges had, in the presence of the prisoner, signed at the foot of a certain bill of account, purporting to be a bill of account between a certain firm called 'Bridges and Co.' and J. Webster, a receipt for the payment of the said bill, and that the prisoner falsely swore that J. H. Bridges did in her presence sign the said receipt; and it was proved that on the trial the prisoner produced an invoice of goods, at the foot of which was a receipt, which purported to bear the signature of Bridges, and the prisoner swore that he in her presence wrote and signed that receipt. Bridges had on other occasions signed receipts in the presence of the prisoner at the foot of invoices. It was objected that the indictment did not sufficiently specify the account and receipt to which the evidence on which the perjury was assigned related; but, on a case reserved, it was held that the indictment was sufficient, as it was only necessary to refer to the receipt as introductory to making out the materiality of the perjury. (*p*)

An account held sufficiently referred to, though there had been several similar accounts.

Where an indictment for perjury alleged that the defendant swore that he had not written certain words in the presence of one Dipple, and alleged that it was a material question whether the defendant had so written such words in the presence of Dipple; the Court of Queen's Bench held that the indictment was sufficient; for the question whether the words were written in the presence of Dipple might have been material; and it was impossible to assume the contrary against the record. (*q*)

An averment that it was material whether the prisoner had written some words in the presence of D.

An indictment for perjury on the taking of an inquisition before a coroner alleged that it 'was, upon the taking of the said inquisition, a material question whether,' &c., and it was urged that this statement did not sufficiently show that the question was material to the inquiry; but Parke, B., held that the statement sufficiently imported that the question was material to the subject-matter of the inquisition. (*r*)

An averment that 'on the taking of an inquisition,' it was material, &c.

two points; but all three reports are very unsatisfactory. No express notice was taken of the other points.

(*o*) Reg. v. Legge, 6 Cox C. C. 220. The Recorder, after consulting Parke, B.

(*p*) Reg. v. Webster, Bell C. C. 154.

(*q*) Reg. v. Schlesinger, 10 Q. B. 670.

(*r*) Reg. v. Kimpton, 2 Cox C. C. 296.

Question as to the materiality of the terms of an agreement.

An indictment for perjury alleged that it was a material question whether, before the execution of a bond, it was agreed between certain persons that the prisoner should lend W. Winder £1,500 before the title to certain premises was investigated by the prisoner, and before any mortgage thereof was executed to secure repayment thereof, and that they should execute the bond to secure the prisoner the repayment of the said sum and interest in case the title should turn out to be defective, or the mortgage should not be duly executed; but if the title turned out to be good, and the mortgage was executed, they were not to be liable on the bond: and then alleged that the prisoner falsely swore that nothing was said by him or in his hearing about the bond being a temporary security, or a security until the mortgage was prepared, 'or anything of the kind.' It was objected that, according to the agreement as stated, the bond would be binding until the title turned out to be good, which would not necessarily be when the mortgage was executed, so that the bond would not necessarily be a temporary security. But Erle, J., held that the exact terms of the alleged agreement were not material; for the prisoner swore that there was no agreement 'of the kind.' (s)

It is sufficient to aver that the question is material, and it need not be shown how it is material.

It is sufficient to aver that a certain question was material, without showing how it was material. An indictment for perjury on the trial of an action in a county court, alleged that upon the said trial it was a material question in the said action whether the said A. S. had ever been tried at the Central Criminal Court for any offence whatever; it was objected that the indictment did not show the materiality of the question; but the Court of Exchequer Chamber held that it was shown sufficiently upon the averment in the indictment that the matter deposed to was material. (t)

Ann Bird's case. Materiality not necessarily apparent on the face of the indictment.

The indictment must show on the face of it that the matter was material; it is not sufficient if it only shows that it *might* or might not have been material. An indictment for perjury alleged that, on the trial of an indictment for an assault, with intent to commit a rape, and for a common assault, upon one Ann Bird, the said Ann Bird swore that she was the wife of one J. Bird, and had been married to him at such a time and such a place, whereas she was not the wife of the said J. Bird, and had never been married to him; and the indictment contained an allegation of materiality, which was insensible in consequence of an error in copying it from the draft; it was, nevertheless, contended that it sufficiently appeared on the face of the indictment, that the evidence on which the perjury was assigned was material on two grounds. First, that on any indictment for an assault, with intent to commit a rape, it was most material, not only as affecting the credit of the witness, but as going to the very gist of the charge itself, whether the party assaulted had falsely sworn that she was a married woman. Secondly, that by swearing that she was the wife of J. Bird, the prosecutrix supported the allegation that the assault was upon 'Ann Bird,' which would have failed if she had admitted that she was not married to J. Bird. But Cresswell, J., held that it did not sufficiently appear that the evidence was ma-

(s) Reg. v. Smith, 1 F. & F. 98.

(t) Lacey v. Reg. 2 Den. C. C. R. 504. See the indictment, 3 C. & K. 26.

terial; it might or might not be material, and that was not sufficient. (*u*)

Where an indictment for perjury stated that a cause was set down for trial, and appointed for a particular day, and that the defendant in that cause, before that day, made an affidavit before a judge, in which he stated that he had a good defence to the action, which he would be able to prove at the trial, and that some of the bills on which it was brought were void for usury, and then assigned perjury on these allegations; it was objected that the indictment was clearly bad: the only manner in which such an affidavit could be in a judicial proceeding, or the matters contained in it become material, would be upon an application to postpone the trial of the cause; but the indictment did not show that any such application was made or intended. Lord Tenterden, C. J., however, thought that the occasion, on which the affidavit was intended to be used, might be sufficiently collected from the indictment, and refused to stop the trial, as the defendant, if there was any weight in the objection, might have the benefit of it after he was convicted. (*v*)

Apparent materiality of an affidavit to postpone a trial.

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An indictment alleged that an action came on to be tried in a county court, in which the plaintiff claimed to recover a sum for the expenses of a journey, and another sum for wages, and it was thereupon proved, on the part of the plaintiff, that the defendant had made certain statements, which were set out, and by which the debt to the plaintiff was sought to be proved; and afterwards averred that the defendant swore that he had not made any of the said statements; whereas he had made them: but there was no averment of materiality. Byles, J., held that such an averment was not necessary; but that it would suffice if the materiality could be gathered from the whole indictment, and if the assignments of perjury showed upon the face of the indictment that they were material to the issue. And here it appeared, on the face of the indictment, that the statements alleged to be falsely made were material to the issue. (*w*)

Apparent materiality of evidence set out in an indictment.

(*u*) Reg. v. Ann Bird, Gloucester Spr. Ass. 1842. The indictment for the assault simply stated the assault to be upon Ann Bird, without any further description. The learned judge expressed an opinion that the indictment was insufficient before the case went to the jury, but he left it to them, and after they had found the prisoner guilty, arrested the judgment, in order that the prosecutor might bring a writ of error if he thought fit. No writ of error was brought, the prosecutor being unable to incur the expense of such a proceeding. It sometimes happens that upon an objection taken to an indictment before verdict, the judge who tries the case, if he considers the objection valid, directs an acquittal; but the course adopted by the learned judge in this case is certainly the better course, as, if the decision be incorrect where the judgment is arrested, it may be reversed upon error; whereas if the prisoner is acquitted, and the decision is incorrect, there is no means

of correcting the error, and as the verdict of the jury has been taken, it may be very questionable whether if a fresh indictment were preferred a plea of *autrefois acquit* might not be successfully pleaded. See per Lord Tenterden, C. J., Reg. v. Fowle, 4 C. & P. 592, *post*, p. [694]. In Reg. v. Purchase, C. & M. 617, tried at the same assizes, Patteson, J., after consulting Cresswell, J., refused to allow any objection to be taken to an indictment for embezzlement, except upon demurrer or in arrest of judgment, and it seems most in accordance with the regular course of proceeding that such a course should be adopted in all cases. C. S. G.

(*v*) Reg. v. Abraham, 1 M. & Rob. 7. The defendant was convicted, but did not appear to receive judgment when called upon, and no motion in arrest of judgment was made.

(*w*) Reg. v. Harvey, 8 Cox C. C. 99. It was urged that the omission of an averment of materiality was a mere formal



Circumstantial materiality.

The indictment must expressly contradict the matter sworn to by the defendant.

Assignment fuller than the statement of the defendant.

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Imperfect assignment of playing at cards between certain hours.

But if the false oath has any tendency to prove or disprove the matter in issue, though but circumstantially, as, if the party willfully misstate the colour of a man's coat, or speak to the credit of another witness, it will amount to perjury. (*x*)

It is also necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant. And the general averment that the defendant falsely swore, &c., upon the whole matter, will not be sufficient: the indictment must proceed by particular averments (or, as they are technically termed, by *assignments of perjury*), to negative that which is false. It may be necessary to set forth the whole matter to which the defendant swore, in order to make the rest intelligible, though some of the circumstances had a real existence: but the word 'falsely' does not import that the whole is false; and when the proper averments come to be made, it is not necessary to negative the whole, but only such parts as the prosecutor can falsify, admitting the truth of the rest. (*y*) It is suggested that in negating the defendant's oath where he has sworn only to his *belief*, (*z*) it will be proper to aver that '*he well knew*' the contrary of what he swore. (*a*) It seems that an assignment of perjury may, in some instances, be more full than the statement of the defendant, which it is intended to contradict. Thus, where the fact in the affidavit, in which the defendant was charged to have perjured himself, was, that he never did, at any time during his transactions with the commissioners of the victualling-office, charge more than the usual sum of sixpence per quarter beyond the price he actually paid for any malt or grain purchased by him for the said commissioners as their corn-factor; and the assignment in the indictment, to falsify this, alleged that the defendant did charge more than sixpence per quarter *for and in respect of* such malt and grain so purchased; it was objected that the words *in respect of* might include lighterage, freight, and many collateral and incidental expenses attending the corn and grain jointly with the charge for the corn or grain, and, that bearing such sense, the defendant was not guilty of perjury; but the objection was overruled. (*b*)

An indictment alleged that it was material, on the hearing of an information before justices of the peace, to prove that cards were played in the bar of a public-house between the hours of six o'clock and eight o'clock on a certain evening, and that the prisoner falsely swore that he was in the bar of the said house from between the hours of six o'clock and seven o'clock until nine o'clock in the said evening, and that he did not play at any game at all, and that no cards or game of cards at all were or was during all the said last mentioned time or between the hours aforesaid played therein; whereas the prisoner did between the

defect, and amendable under the 11 & 15 Viet. c. 100, s. 23, *ante*, vol. 2, p. 327; but Byles, J., was clearly of opinion that it was matter of substance. It was also urged that sec. 20 of that Act (*ante*, p. 39) rendered the averment unnecessary; but Byles, J., was clearly of opinion that it did not, as it was not one of the things named in that section.

(*x*) *Rex v. Gripe*, 12 Mod. 142. Reg.

*v. Muscot*, 10 Mod. 195. 3 Stark. Evid. 859. And see *Reg. v. Gardiner*, *ante*, p. 57.

(*y*) *Rex v. Perrott*, 2 M. & S. 385, 390. And see *ante*, vol. 2, p. 670.

(*z*) *Ante*, p. 2.

(*a*) 2 Chit. Crim. L. 312.

(*b*) *Rex v. Atkinson*, Dom. Proc. 1785. Bac. Abr. tit. *Perjury* (C). See *Reg. v. Gardiner*, *ante*, p. 57.

hours of six o'clock and eight o'clock in the said evening play at a certain game of cards. Rolfe, B., held that the indictment was bad. The prisoner might have played at five minutes past six, and yet not have played from between six and seven until nine; the words 'from between six and seven' might be any time short of seven, five minutes or five seconds to that hour. The indictment could not be read as averring that the prisoner swore that he did not play at any time during that evening, but merely that he did not play at a particular period of that evening, namely, from some period before seven until nine. That might be perfectly true, and yet he might have played between six and seven, and so may have played, as is assigned in the indictment, between six and eight. (c)

Where an indictment for perjury committed in an information before magistrates, alleged that the prisoner was sworn on an information taken on the 11th of March, 1844, and deposed that on 'the morning of Thursday last, the 7th day of March (he meaning the 7th day of March in the year 1804),' he met G. C.; whereas the prisoner did not on the morning of Thursday, the 7th day of March, 1844, meet G. C.; it was held that 1804 could not be rejected as surplusage, and that the indictment was bad. (d)

The averments introduced to negative the matter sworn, ought to be so distinct and definite as to inform the defendant of the particular and precise charges which are intended to be proved against him. An indictment for perjury committed in the Insolvent Debtors Court alleged, that the defendant swore in substance that his schedule contained a full, true, and perfect account of all debts owing to him at the time of presenting his petition; whereas the said schedule did not contain a full, true, and perfect account of all debts owing to him at that time; and Lord Tenterden, C. J., after consulting the other judges of the Court of King's Bench, held that the indictment was insufficient, as it was quite impossible that the defendant could know, from allegations so vague and indistinct, what was to be proved against him; the allegations conveyed no information whatever of the particular charges, against which the defendant ought to be prepared to defend himself. (e)

It has been decided that perjury cannot be legally charged and assigned by showing that the defendant did on two different occasions make certain depositions contradictory to each other with an averment that each of them was made knowingly and deliberately, but without averring or showing in which of the two depositions the falsehood consisted. The information stated that the defendant, before a committee of the House of Commons, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c.; setting out

A variance between a material date in the matter sworn and the date in the denial of that matter is fatal.

The averments negating the truth of the matter sworn ought to be distinct and precise.

Perjury cannot be assigned on contradictory depositions without showing which of them is false.

(c) Reg. v. Whitehouse, 3 Cox C. C. 86.

(d) Reg. v. Garvey, 1 Cox C. C. 111. Brady, C. B. This case is very badly reported, and it is very doubtful whether the wrong year was not given as the date of swearing the information.

(e) Rex v. Hepper, R. & M. N. P. R.

210. Lord Tenterden, C. J., referred to *J'Anson v. Stuart*, 1 T. R. 748, where in an action for a libel in describing the plaintiff as a swindler, a justification that the defendant had been guilty of divers acts of swindling was held on demurrer too general to be sustained. See *Rex v. Mudie*, 1 M. & Rob. 128, post, p. 100.

the evidence so given. And then the count averred that the said defendant, at the bar of the House of Lords, being duly sworn, deliberately and knowingly, and of his own act and consent, did say, swear, and give in evidence, &c.: setting out in like manner the latter evidence, which was directly contrary to that given before the House of Commons; and concluded (after averments as to the identity of the persons and places referred to in the evidence on both occasions), and so the jurors aforesaid do say that the said Edward Harris did commit wilful and corrupt perjury. And this was holden to be bad on motion in arrest of judgment. (*f*)

Of the  
*innuendo*.

If there be any doubt on the words of the oath, which can be made more clear and precise by a reference to some former matter, it may be supplied by an *innuendo*; the use of which is, by reference to preceding matter, to explain and fix its meaning more precisely: (*g*) but it is not allowed to add to, extend, or change the sense. (*h*) We have seen that, in a case of perjury committed in an affidavit, it was holden that a word which had been omitted by accident in the original document was improperly stated in the indictment, as though it had been in the original document, and that such word ought to have been inserted and explained by an *innuendo*. (*i*) In a case where an objection was taken to an indictment, that it added, by way of *innuendo* to the defendant's oath, 'his house situate in the Haymarket in St. Martin in the Fields,' without stating by any averment, recital, or introductory matter, that he had a house in the Haymarket, or (even admitting him to have such a house) that *his oath was of and concerning the said house*, so situated, the objection was overruled, on the ground that the *innuendo* was only a more particular description of the same house which had been previously mentioned. (*j*) And, in the same case, the oath of the defendant being that he was arrested upon the steps of his own door, an *innuendo* that it was the outer door was holden good. (*k*) Where an *innuendo* is introduced contrary to the rules which have been mentioned, and any use is made of it in the indictment, it cannot be rejected as surplusage, and it will be bad after verdict. (*l*) But if the *innuendo*, and the matter introduced by it, are altogether impertinent and immaterial, and can have no effect in enlarging the sense, it seems that they may be rejected as superfluous. (*m*)

Where it may  
be rejected.

Virrier's case.  
An *innuendo*  
held good, as  
it fixed the  
meaning of  
what was pre-  
viously stated.

The proper office of an *innuendo* is to fix and point the meaning of something that has been previously averred. The indictment stated the presenting of a petition to the House of Commons concerning the election of F. H. F. Berkeley, and set out the petition, which stated the said F. H. F. Berkeley before and at the election was guilty of bribery, and that certain agents of the said F. H. F. Berkeley, being trustees of divers public charities, and

(*f*) *Rex v. Harris*, 5 B. & A. 926. It should have been averred and shown in which of the two depositions the falsehood consisted.

(*g*) *Rex v. Aylett*, 1 T. R. 70. *Rex v. Taylor*, 1 Campb. 434.

(*h*) *Rex v. Griep*, 1 Lord Raym. 256. 2 Salk. 513. And see as to the use of an *innuendo*, 1 Saund. 243, note (4). 1

Chit. on Plead. 406. 1 Stark. Crim. Plead. 118, *et seq.*

(*i*) *Rex v. Taylor*, 1 Campb. 404. *Ante*, p. 43.

(*j*) *Rex v. Aylett*, 1 T. R. 70.

(*k*) *Id. ibid.*

(*l*) *Rex v. Griep*, 1 Ld. Raym. 260.

(*m*) *Roberts v. Camden*, 9 East, 93. 2 Chit. Crim. L. 311.



by virtue of such office entitled to dispose of the funds of such charities, before and at the said election were guilty of various corrupt acts, &c., in order to procure the return of the said F. H. F. Berkeley. The indictment then averred that one T. Carlisle was a trustee of divers of the said public charities, and 'that shortly before the said election (to wit), on, &c., the said T. Carlisle, the said F. H. F. Berkeley, and other persons, went to the house of one W. Virrier for the purpose of soliciting the said W. Virrier to vote for the said F. H. F. Berkeley at the said election.' The indictment then stated that certain members of the House of Commons were chosen to try and determine the merits of the said election, and that the said persons so chosen met to try and determine the matter of the said petition. The indictment then averred that S. Virrier appeared 'as a witness before the said select committee touching the matter of the said petition,' and that the said S. Virrier was duly sworn, &c. 'And it then and there became and was a material question, whether at the time aforesaid, when the said T. Carlisle, the said F. H. F. Berkeley, and the said other persons, so went to the house of the said W. Virrier, the said T. Carlisle said that he would give the said W. Virrier £6 out of the funds of one of the aforesaid charities at Christmas, whereof the said T. Carlisle was trustee as aforesaid, or that he would give him £6 at Christmas.' (n) And that the said S. Virrier falsely, &c., did depose, &c., to the select committee aforesaid, 'touching the matters and merits of the said election, and the matter of the said petition, in substance and to the effect following, viz., that *before the said election* a canvassing party came to her husband's house, and Mr. Berkeley (meaning the said F. H. F. B.), and Mr. Carlisle (meaning the said T. C.), came into the house of the said W. Virrier, and Mr. Carlisle asked her if she knew who her husband was going to vote for at the ensuing election; that she said she believed he was going to vote one and one, and that Mr. Carlisle then said that he would act like a sensible man, and 'I will give him the £6 at Christmas' (thereby meaning that at the said time when the said F. H. F. Berkeley, and the said T. Carlisle, and the said other persons so went as aforesaid to the house of the said W. Virrier, for the purpose of soliciting him to vote for the said F. H. F. Berkeley, the said T. Carlisle said he would give the said W. Virrier £6 at Christmas, out of the funds of one of the aforesaid public charities, whereof the said T. Carlisle was trustee as aforesaid).' (o) 'Whereas in truth and in fact the said T. Carlisle did not at the said time when the said F. H. F. Berkeley, the said T. Carlisle, and other persons went to the said house of the said W. Virrier to solicit him to vote as aforesaid, or during the time when, on that occasion, they were in or at the said house, say to the said S. Virrier that the said T. Carlisle would give to the said W. Virrier the £6 at Christmas, or any sum of money from or out of any of the said public charities, or any sum of money whatsoever at Christmas or at any other time.' (p) The defendant

Indictment held sufficiently to show that the occasion, to which the matter sworn related, was the one to which the allegation of materiality referred.

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(n) The indictment here stated other questions to be material in a similar manner.

(o) The indictment here set out more

of the evidence. See the case, *post*, p. 80.

(p) The indictment here set out other assignments of perjury to the other parts

having been found guilty, it was moved, in arrest of judgment, that it did not appear either from the evidence said to have been given by the defendant, or from any other part of the indictment, except the innuendo, that the occasion on which the speaking of the words was said to have been material, was the same occasion with reference to which the evidence was given; that the averment of materiality might relate to one occasion, and the evidence to another occasion of the same kind; and that the innuendo would not aid, because an innuendo can only explain, and cannot supply the place of a substantial averment. The indictment also alleged that the defendant swore 'touching the matters and merits of the said election, and the matter of the said petition,' but that did not show that her evidence related to the material time before mentioned. Nor did her evidence, as set out, identify the occasion without the innuendo. The innuendo, therefore, did more than explain; it supplied that which made the evidence material. Lord Denman, C. J., after full argument and time taken to consider, delivered the judgment of the court as follows:— Upon this indictment a motion has been made to arrest the judgment upon two objections. 1st, that the allegation of the oath having been taken 'touching the matter of the said election, and the matter of the said petition,' did not sufficiently point to the matter whereupon the defendant was alleged to have given evidence; and, secondly, that there was nothing to fix the alleged gift and promise of money to the said visit on the 6th of July. We think, however, that neither objection is sustainable. As to the first, it does sufficiently appear that a competent trial was had, that a material question arose as to the existence of certain facts, to which the defendant deposed, and was therein guilty of perjury. Now although it is certainly true that the averment stating the oath to have been 'touching and concerning the matters and merits of the said election, and the matter of the said petition,' does not directly refer to what are alleged to be the material questions which arose, yet, where it does sufficiently appear, both by averment and otherwise, that the oath was upon a material point, the allegation 'touching and concerning, &c., is wholly superfluous and unnecessary, and the indictment would have been sufficient if it had omitted that part altogether, and had merely stated that the defendant deposed and swore "as follows," &c. The second objection is, that the evidence, upon which the perjury is alleged to have been committed, is not referred with sufficient distinctness to the said canvassing visit, and that the innuendo, by which it is attempted so to apply it, introduces new matter, and is therefore bad. We, however, think otherwise, for an introductory averment expressly states that there was, in fact, such canvassing visit, and the innuendo directly refers thereto. It is plain, therefore, that this case comes within the rule laid down by Lord C. J. De Grey, in *Rex v. Horne*, (q) which has always been recognized as the true one, and that the innuendo does only point and fix the meaning of something previously averred, which is the proper office of an innuendo, and that it does

of the evidence, which was set out in the indictment.

(q) 2 Cowp. 672.

in no respect enlarge it. We think, therefore, that there is no ground for arresting the judgment.' (r)

An indictment for perjury at common law need not conclude against the form of the statute. The defendant was indicted for perjury in giving false evidence before the revising barrister as to the occupation of a tenement in the borough of Bridgnorth, and the indictment did not conclude against the form of the statute. It was objected that as this was a crime created by the 2 Will. 4, c. 45, s. 52, the indictment ought so to have concluded. It was answered that the revising barrister held a court, which was made so by sec. 50 of the same Act. That any false swearing in a court was perjury at common law, and therefore the indictment was good. Lord Abinger, C. B., thought the only question was, whether the statute, by sec. 50, constituted a court; for if it did, the offence of false swearing in it was perjury at common law, and his opinion was that it did constitute a court, and therefore the indictment was sufficient. (s) And so it has been held that an indictment for perjury committed by a plaintiff as a witness in his own behalf in a suit in a county court need not conclude 'against the form of the statute.' (t)

Conclusion of the indictment.

Where all the counts of an indictment for perjury concluded, 'and so the jurors aforesaid upon their oath aforesaid *did* say that the defendant on &c., at &c., before &c., did commit wilful and corrupt perjury,' it was objected, on error, that this conclusion was erroneous in using the words 'did say' instead of 'do say;' but the Court of Queen's Bench held that the whole averment might be struck out, as the perjury was sufficiently alleged by the preceding part of each count; and as 'perjury' was not a word of art, like 'murder,' the concluding part of the count was immaterial. (u)

The old formal conclusion was immaterial.

In general the court will oblige the defendant to plead or demur to a defective indictment for perjury, (v) or to one that has been preferred without proper authority. (w) And they are also very cautious in granting a certiorari to remove it. (x) And it appears that Lord Thurlow refused permission to amend an answer where an indictment for perjury had only been threatened, even where the party, having no interest, could not be supposed to take the false oath intentionally. (y) In a late case, Abbott, C. J., said that, inasmuch as the objection taken to an indictment for perjury appeared upon the record, he did not feel himself warranted in taking notice of it at *nisi prius*. (z)

The court will, in general, oblige the defendant to plead or demur to a defective indictment.

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But where an indictment for perjury is clearly bad upon the face of it, a judge at *nisi prius* may refuse to try such indictment. An indictment for perjury charged that one A. B. had been

Where an indictment for perjury is clearly bad

(r) Reg. v. Virrier, 12 Ad. & E. 317.

(s) Reg. v. Thornhill, Salop Sum. Ass. 1838, reported on another point, 8 C. & P. 575. In Rex v. De Beauvoir, 7 C. & P. 17, the indictment seems not to have concluded 'against the form,' &c. See the note at the end of the case.

(t) Reg. v. Morgan, 6 Cox C. C. 107. Martin, B.

(u) Ryalls v. The Queen, 11 A. & E. 781; and see now the 14 & 15 Vict. c. 100, s. 24, ante, vol. 2, p. 326.

(v) 2 Hawk. P. C. c. 25, s. 146.

(w) Reg. v. Burnby, 5 Q. B. 348.

(x) 2 Hawk. P. C. c. 27, s. 28.

(y) Brown's Chan. Cas. 419.

(z) Rex v. Souter, 2 Stark. R. 423.

The objection was, that the indictment was drawn in the compendious manner prescribed by the 23 Geo. 2, c. 11; and yet no count alleged that the question upon the answers to which perjury was assigned was material.



the judge will  
refuse to try it.

convicted of certain offences, and that A. B. afterwards obtained a rule to show cause why a new trial should not be granted, and that the defendant, in order to prevent the said rule from being made absolute, made the affidavit whereon the perjury was assigned, but there was no averment that the matters falsely sworn were material, nor could it be collected from the indictment that they were so; and Garrow, B., having consulted Abbott, C. J., who concurred with him in opinion that the indictment was clearly bad, held that it was the duty of the judge not to proceed to try the case. (a) So where in an indictment for perjury the allegations negating the matter sworn, were so vague and indistinct as to convey no information of the particular charges against the defendant; Abbott, C. J., after consulting the other judges of the Court of King's Bench, ordered the case to be struck out of the list. (b) So where an indictment for perjury at common law was found at the Quarter Sessions, and removed by certiorari into the Court of King's Bench, and sent down to be tried at *nisi prius*; Gaselee, J., refused to try it, as it was quite clear that the sessions had no jurisdiction over perjury at common law, and the indictment was, therefore, void. (c) But a judge will not allow counsel to argue at length at *nisi prius* the invalidity of an indictment, for the purpose of inducing the court to refuse to try it, as that is not the time or place to discuss such disputed questions. (d)

Plea of autre-  
fois acquit.

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The defendant was indicted in Middlesex, for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a *prout patet* by the affidavit filed in the Court of King's Bench, at Westminster, &c., and on this he was acquitted; after which he was indicted again in Middlesex, for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, in which it was stated to have been sworn in London; which was traversed by an averment that, in fact, the defendant was so sworn in Middlesex, and not in London: and the Court of King's Bench held that he was entitled to plead *autrefois acquit*, as the *jurat* was not conclusive as to the *place* of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and, therefore, the defendant had been once before put in jeopardy for the same offence. (e)

(a) *Rex v. Tremearne*, R. & M. N. P. R. 147. In *Rex v. Deacon*, R. & M. N. P. R. 27, Abbott, C. J., refused to try an indictment for a forcible entry, which was bad for want of alleging that the entry was *noni fecit*, although the counsel for the defendant insisted that the case should proceed in order that the defendants might have the benefit of an acquittal by a jury, as they intended to institute proceedings for a malicious prosecution.

(b) *Rex v. Hepper*, R. & M. N. P. R. 210.

(c) *Rex v. Haynes*, R. & M. N. P. R. 298. See *Reg. v. Rigby*, 8 C. & P. 779, where Erskine, J., quashed an indictment

for forging a request for the delivery of goods which had been found at the Quarter Sessions on the same ground.

(d) *Rex v. Abraham*, 1 M. & Rob. 7, ante, p. 69. In this case the defendant's counsel pointed out the objections in order to induce the court to stop the trial, and Lord Tenterden, C. J., said that 'it might be convenient sometimes for counsel to suggest a point on which an indictment is clearly bad, to save the time of the court.' In *Rex v. Hepper* and *Rex v. Tremearne* the objections to the indictment were pointed out by the court. See note (a), ante, p. 69.

(e) *Rex v. Emden*, 9 East, 437.

With respect to the trial of perjury it may be observed, that the courts of Quarter Sessions have no jurisdiction over the offence at common law, and though they had jurisdiction over it under the 5 Eliz. c. 9, yet that jurisdiction is taken away by the 5 & 6 Vict. c. 38, s. 1, which enacts, that ‘neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons for (*inter alia*) perjury or subornation of perjury;’ or ‘making or suborning any other person to make a false oath, affirmation, or declaration punishable as perjury, or as a misdemeanor.’ The mode of proceeding is by indictment at the Assizes, or in the King’s Bench. And indictments for perjury at common law, preferred at the Quarter Sessions, appear to have been quashed for want of jurisdiction. (*f*)

By the 22 & 23 Vict. c. 17, no indictment for perjury or subornation of perjury can be found by any grand jury, unless the case has been taken before a justice, &c., as therein mentioned. (*g*)

It may be observed that it is the practice of the Central Criminal Court not to try an indictment for perjury arising out of a civil suit while that suit is in any way undetermined, except in cases in which the court, where the suit is pending, postpones the decision of it in order that the criminal charge may first be disposed of. (*h*)

Where two justices refused to hear a charge of perjury alleged to have been committed in a suit in the Ecclesiastical Court, on the ground that that suit was still pending, the Court of Queen’s Bench refused to grant a mandamus to compel them to hear the charge, and the court seem to have thought that the course the justices had taken was the most likely to answer the ends of justice. (*i*)

Where a person made an affidavit in the Court of Common Pleas, and afterwards, being summoned to appear in court, came there, and confessed it to be false, the court recorded his confession, and ordered that he should be taken into custody, and put in the pillory. (*j*) In answer to the objections of the defendant’s counsel to this proceeding, it was argued that it was fully justified under the 5 Eliz. c. 9, and that even if the court could not punish the defendant by virtue of that statute, he might be punished at common law, on the ground that any court might punish such a criminal for an offence committed in *facie curiæ*. (*k*)

The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury; as in such case there would

Trial. Jurisdiction of the quarter sessions.

5 & 6 Vict. c. 38, s. 1.

Examination before a justice, &c.

Time of trial at the Central Criminal Court.

Refusal to hear a charge of perjury whilst a suit is pending.

Summary proceeding.

Evidence. One witness not sufficient.

(*f*) 3 Burn. Just. tit. *Perjury*, &c. *Rex v. Bainton*, 2 Str. 1088. *Rex v. Westiness*, id. *ibid.* 1 Chit. Crim. L. 301. *Rex v. Haynes*, R. & M. N. P. R. 298, *ante*, p. 76. It is clear that justices of the peace now have jurisdiction to receive an information and take depositions in a case of perjury, by the 11 & 12 Vict. c. 42, s. 1.

(*g*) See the Act in the appendix, and *Reg. v. Bray*, 3 B. & S. 255, as to an application to a judge under the Act.

(*h*) *Rex v. Ashburn*, and *Rex v.*

*Simmons*, 8 C. & P. 50. The reporters state that the reason of the practice is that so long as the case is undecided the plaintiff and defendant, who might be witnesses on the trial for perjury, have a direct interest in giving their evidence, which they would not have after the case was finally decided.

(*i*) *Reg. v. Ingham*, 14 Q. B. 396.

(*j*) *Rex v. Thorogood*, 8 Mod. 179.

(*k*) *Id. ibid.*; and *Bushell’s case*, Vaugh. 152, was cited.

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One witness  
and corroborative  
evidence.

Where there  
is only one  
direct witness  
there must be  
strong evi-  
dence to con-  
firm that wit-  
ness in order  
to warrant a  
conviction.

Corroboration  
as to making  
a note.

be only one oath against another. (l) But this rule must not be understood as establishing that two *witnesses* are necessary to disprove the fact sworn to by the defendant; for if any material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale, and warrant a conviction. (m)

Upon an indictment for perjury, Coleridge, J., is reported to have said, 'one witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed, Lord Tenterden, C. J., was of opinion that two witnesses were *necessary* to a conviction.' (n) In a later case, where the evidence of one witness went in support of all the assignments of perjury, and to confirm him another witness was examined as to a conversation between himself and the defendant, and some entries in the defendant's books were given in evidence; it was submitted that there was no evidence to go to the jury; that the rule is that a case of perjury cannot be submitted to the jury on the evidence of a single witness; and as to the evidence of confirmation, it was not enough that there should be *some* evidence in confirmation, as in an ordinary case at *nisi prius*, where some evidence is necessary to prevent a nonsuit; but it must be such evidence as, in the opinion of the judge, is really confirmatory in some important respect, and equivalent to the positive testimony of a second witness. Coleridge, J., 'I think that the case must go to the jury, but I also think without the slightest chance of a verdict for the crown. The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction.' (o)

An indictment for perjury committed on the trial of a civil bill alleged that the prisoner, Thomas Towey, falsely swore that 'the note produced is not my handwriting, or any part of it, and the name "Thomas Towey" as a witness is not in my handwriting.' The note purported to bear the marks of Patrick and James Towey as makers of the note, and had on it, 'Witness present, Thomas Towey.' The payee of the note could not read, but he identified the note, and swore that he saw Thomas Towey write on the paper, and saw Patrick and James put their marks on it. Another witness proved that he had subpoenaed Thomas Towey to appear at the sessions as a witness, and that the prisoner then said that there was no occasion to test him; that he would go to prove the note; and that at a meeting between the parties to try to settle the civil bill, on the payee of the note saying he had James Towey's note, and would take the law on it unless he signed a new one, Thomas said that he had been tested (sub-

(l) Reg. v. Muscut, 10 Mod. 193. 4 Black. Com. 378. *Facts on Evid.* 10. 1 Phil. on Evid. 151, 7th edn.

(m) Reg. v. Lee, Mich. 6 Geo. 3. M.S. Bayley, J., 1 Phil. Evid. 152, 7th edn.

(n) Champney's case, 2 Lew. 258, and the same point is said to have been ruled by the same learned judge in Reg. v. Wigley, *Ibid.* note. And Mr. Starkie

observes, 'And *semble* that the contradiction must be given by *two direct witnesses*, and that the negative supported by one witness, and by circumstantial evidence, would not be sufficient. It has been so held (*ut audiri*) by Lord Tenterden, C. J.' 3 Stark. Evid. 860, note (g).

(o) Reg. v. Yates, C. & M. 132. See Reg. v. Parker, *post*, p. 100.



pœnaed) to come there, but that there was no occasion to test him; that he would prove the note. But the note was not produced at this meeting; and, upon a case reserved, it was held that this evidence was a sufficient corroboration of the evidence of the payee. The prisoner was the only witness to the note, and he could only prove it in his character as a witness, and, therefore, when he said he could prove it, it came to sufficient evidence that he was the witness to the note. (*p*)

An indictment for perjury alleged that in the month of *June*, 1851, the prosecutor had distrained upon the prisoner for certain arrears of rent, and that the prisoner on a trial at nisi prius falsely swore that there was only one quarter's rent due at the time of the said distress. On the trial for perjury the prosecutor positively swore to the fact of there being five quarters' rent due at the time of the said distress; and produced his books by which he refreshed his memory; and for the purpose of corroborating his statement and showing by the oaths of two witnesses the falsity of the matter sworn to, the son of the prosecutor deposed to a conversation with the prisoner in *August*, 1850, in which the prisoner admitted that three or four quarters of the said rent were then due. The jury convicted; but, upon a case reserved, the judges were unanimously of opinion that this was not sufficient corroboration. There was nothing in the evidence of the son relevant to the issue. There was a year's interval between the transaction he spoke of and the time when the distress was made, and the money might have been paid intermediately. The oath of the son was quite as consistent with the oath of the prisoner as with that of the prosecutor. In perjury there must be something to make the one believed rather than the other, and there was no such evidence in this case. (*q*)

In one case where there were three assignments of perjury upon evidence relating to one and the same transaction, at one and the same time and place, it seems to have been considered that the jury ought not to convict on one of the assignments, although there were several witnesses who corroborated the witness who spoke to such assignment on the facts contained in the other assignments. The indictment stated that the defendant swore that Mr. B. and Mr. C. came to her husband's house, that Mr. C. said, 'I will give him the £6 at Christmas,' and Mr. B. shook hands with her, and put something into her hand, and told her to give it to her husband, and that it was a sovereign wrapped up in some paper; and Mr. C. told her he should not forget it was in his power to give her husband the £6 at Christmas. The assignments of perjury were, 1st, that Mr. C. did not say that he would give the £6 at Christmas; 2ndly, that Mr. B. did not put a sove-

A statement by a prisoner that he owed certain rent is no corroboration of the evidence of a witness that a larger amount of rent was due a year after that statement was made.

Virrier's case. Confirmation on two out of three assignments of perjury.

(*p*) *Reg. v. Towey*, 8 Cox C. C. 328. The payee was cross-examined to show that there was another paper written by the prisoner, which the payee could not distinguish from the note; but Hayes, J., observed that the jury had found that the prisoner spoke of 'the note.'

(*q*) *Reg. v. Boulter*, 2 Den. C. C. 396. In *Best's Pr. Ev.* 440 it is observed, 'We apprehend that the old rule and reason of

the matter are not satisfied unless the evidence of each witness has an existence and probative force of its own, independent of the other; so that, supposing the charge to be one of those in which the law allows condemnation on the oath of a single witness, the evidence of either would form a case proper to be left to a jury, or would at least raise a strong suspicion of the guilt of the defendant.'

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reign into the hand of the defendant; and, thirdly, that Mr. C. did not tell the defendant that he should not forget it was in his power to give her husband the £6 at Christmas. Evidence was given in support of all the assignments of perjury. Lord Denman, C. J., in summing up, said, that as to the second assignment the proof lay almost entirely in the evidence of one witness, and, therefore, he did not see how the jury could convict of the perjury imputed; but that on the others there was a distinct contradiction of the defendant's testimony by Mr. C., who was supposed to have offered the £6, and several other witnesses; and he left it to the jury to say whether there was not a strong body of evidence clearly supporting Mr. C.'s denial. (*r*)

Gardiner's case.

But where upon an indictment for perjury, alleged to have been committed in making a charge of an unnatural offence, in which the defendant had deposed that he saw the prosecutor committing the offence, and saw the flap of his trowsers unbuttoned, and that he was there five minutes; and to disprove this the prosecutor swore that he did not commit the offence, and that his trowsers had no flap on; and to confirm him his brother proved that at the time in question the prosecutor was only absent three minutes, and that the trowsers he had on, which were produced in court, had no flap; Patteson, J., held that the corroborative evidence was quite sufficient to go to the jury; and, upon a case reserved, the judges held the conviction right. (*s*) So where perjury was alleged to have been committed by the defendant, who was an attorney, in an affidavit made by him to oppose a motion to refer the defendant's bill of costs to taxation, and to prove the perjury one witness was called, and in lieu of a second witness, it was proposed to put in the defendant's bill of costs delivered by him to the prosecutor; it was suggested that this was not sufficient, as the bill had not been delivered by the defendant on oath. Lord Denman, C. J., 'I have quite made up my mind that the bill delivered by the defendant is sufficient evidence, or that even a letter, written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness.' (*t*)

One witness and a bill of costs of defendant.

Insufficient corroboration as to the payment of money.

Where a prisoner was indicted for falsely swearing that he had paid J. Bland a certain sum of money on a particular occasion, and Bland swore that he received the money in packages, and afterwards counted it, and found it £7 short; and the only corroboration of his statement was by another person, who also

(*o*) Reg. v. Varrier, 12 Ad. & E. 317. The learned chief justice considered the most convenient mode of summing up the case to be to treat the second assignment as the first, and the first and third as one, and did so leave the case to the jury, who found a verdict of 'not guilty' on the first assignment of perjury for want of sufficient evidence, and guilty on the second; but said nothing on the third, and the verdict was entered accordingly. The chief justice did not at the time make any note of his summing up, but did so afterwards; and having a distinct

remembrance of it, and no doubt of the jury's intention, he (on summons) allowed the *postea* to be amended by entering a verdict of 'guilty' on the first and third assignments, and 'not guilty' on the second; but the court afterwards held that the amendment ought not to have been made, there being no note or memorandum of the judge or other document to amend by.

(*s*) Reg. v. Gardiner, 2 Moo. C. C. R. 95. See a fuller statement of this case, *ante*, p. 55, *et seq.*

(*t*) Rex v. Mayhew, 6 C. & P. 315.

counted it, but had not been present when the money was received; it was held that this was no corroboration at all. (*u*)

An indictment alleged that the prisoner falsely swore at a petty sessions that D. Rees was the father of her illegitimate child. A witness other than D. Rees proved that the prisoner had said that D. Rees 'had never touched her clothes' at a time when she generally denied being in the family way; and Martin, B., thought that though, under some circumstances, such a statement might have been a sufficient corroboration of the evidence of D. Rees, yet this negation was so far a part of the general denial that the jury could not safely convict upon it alone. (*v*)

A statement by a mother of a bastard child.

A count alleged that the prisoner falsely swore that she had shown to one Cuthbert certain invoices bearing certain dates. Cuthbert swore that the prisoner had not shown him the invoices she had sworn to; but that she had shown others, and he produced a memorandum, he had made privately at the time, of the dates of the invoices, which showed that they were not the same as those sworn to by the prisoner; Cockburn, C. J., held the private memorandum a sufficient corroboration. (*w*)

A witness corroborated by his own memorandum.

And the rule does not apply where the evidence consists of the contradictory oath of the party accused. Thus, in a case where the defendant had been convicted of perjury, charged in the indictment to have been committed in an examination before the House of Lords, and the only evidence was a contradictory examination of the defendant before a committee of the House of Commons, application was made for a new trial, on the ground that in perjury two witnesses were necessary, whereas in that case only one witness had been adduced to prove the *corpus delicti*, namely, the witness who deposed to the contradictory evidence given by the defendant before the committee of the House of Commons; and, further, it was insisted, that mere proof of a contradictory statement by the defendant on another occasion was not sufficient, without other circumstances, showing a corrupt motive, and negating the probability of any mistake. But the court held that the evidence was sufficient, *the contradiction being by the party himself*, and that the jury might infer the motive from the circumstances; and the rule was refused. (*x*) And the same principle appears to have been acted upon in a former case. The defendant had first made his information upon oath before a

Knill's case. Contradictory oath of the defendant.

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(*u*) Reg. v. Braithwaite, 1 F. & F. 638, 8 Cox C. C. 444. Watson, B., and Hill, J. In the latter report it is stated that 'the prosecutor took it without counting it, and carried it to a Mrs. Watson's, and counted it over.' In the former 'The prosecutor took it without counting it, and carried it to an adjacent lane, where he counted a part of it, and found it wrong; he then gave it to a Mrs. Watson, and asked her to count it over.' Mrs. Watson was the witness called to corroborate Bland.

(*v*) Reg. v. Owen, 6 Cox C. C. 105.

(*w*) Reg. v. Webster, 1 F. & F. 515. If this case is correctly reported, it deserves reconsideration. The memorandum was not itself admissible, and could only

be used to refresh the memory of the witness; so that the whole statement rested on his single oath; and, even if the memorandum had been admissible, it would only have been the written statement of the witness and not on oath; and the time when it was made and the veracity of its statements must have rested on his single oath. See Reg. v. Lara, *ante*, vol. 2, p. 614, in support of this reasoning. In Reg. v. Boulter, *supra*, p. 79, it was not even suggested that the prosecutor's books could be used to corroborate his evidence.

(*x*) Reg. v. Knill, 5 B. & A. 929, note (*a*). In Reg. v. Hook, *infra*, p. 84, Pollock, C. B., doubted whether any conviction would now be permitted in such a case as Reg. v. Knill.



justice of the peace, that three women were concerned in a riot at his mill (which was dismantled by a mob on account of the price of corn), and afterwards, at the sessions, when the rioters were indicted, he was examined concerning those women, and (having been tampered with in their favour) he then swore they were not in the riot. There was no other evidence on the trial of the defendant for this perjury, to prove that the women were in the riot (which was the perjury assigned), but the defendant's own original information on oath, which was produced and read, and by which he had sworn that they were in the riot. And the judge thought this evidence sufficient, and the defendant was convicted and transported. (*y*) And with respect to this evidence, it has been observed, that when the same person has by opposite oaths asserted and denied the same fact, the one seems sufficient to disprove the other; and with respect to the defendant (who cannot contradict what he himself has sworn) is a clear and decisive proof, and will warrant the jury in convicting him on either, for whichever is given in evidence to disprove the other, it can hardly be in the defendant's mouth to deny the truth of that evidence, as it came from himself. (*z*)

Wheatland's case. Contradictory oath of the defendant not sufficient without other evidence.

But where the defendant was indicted for perjury, alleged to have been committed on the trial of an indictment for larceny, and it appeared that the defendant had sworn to several material facts before the committing magistrate, but, when he was called on the trial, denied the whole of what he had stated before the magistrate; and *Rex v. Knill* and *Anon.* (*a*) were cited to show that the contradiction by the oath before the magistrate would alone be sufficient evidence to convict the defendant; but Gurney, B., held, that it was not sufficient to prove that the defendant had, on two different occasions, given directly contradictory evidence, although he might have wilfully done so; but that the jury must be satisfied affirmatively that what he swore at the trial was false; and that would not be sufficiently shown to be false by the mere fact that the defendant had sworn the contrary at another time; it might be, that his evidence at the trial was true, and his deposition before the magistrate false. There must be such confirmatory evidence of the defendant's deposition before the magistrate, as proved that the evidence given by the defendant at the trial was false. (*b*)

(*y*) *Anon. cor. Yates, J., Lancaster Sum. Ass. 1764.* And afterwards, Lord Mansfield, C. J., and Wilmot, J., and Aston, J., to whom Yates, J., stated the reasons of his judgment, concurred in his opinion. Notes to *Rex v. Harris*, 5 B. & A. 339, MS. Bayley, J.

(*z*) From the Precedent-book of Chambre, J., cited 5 B. & A. *ibid.*

(*a*) *Supra*, notes (*x*) and (*y*).

(*b*) *Reg. v. Wheatland*, 8 C. & P. 238. Although at first sight this decision may seem at variance with those cited, perhaps it may not in fact be so. In *Rex v. Knill*, the court held that 'the jury might infer the motive from the circumstances,' none of which are stated in the short minute of the case; some of them might have been such as to show that the

one statement was false, or the other statement true. In the Anonymous case the defendant had been tampered with after his first examination, and the evidence of the tampering with the defendant might be such as to lead to the conclusion that his evidence on the trial was false. But supposing those cases to go the length of establishing the proposition, that the defendant's own evidence upon oath is sufficient to contradict the evidence on which the perjury is assigned, it is conceived they cannot be supported. The prosecutor may charge the perjury either on the one statement or on the other, and whichever he selects it is clear that the defendant could not avail himself of a plea of *autrefois acquit*, or *convict* in case he were subsequently indicted for the

So where a prisoner was indicted for perjury in evidence given before a grand jury, and her deposition on the hearing of the charge before the committing magistrate was put in to show that the statement before the grand jury was false; Tindal, C. J., held that further evidence must be given; for if the two contradictory statements on oath alone were proved, *non constat* which was the true one. (c)

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And where the prisoner was indicted for perjury, and it appeared that she had made two statements on oath, one of which was directly at variance with the other; Holroyd, J., is reported to have said, ‘Although you may believe, that on one or other occasion she swore that which was not true, it is not a necessary consequence that she committed perjury; for there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances, at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict where it is not possible to tell which was the true and which was the false.’ (d)

One statement may be true, the other innocently erroneous.

The prisoner, a policeman, laid an information against a publican for keeping open his house after lawful hours on the fast day, and on the hearing of the information swore that he knew nothing of the matter, except what he had been told by another person, and that ‘*he did not see any person leave the publican’s house after eleven*’ on the night in question. Perjury was assigned on this last allegation. It was proved by the clerk of the magistrates that the prisoner on laying the information said, he had caught the

Contradictory statements of the prisoner, but not on oath.

other, and therefore he might be twice put in jeopardy, and perhaps twice convicted for the same offence. The judgment in *Rex v. Harris*, 5 B. & Ald. 926, is conclusive to show that this is a good objection. Again, such evidence leaves it wholly uncertain which of the two statements is true; now it is a clear rule of criminal law that if the evidence on the part of the prosecution leaves it wholly uncertain whether the *crime charged* has been committed or not, the defendant must be acquitted; and as to the observation that ‘it can hardly be in the defendant’s mouth to deny the truth of the evidence that came from himself,’ it must be remembered that there are two statements upon oath, and if he is to be concluded from denying one to be true, the same reason would conclude him from denying the other, and it would surely be very unreasonable to hold that he is concluded to deny the truth of whichever the prosecutor may think fit to select. It is conceived, also, that an indictment charging each of the statements to be false in separate counts could not succeed. The charges being directly contradictory the one to the other, it may be doubted whether the grand jury would be warranted in finding such an indictment; or, if found, whether it would not be bad

on the face of it; and as the defendant could only make a defence to one charge by proving himself guilty of the other, the judge would probably insist upon the prosecutor electing on which charge he would proceed. But supposing these difficulties to be surmounted, it is not easy to see how it would be possible for the jury to find a verdict without any evidence to show which statement was false. If they found a general verdict they would at one and the same time find each of the statements to be both true and false, unless indeed they were satisfied that the defendant had, upon both occasions, wilfully sworn to matters about which he had no knowledge at all. *Ante*, pp. 2. 71. C. S. G.

(c) *Reg. v. Hughes*, 1 C. & K. 519. The false statement before the grand jury was that certain table-cloths were the property of the prisoner’s son, and she had sworn before the magistrates that they were her husband’s; and evidence of the state of the family was given to prove that the latter statement must be true; but Tindal, C. J., thought that there was so much doubt whether the prisoner might not have sworn under a misapprehension, that he directed an acquittal.

(d) *Mary Jackson’s case*, 1 Lew. 270.

publican; he had last night seen four men leave his house after eleven; one of them he could swear to; it was Williamson; he knew him by his coat. Another witness proved that the prisoner, on another occasion, made the same statement to him. A third witness, Williamson, proved that, on a third occasion, the prisoner repeated the statement with the variation, 'One I can swear to; it was your brother.' It was proved that Williamson and others had left the house on that night after eleven. The prisoner on the hearing of the information acknowledged that he had offered to smash the case for 30s. He told another witness he should make the publican give him money to settle it; another witness heard him offer the publican to settle it for £1, saying he was risking perjury: and another witness proved that the prisoner owned he had received 10s. to smash the case, and was to have 10s. more. It was objected that there was no sufficient evidence, as these were only the statements of the prisoner not on oath against that on oath. But, on a case reserved, it was held that the conviction was right. In addition to the statements of the prisoner there were strong confirmatory circumstances. The prisoner's offering to smash the case for one pound, his admitting that he had received 10s. and was to receive 10s. more, and his talking of making the publican pay to settle it, are strong evidence to show that what he stated upon his oath was false, and that his statements not upon oath were true. (e)

Mudie's case. Several witnesses speaking to several assignments of perjury.

In the following case, it was doubted whether the rule, which requires two witnesses, was satisfied by several witnesses, each supporting a separate assignment of perjury, but no two speaking to the same assignment. Upon the trial of an indictment for perjury, alleged to have been committed by an insolvent debtor in falsely swearing to the correctness of his schedule, the defendant's account-book, given by him to the Insolvent Debtors Court, was put in, and several persons, whose names were specified in the indictment as debtors, and omitted in the schedule, appeared in the book as debtors to the defendant, and 'paid' was marked to their accounts in the defendant's writing. These persons were called, and stated that they did not pay until after the petition and schedule. It was objected that this was not sufficient evidence, inasmuch as it was only oath against oath, the defendant having sworn that the debts were paid; a single witness,

(e) Reg. v. Hook, D. & B. 606. Wightman, J., said, 'It is not necessary that there should be two independent witnesses to contradict the particular fact, if there be two pieces of evidence in direct contradiction. Here one piece of evidence is that the prisoner himself is proved to have made statements directly contrary to his statement on oath; that alone would not do; but in addition to that you have the oaths of other witnesses, which go to show that that which he stated when not upon oath was true; and therefore you have two pieces of evidence. I ought rather to put it that, instead of two witnesses being necessary to prove each fact, you must have the evidence of two persons giving evidence in contradiction to what has been sworn to by the

prisoner; as, one witness who could prove, as in this case, that on other occasions the prisoner had stated that which was diametrically opposed to that which he has sworn, and the other witness to give evidence of that which is directly opposite. You have therefore two contradictions; you have the contradiction of the prisoner himself, as deposed to on oath by one witness, and you have the contradiction of another independent witness, who speaks to the falsehood of the fact; you, therefore, have two independent contradictions on oath.' It is to be observed that, as it was proved that in fact the men did leave the public-house, as stated by the prisoner when he laid the information, the only question really was whether he saw them leave it.



with respect to each particular debt, swore that it was not paid at the particular time of the schedule. Lord Tenterden, C. J., ‘I feel the force of the objection. It is a very important point whether the defendant’s book, and the oath on one side, be not met by the oath of the witnesses on the other side. It would be very difficult to give any other evidence. I will not stop the case. If the defendant is convicted, you can move for a new trial.’ (f)

But it has since been held, that the rule which requires two witnesses, or one witness and some sufficient corroboration, applies to every assignment of perjury in an indictment. Where, therefore, an indictment contains several assignments of perjury, it is not sufficient to disprove each of them by one witness; but in order to convict on any one assignment, there must be either two witnesses, or one witness and corroborative evidence, to negative the truth of the matter contained in such assignment. The prisoner was indicted for perjury, alleged to have been committed in an affidavit to obtain a criminal information, in which he had sworn that he had paid all his debts, except two, as to which there was an explanation, and there were several assignments of perjury averring that he had not paid certain persons who were named (besides the two excepted ones), and such persons proved that they had not been paid, but only spoke to their respective debts not having been paid; Tindal, C. J., held that this was not sufficient, and that as to each debt there should be the testimony of two witnesses, or of one witness, and such confirmatory evidence as was equivalent to the testimony of a second witness. (g)

The rule that the testimony of a single witness is insufficient to warrant a conviction on a charge of perjury, is an arbitrary rule, founded upon the general apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against the oath of another; (h) and it should be observed, that this rule does not extend to all the facts, which are necessary to be proved on the trial of an indictment for perjury; but only to the proof of the falsity of the matter upon which the perjury is assigned. Thus, the holding of the court, the proceedings in it, the administering the oath, and even the evidence given by the defendant, may all be proved by one witness. (i)

The prisoner was indicted for having falsely sworn that one Prosser never was out of his sight between the hours of 7 A.M. and 10 A.M. on a certain day, and two witnesses proved that they saw Prosser at 8½ A.M. on that day near Lane’s Fallow, but could not tell whether the prisoner was in sight of Prosser or not, as the fences were high. Another witness proved that at 9 A.M. the same morning he saw the prisoner alone and on foot at a place more than six miles from Lane’s Fallow. It was objected that the assignment of perjury was not proved by two witnesses. Patteson, J., ‘It is necessary to have two witnesses to prove an assignment of perjury; but there need not be two witnesses to prove every fact necessary to make out an assignment of perjury. If the false swearing be that two persons were together at a

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The rule applies to every separate assignment of perjury.

To what the rule requiring two witnesses extends.

Although an assignment of perjury must be proved by two witnesses, it is not necessary to prove by two witnesses every fact which goes to make out the assignment of perjury.

(f) *Rex v. Mudie*, 1 M. & Rob. 128. The defendant was acquitted on another ground; see the same case, *post*, p. 109.

(g) *Reg. v. Parker*, Stafford Sum. Ass.

1842. MSS. C. S. G. and C. & M. 639.

(h) 3 Stark. Evid. 859.

(i) See 2 Hawk. P. C. c. 46, s. 10.

certain time, and the assignment of perjury that they were not together at that time, evidence by one witness that at the time named the one was at London, and by another witness that the other was at York, would be sufficient proof of the assignment of perjury.' (*j*)

An admission stands on the ground of a confession.

It is almost unnecessary to remark that where a statement made by a prisoner is in the nature of an admission that a previous statement on oath is false, it is to be dealt with as a confession, and not as falling within the cases which have just been noticed. (*k*)

A judge's notes are not admissible in evidence, but can only be used to refresh the memory.

Where on an indictment for perjury committed, on a trial before a Queen's counsel at the assizes, his notes of the evidence, proved to be in his handwriting, were tendered in evidence; Talfourd, J., held that they were inadmissible. A judge's notes stood in no other position than anybody else's notes. They could only be used in evidence to refresh the memory of the party taking them. (*l*)

Competency of witnesses.

The incompetency of witnesses on the ground of interest is removed by the 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83, and therefore the decisions on that subject are omitted.

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If several persons are separately indicted for perjury in swearing to the same fact, either of them, before conviction, may be a witness on the trial of the other. (*m*)

Chairman at Quarter Sessions not allowed to be examined as a witness.

Where a bill of indictment was preferred against the defendant for perjury, alleged to have been committed on a trial at the Quarter Sessions, and it was proposed to examine one of the grand jury, who had acted as chairman of the Quarter Sessions at the trial at which the alleged perjury was committed, but that gentleman expressed a desire not to be examined as a witness, and the grand jury wished to know whether they ought to examine him or not; Patteson, J., held that they ought not to examine him. He was the president of a Court of Record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court. (*n*)

Judge of a county court.

In a case of perjury where the statements of the prisoner had not been taken down and were proved from memory, some ob-

(*j*) Reg. v. Roberts, 2 C. & K. 607.

(*k*) See Reg. v. Hook, D. & B. 606, per Byles, J.

(*l*) Reg. v. Child, 5 Cox C. C. 197.

(*m*) 2 Hale, P. C. 280.

(*n*) Reg. v. Gazard, 8 C. & P. 595. In Rex v. Jones, 6 C. & P. 137, on an indictment for perjury the chairman of the Worcestershire Quarter Sessions proved what a witness swore on a trial before him at the Quarter Sessions. In Reg. v. Gazard, the chairman was required as a witness for the same purpose, and, not being examined, the bill was ignored. Mr. Starkie, after citing this case, adds a *quære*, without stating any reason for so doing. 3 Stark. Evid. 861. It may, however, have struck him that no sufficient reason could be assigned for the decision. It would, no doubt, be extremely

inconvenient if the judges were called upon to give evidence as to what occurred before them in court, but the inconvenience in the case of chairmen of Quarter Sessions is comparatively slight, especially as they are usually present at the Assizes, and the evidence must be given in the county where they are chairmen. Assuming, however, that the inconveniences in their case were considerable, it seems worthy of further consideration how far that can prevent their liability to be called as witnesses. The general rule undoubtedly is, that every person is liable to be compelled to give evidence in a criminal case, and it may be dangerous to introduce exceptions which may prevent persons from giving evidence either for the crown or for the defendant. C. S. G.

servations being made as to the judge of the county court who had tried the case not being called to prove his notes, though he was willing to appear; Byles, J., said that the judges of the superior courts ought not of course to be called upon to produce their notes. If he were subpoenaed for such a purpose he should certainly refuse to appear. But the same objection was not applicable to the judges of inferior courts: he saw no reason why they should not be called, especially where, as in this case, the judge was willing to appear. (o)

On an indictment for perjury committed by a plaintiff in a cause in a county court, the advocate and attorney for the defendant in that cause is competent to prove, from his notes as taken at the time, the evidence that was given by the plaintiff on that occasion. (p)

Advocate in a county court.

It has been holden, that if a count in an indictment for perjury undertake to set out continuously the *substance and effect* of what the defendant swore when examined as a witness, it is necessary, in support of this count, to prove that *in substance and effect* he swore the whole of that which is thus set out as his evidence, although the count contains several distinct assignments of perjury. It was urged in support of the prosecution that *reddendo singula singulis*, the defendant was charged with swearing separately in answer to all the questions that were mentioned. But Lord Ellenborough, C. J., said, ‘Suppose you had undertaken to set out the *tenor* of what the defendant swore, and it should appear by the evidence that he had not sworn a material part of that which was set out, would not this have been fatal? Having taken upon you to state the *substance and effect* of what he swore, you are not bound down to precise words; but must you not prove that he swore in substance and effect the whole that you have stated? You aver that part of the defendant’s evidence concerning the assurance given by Lord Headley to be material, and you have not proved that he swore to any such assurance. Did you ever know the rule of *reddendo singula singulis* applied to a misrecital? Is there any authority to show that under *secundum substantium* you are not bound to prove the *substance* of what you state, as under *secundum tenorem* you are bound to prove the *tenor*? To hold otherwise would be to introduce a most dangerous latitude into criminal proceedings. I am decidedly of opinion that you have failed in the proof of a substantial allegation. It is essential to the security of innocence, that words set out in the record should be either literally or substantially proved. A person giving his assurance generally, and giving his assurance for the performance of a particular stipulation, are allowed to be entirely different. If a man swears falsely to several material questions, these may be included in distinct counts.’ (q)

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Proof of the defendant having sworn *in substance and effect*.

(o) Reg. v. Harvey, 8 Cox C. C. 99.

(p) Reg. v. Morgan, 6 Cox C. C. 107, Martin, B.

(q) Rex v. Leefe, 2 Campb. 134. The learned reporter says, ‘I find no decision or dictum in the books as to the evidence of the words sworn which is necessary to support an indictment for perjury. For the general principles upon this subject,

vide 2 Hawk. P. C. c. 46, s. 34, 35, 36. Compagnon v. Martin, 2 Bl. Rep. 790.’ The count upon which the question in this case turned, alleged that a committee was appointed and met to try the merits of a petition complaining of an undue election, that certain questions were material, and that the defendant swore ‘touching the said material questions, and



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Proof of the  
whole of the  
defendant's  
testimony.

It appears to have been ruled, that upon an indictment for perjury committed at the trial of a cause, the prosecutor must prove *the whole* of the defendant's testimony, (*r*) unless the perjury be assigned upon a point which first arose upon the defendant's cross-examination, in which case proof of the whole cross-examination has been ruled to be sufficient. (*s*) And the ground upon which proof of the *whole* of the examination or cross-examination was ruled to be necessary in these cases appears to have been, that possibly the defendant might have corrected in some part of such examinations any mistake he had made in other parts. But it is observed, that this doctrine of compelling the prosecutor to prove more than a *prima facie* case is an anomaly in the criminal law; that in general the party indicting is not bound to anticipate matters of defence, which it lies on the prisoner to bring forward; and that it does not seem that, in this case, the party indicted would sustain hardship in being compelled to show that he had corrected the part of his evidence assigned. (*t*) And it is said by another learned writer, that at most the rule seems to amount to this, that all the evidence given by the defendant, in reference to the particular fact on which perjury is assigned, ought to be proved. (*u*) And the rule hardly seems to be necessary for the protection of the defendant, as it will be open to him to cross-examine the witness by whom his statements upon oath are proved, whether he did not in some other parts of his evidence correct or explain those statements upon which the prosecution is founded, and unless the witness can positively deny any such correction or explanation, or if he admits that they may have occurred, the proof would probably be deemed insufficient for a conviction. And it will of course be open to the

the merits of the said petition,' in substance and effect as follows,—that he, by the directions of J. L., waited upon Lord H. and proposed to the said Lord H. that the said J. L. would decline upon the expenses being paid him, including the previous expenses of the day before; that Lord H. agreed that the said expenses should be paid, including the expenses that had been incurred at different inns in the town; that J. L.'s voters were to be applied to in consequence of that arrangement for the purpose of voting for the said Lord H., and that the defendant enumerated the expenses: that the defendant upon his return to the committee of the said J. L. communicated to them what had so passed between the said Lord H. and him; and that the said committee dispersed to carry the said agreement into effect; and that the said J. L. asked the defendant if the expenses were secured; and that the defendant told the said J. L. his lordship had given his assurance that it should be so. The assignments of perjury negatived each of these statements, and it was proved that every thing alleged was sworn, except the last words 'that it should be so.' The decision in this case seems questionable. As it is clearly settled that a defendant may be convicted of any one distinct assignment of perjury, though acquitted of all the rest; see

*post*, p. 105, note (*b*); there seems no reason why proof of having sworn the matter negatived by one assignment should not be sufficient. In the case of obtaining goods by false pretences, it is clearly settled that proof of any one false pretence, and that the goods were obtained by that pretence, is sufficient, *ante*, vol. 2, p. 680; and that is a stronger case, because there the indictment in effect avers that all the pretences operated towards the obtaining the goods. In perjury each assignment of perjury is separate and distinct, and the court will give judgment upon one, although all the others are bad in point of law. *Reg. v. Rhodes*, 2 Lord Raym. 886. C. S. G.

(*r*) *Rex v. Jones, Peake*, N. P. C. 37, Lord Kenyon, C. J.

(*s*) *Rex v. Dowlin, Peake*, N. P. C. 170, Lord Kenyon, C. J.

(*t*) 2 Chit. Crim. L. 312, referring to 1 Sid. 418, *Rex v. Carr*

(*u*) 3 Stark. Evid. 858. And the author further observes, that the rule even to this effect appears to be a doubtful one; for when it has once been proved that particular facts, positively and deliberately sworn to by the defendant in any part of his evidence, were falsely sworn to, it seems in principle to be incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had so sworn.

defendant to prove that any corrections or explanations were given by him in other parts of his evidence. (v) And it has since been held, upon a case reserved, that on an indictment for perjury committed on the trial of a cause, it is sufficient to go to the jury, if a witness states from recollection the evidence that the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence the defendant gave, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it. (w)

Where a prisoner is indicted for perjury in evidence given on the trial of a cause, it is only necessary for the prosecution to prove so much of that evidence as is relevant to the matter in issue on the trial for perjury; but if the prosecution prove the whole of his evidence, and it refers to any deed or other document, which is so mixed up with it, that it is necessary to be read in order to make the evidence intelligible, the prisoner is entitled to have it put in and read for that purpose; but he is not entitled to require it to be regularly proved by calling the attesting witness or the like. (x)

It is sufficient to support the averment that the party administering the oath had competent authority for that purpose, to show in the first instance that he *acted* as a person having such authority. Thus, upon an indictment for perjury before a surrogate in the Ecclesiastical Court, it was ruled, that the fact of the person who administered the oath having acted as a surrogate, was sufficient *primâ facie* evidence of his having been duly appointed, and having authority to administer it. And Lord Ellenborough, C. J., said, ‘I think the fact of Dr. Parson having acted as surrogate is sufficient *primâ facie* evidence that he was duly appointed and had competent authority to administer the oath. I cannot for this purpose make any distinction between the Ecclesiastical Courts and other jurisdictions. It is a general presumption of law, that a person acting in a public capacity is duly authorized so to do.’ (y) But it was holden, in the same case, that upon its appearing that the surrogate was appointed contrary to the canon (which requires that no judicial act shall be speeded by any ecclesiastical judge, unless in the presence of the registrar or his deputy, or other persons by law allowed in that behalf), his appointment was a nullity, and the averment that he had authority to administer the oath was negatived. (z) So where perjury was assigned upon an affidavit sworn before Chell, a commissioner, &c., and it was proved that Chell acted as a special commissioner for taking the affidavits of parties in prison, or unable from sickness to attend before a judge; Patteson, J., held that this was sufficient evidence that Chell was a commissioner, and that it was

Proof of all that was given on the particular point is sufficient.

The prosecutor need only prove so much of the prisoner's evidence as is relevant to the matter in question on the trial for perjury.

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Proof of authority to administer the oath.

Acting as an officer sufficient.

(v) *Rex v. Carr*, 1 Sid. 418.

(w) *Rex v. Rowley*, R. & M. C. C. R. 111, and R. & M. N. P. R. 299, where Littledale, J., is reported to have said, ‘I take the true rule to be this, that all the evidence referable to the fact on which the perjury is assigned must be proved.’ In *Rex v. Munton*, 3 C. & P. 498, three witnesses stated what the defendant had said on the trial of an indictment for an assault, and the defendant was convicted, although none of the witnesses took down the evidence as it was given,

and none of them professed to state the whole of the evidence given. And this course has been followed in subsequent cases. *Reg. v. Meek*, reported, 9 C. & P. 513, as to another point. *Reg. v. Ann Bird*, Gloucester Spr. Ass. 1842, Cresswell, J.

(x) *Reg. v. Smith*, 1 F. & F. 98, Erle, J.

(y) *Rex v. Verelst*, 3 Campb. 432. *Rex v. Creswell*, 2 Chit. Cr. L. 312. S. P. per Lord Ellenborough, C. J.

(z) *Rex v. Verelst*, *supra*.

not necessary to prove the commission under which the affidavit was taken, upon the general principle that a person acting as a public officer must be taken to have authority as such, and that a commissioner for taking affidavits came within that principle. (*a*) So where an affidavit was alleged to have been sworn before R. G. Whatley, a commissioner, 'then and there being duly authorized and empowered to take affidavits in the said county of G. in or concerning any cause depending in Her Majesty's Court of Exchequer,' and it was proved that Whatley had acted as a commissioner for taking affidavits in the Court of Exchequer for ten years; but had never seen his commission. He had, however, directed it to be applied for ten years before through his agent, and had been told by him that it had been granted; it was held that Whatley's acting as a commissioner was *prima facie* evidence that he was so. (*b*)

Acting as a  
judge of a  
county court.

Where in order to prove an allegation in an indictment for perjury that a county court was duly constituted under the 9 & 10 Vict. c. 95, a Gazette was put in, but it turned out to be a wrong one; Maule, J., held that proof that the judge acted in the capacity of a judge of the court, in pursuance of and under the County Courts Act, would suffice. (*c*)

Perjury in an  
affidavit in the  
insolvent  
court.

It has recently been held that an indictment for perjury in an affidavit sworn in the Insolvent Debtors Court by an insolvent, respecting the state of his property and expenditure, for the purpose of obtaining an extended time to petition under the 7 Geo. 4, c. 57, s. 10, cannot be supported, without proving that the court by its practice required such an affidavit: and it was also held that such proof was not given by an officer of the court producing printed rules, purporting to be rules of the court, which he had obtained from the clerk of the rules, and was in the habit of delivering out as the rules of the court, but which were not otherwise shown to be sanctioned by the court; the officer professing to have no knowledge of the practice except from such printed rules. (*d*)

Examination  
on oath *vivâ  
voce* by a  
commissioner  
authorized to  
take affida-  
vits.

Upon an indictment for perjury committed before Mr. Dudley, an arbitrator, it appeared that an action was referred to the arbitrator, by an order of Lord Tenterden, which ordered that the witnesses should be sworn before a judge or 'before a commissioner duly authorized.' Mr. Dudley was a commissioner for taking affidavits in the Court of King's Bench, and he, under this order, swore the present defendant as a witness before himself, and signed a jurat stating that she had been so sworn; and he then examined her *vivâ voce*. It was objected that Mr. Dudley had no authority to administer an oath for any *vivâ voce* examination. Gaselee, J., 'By the 29 Car. 2, c. 5, the courts are empowered to appoint commissioners for taking affidavits; and if this order had empowered a commissioner for taking affidavits to administer this oath, I would have reserved the point, because, whether the

(*a*) *Rex v. Howard*, 1 M. & Rob. 187.

(*b*) *Reg. v. Newton*, 1 C. & K. 469. Atcherley, Serjt., after consulting Tindal, C. J. The defendant had requested Whatley to act as commissioner in taking this particular affidavit.

(*c*) *Reg. v. Ward*, 3 Cox C. C. 279.

(*d*) *Rex v. Koops*, 6 Ad. & E. 198, 1 N. & P. 828. It was also contended for the defendant that the Insolvent Court had no power to make the rule, and that the offence was at any rate not perjury; but no opinion was expressed upon these points.



Court of King's Bench has any power to authorize their commissioners to take anything but affidavits, is a question that I should have left them to decide. However, on this order that question does not arise, for the order only allows the witnesses to be sworn before a commissioner duly authorized. Now, as Mr. Dudley was never authorized to administer an oath for a *vivâ voce* examination, I am of opinion that the defendant must be acquitted.' (e)

The taking the oath must be proved as it is alleged. Therefore, if it be averred that the defendant was sworn upon the Holy Gospels, &c., and it turned out that he was sworn in some other manner, according to some particular custom, and not upon the Gospels, the variance will be fatal. (f) But where the allegation in an indictment was, that on the trial of an action the prisoner 'was duly sworn, and took his corporal oath on the Holy Gospel of God,' and the proof was that the witness was sworn and examined; and it was objected that the particular mode of swearing must be proved, as the evidence given would apply to the oath of a Jew, or person of any other religion than the Christian; Littledale, J., held the evidence sufficient, as the ordinary mode of swearing was the one specified. (g)

The oath must be proved as alleged.

The recital of the place where the oath is administered in the jurat has always been considered as a sufficient proof that the oath was administered at the place named. (h) Where, therefore, perjury was assigned on an answer in chancery, and the defendant's signature to the answer, and that of the Master in Chancery to the jurat, were proved, and that Southampton Buildings, which the jurat recited as the place where the oath was administered, was in the county of Middlesex; Lord Tenterden, C. J., held that this was sufficient proof that the oath was administered in Middlesex. (i) So where on an indictment for perjury committed in an affidavit, the original affidavit was produced; and it was proved to be signed 'John Turner,' in the handwriting of the prisoner, and the jurat was 'Sworn in open court at Westminster Hall, the 10th day of June, 1846, By the court,' and it was proved that the words 'By the court' were in the handwriting of one of the masters of the court, by whom the jurats of affidavits are signed when the affidavits are sworn in court; it was objected that it should be shown that the master was in court when the prisoner was sworn before him. Erle, J., 'We have proof of the handwriting of the party sworn, and of the officer, who is authorized to administer the oath; and when an officer thus authorized writes under a proper jurat the words "By the court," I think that that is sufficient evidence that the affidavit was sworn before him, and properly sworn in court.' (j) But a variance as to the place of taking the oath will not be material, if it be proved to have been taken in the county where the defendant is indicted. (k) And upon an indictment in Middlesex, it

The place stated in the jurat is evidence that the defendant was sworn there, but not conclusive.

(e) *Rex v. Hanks*, 3 C. & P. 419.

(f) 3 Stark. Evid. 857. *Rex v. M'Arthur*, Peake's C. 155.

(g) *Rex v. Rowley*, R. & M. N. P. R. 299.

(h) Per Lord Tenterden, C. J. *Rex v.*

*Spencer*, R. & M. N. P. R. 97. 1 C. & P. 260.

(i) *Rex v. Spencer*, *supra*.

(j) *Reg. v. Turner*, 2 C. & K. 732.

(k) *Rex v. Taylor*, Skin. 403.

Proof against  
a bankrupt.

may be shown that the oath was in fact taken in Middlesex, although the jurat state it to have been sworn in London. (*l*)

It seems that on an indictment against a bankrupt for perjury before the commissioners, in passing his last examination, it is necessary to give strict evidence of the trading, petitioning creditor's debt, and act of bankruptcy. (*m*) For where the authority delegated is of a special nature, limited to particular circumstances, it is essential to prove their existence, in order to show the authority to administer the oath. (*n*)

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Upon an indictment for perjury against a witness examined as to a bankrupt's estate, a good petitioning creditor's debt must be shown.

Upon an indictment for perjury, committed in an examination of a witness touching the estate of a bankrupt, it must be proved that there was a good petitioning creditor's debt. The indictment stated that A. P. carried on the business of a builder, and that he was indebted to W. B. in the sum of £100 and upwards; that he committed an act of bankruptcy; that a fiat issued against him, on the petition of W. B.; that the commissioners adjudicated A. P. to be a bankrupt; that in the prosecution of the fiat it became material to inquire into the estate and effects of A. P.; and that at a meeting of the commissioners the defendant appeared before them as a witness, and was sworn, &c. It appeared that the debt due to W. B. was much less than £100, but that there were two other creditors, to each of whom A. B. owed more than £100; therefore, under the 6 Geo. 4, c. 16, s. 18, the Lord Chancellor might, on application, have directed the substitution of a good petitioning creditor's debt for that of W. B., but that in fact this had not been done. It was objected that the defendant was entitled to be acquitted, as the averment that W. B. was a creditor to the amount of £100 was not only not proved, but was disproved. The counsel for the crown cited *Rex v. Raphael*, (*o*) where Abbott, J., held, that on an indictment against a third person, examined before commissioners of bankruptcy, their declaration that a party was a bankrupt is sufficient. The defendant having been convicted, the judges, upon a case reserved, held the conviction wrong. (*p*)

Proof of the  
defendant  
having taken  
the oath in an  
answer in  
chancery.

On an indictment for perjury, in an answer in chancery, the bill must be proved in the usual way; the proof of the defendant's signature, and that of the master before whom the answer purports to be sworn, is evidence of the defendant's having sworn to the truth of the contents, without calling the person who wrote the jurat; or further, proving the identity of the defendant as being the very same person who had signed the answer. (*q*) But

(*l*) *Rex v. Emden*, 9 East, 437. 3 Stark. Evid. 858.

(*m*) *Rex v. Pimshon*, 3 Campb. 96. And see *Rex v. Bullock*, 1 Taunt. 71.

(*n*) 3 Stark. Evid. 854. If the defendant was not a bankrupt, there was no authority to administer the oath. But the case might admit of a different consideration, where the perjury is assigned upon the deposition of a witness who comes to prove the bankruptcy; for there the commissioners have jurisdiction to inquire into the fact, though it should ultimately turn out that there was no bankruptcy. *Id. ibid.* See note (*p*), *infra*.

(*o*) *Manning's Ind.* 232.

(*p*) *Reg. v. Ewington*, 2 M. C. C. R. 223. C. & M. 319. In the course of the argument before the judges, Lord Abinger, C. B., said, 'You cannot dispute the authority of the commissioners to take the preliminary proceedings under the fiat, to ascertain whether the party should be adjudged bankrupt or not. They were authorized to do that by the fiat of the Lord Chancellor; but you say that if there was no good petitioning creditor's debt, the commissioners had no authority to inquire and examine witnesses as to the bankrupt's property.'

(*q*) *Rex v. Benson*, 2 Campb. 508. *Rex v. Morris*, 2 Barr. 1189. 1 Leach, 50.

unless there be such proof of the defendant's signature, or some other sufficient proof to identify him as the person by whom the oath was taken, no return of commissioners, or of a master in chancery, will be sufficient. (r) In a case upon the 31 Geo. 2, c. 10, s. 24 (for taking a *false oath* to obtain administration to a seaman's effects, in order to receive his wages), it was holden necessary to prove, directly and positively, that it was the prisoner who took the oath. And the court said that the evidence given was defective, as there was a possibility, from anything that had been given in evidence to the contrary, that the prisoner might have gone through all the rest of the fraud, and have avoided the circumstance of taking the oath, especially as he probably knew that the taking the oath was a capital felony. And they further said, that if this had been an indictment for perjury at common law, it would have been incumbent on the prosecutor to have given precise and positive proof that the prisoner was the person who took the oath; and it was equally incumbent on him so to do upon an indictment on the statute in question. (s)

Proof upon obtaining administration of a seaman's effects.

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An indictment for perjury alleged that the prisoner, 'being a trader within the meaning of the statutes in force relating to bankrupts, but owing debts amounting in the whole to less than £300, and having resided for six calendar months next immediately preceding the time of filing his petition within, &c.,' did present his petition to the Insolvent Court in Portugal Street; and the only evidence given in support of these allegations was the prisoner's petition filed in that court, which alleged the very same matters as facts upon the truth of which, with others, the prisoner rested his application to the Insolvent Court; and, on a case reserved, it was held that, as against the prisoner, the statements in the petition, uncontradicted by any conflicting testimony, were abundant evidence to prove those allegations in the indictment. (t)

The statements of facts in an insolvent's petition are evidence against him of those facts.

An indictment for perjury alleged that W. Turner made his will and appointed J. H. Turner, W. B. Wood, and W. T. Abud the executors thereof, and to prove this averment the probate of the will was tendered; it was objected that, as the will applied both to lands and personalty, the original will must be produced and proved. Erle, J., 'A will may in law have two operations—the one, as to realty, respecting which the Ecclesiastical Courts have no jurisdiction; the other, as to personalty and executors, in which the Ecclesiastical Courts have sole jurisdiction, and therefore, with respect to the latter, the evidence of the attesting witness is not necessary here. If all the matters in this indictment relate to personalty and executors, the probate is the proper proof; but if there is any question here raised as to whether the testator devised lands, the original will must be produced, and one of the attesting witnesses called. But if it is only to be shown that the deceased made a will, and left certain persons' executors

Where the matters in an indictment for perjury relate to personalty only and the appointment of executors, the probate is the proper proof that the testator made a will.

The reason why the Court of Chancery made a general order that all defendants should *sign* their answers was with a view to the more easy proof of perjury in answers. 2 Burr. 1189. See Reg. v. Tur-

ner, 2 C. & K. 732.

(r) Id. *ibid.*

(s) Brady's case, 1 Leach, 327.

(t) Reg. v. Westley, Bell C. C. 193.



of it, I shall hold the production of the probate to be the proper proof.' (u)

After proof of the loss of a deposition in bankruptcy, an office copy of it is admissible.

On an indictment for perjury in a deposition sworn by the prisoner as a proof of a debt against a bankrupt, it appeared that the proof was placed according to the practice on a file of the proceedings, where it remained for several months, and the prisoner, having demanded an inspection of the file, it was handed to him by the usher, and shortly afterwards returned to the usher, who restored it to the customary place of deposit without examination. It was afterwards discovered that the proof had disappeared, and all searches for it had proved ineffectual; and an office copy under the seal of the court was tendered in evidence. It was objected, on the authority of *Taylor* on evidence, (v) that a copy could not be received in evidence in a case of perjury; but *Hill, J.*, held that, on proof that the original had been lost or destroyed, secondary evidence was admissible. (w)

Proof of materiality.

In order to show the materiality of the deposition or evidence of the defendant, it is essential, where perjury is assigned in an answer to a bill in equity, to produce and prove the bill, (x) or if the assignment is on an affidavit, to produce and prove the previous proceedings, such as the rule *nisi* of the court, in answer to which the affidavit in question has been made. (y)

If the assignment be on evidence on the trial of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn was material. So also such prefatory circumstances and innuendos as are averred upon the face of the indictment for the same purpose must be proved. (z)

Evidence of a deceased witness.

It is reported to have been held upon the trial of an information for perjury, alleged to have been committed on the trial of an ejectment, that in order to prove the perjury a witness might prove what a witness, who was since dead, swore on the trial of the ejectment. (a) It has been observed that this ruling seems to be utterly inconsistent with the principles now established. (b)

Evidence that judgment had been entered up.

Some counts in an indictment for perjury committed in an affidavit to oppose a summons to set aside a judgment obtained by the prisoner alleged that the prisoner 'caused to be entered up final judgment in the said action;' and a clerk from the judgment office produced from that office a book in which judgments are entered up, and stated that interlocutory judgment was signed in the action, and that final judgment was afterwards entered up; it was objected that the roll or an examined copy of it ought to have been produced. It was answered that the 'entering up' of final judgment always takes place before there is any roll carried in, and is the making of the entry in the book produced; (c) and *Lord Denman, C. J.*, held the proof sufficient. (d)

(u) *Reg. v. Turner*, 2 C. & K. 732.

(v) S. 1379, p. 1232, third edit.

(w) *Reg. v. Milnes*, 2 F. & F. 10.

(x) 3 Stark. Evid. 859, citing *Rex v. Alford*, 1 Leach, 150.

(y) 3 Stark. Evid. 859.

(z) 3 Stark. Evid. 859.

(a) *Rex v. Buckworth*, T. Raym. 170, per *Twisden, J.*, and *Morton, J.*, against *Keeling, C. J.*, who said it was not to be allowed, because between other parties.

(b) 3 Stark. Evid. 861, where the case is erroneously cited as *Taylor v. Brown*. The report does not show for what precise purpose the evidence was adduced; if for the purpose of proving what passed on the former trial in order to show that the matter was material, *qu.* whether it was not admissible. C S. G.

(c) *Fisher v. Dudding*, 9 Dowl. P. C. 872.

(d) *Reg. v. Gordon*, C. & M. 410. The

If the perjury was committed on the trial of a cause at *nisi prius*, the record ought to be produced, in order to show that such a trial was had: but the production of the *postea* will be sufficient for this purpose. (e) And, in addition to the production of the record, the previous evidence and state of the cause should be so far proved as to show that the matter sworn to was material: and the prefatory circumstances and innuendos averred in the indictment for the purpose of showing such materiality must also be proved. The record will show what issues were joined between the parties; but such proof must be given of what occurred at the trial as will show the bearing and materiality of the defendant's evidence. (f)

Proof of *nisi prius* record.

Where, in order to prove an allegation in an indictment for perjury that a cause came on to be tried, the *nisi prius* record was produced, and it appeared that no *postea* had been indorsed upon it, but there was a minute, in the handwriting of the officer, indorsed upon the jury panel which was affixed to it, in these words, 'Verdict for plaintiff, damages 1s.' Lord Tenterden, C. J., after consulting the other judges of the Court of King's Bench, held that the officer's minute was sufficient evidence that the trial took place. (g)

Officer's minute of a verdict at *nisi prius*.

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Where an indictment for perjury alleged that certain issues came on to be tried and were tried before the sheriffs of London upon the execution of a writ of trial, and the *postea* being produced, the verdict appeared to have been taken on one of two issues, without any statement as to the event of the other, the Court of Queen's Bench held that the allegation was proved by the record and *postea* taken together. It appeared that the jury was summoned and sworn to try 'the issues:' and if on one of the issues the jury had been withdrawn, yet both would have come on for trial and have been tried. (h)

Evidence that issues came on to be tried.

An indictment alleged that a certain action came on to be tried in due form of law, and was duly tried by a jury of the county in that behalf duly sworn. The record stated that the jury were sworn, and after evidence given withdrew to consider their verdict, and after they had agreed returned to the bar to give their verdict, 'whereupon the plaintiff being called, comes not, &c.' It was objected that the trial was not complete, as the jury had not given any verdict. It was answered that, as far as the jury were concerned, the cause was by them duly tried. They were sworn to 'truly try and a true verdict give,' and they might try and yet not give a verdict; and the objection was overruled. (i)

An averment that an action was tried, held to be proved, though the plaintiff was nonsuited when the verdict was about to be given.

An indictment for perjury averred that there was an action pending between W. C. and B. and the defendant. The writ was not produced, but to show the existence of the action, the attorney for the plaintiffs in the action produced a notice of set-off entitled in the cause, which he had received from the attorneys for the defendant in the action; it was objected that the notice of set-

A notice of set-off is not evidence that an action was pending.

prisoner was convicted, and no motion made on the point, as there were other counts which did not allege the entering up of the judgment.

(e) *Rex v. Iles*, Hard. 118. Bull N. P. 243. 2 Hawk. P. C. c. 46, s. 57, 3 Stark. Evid. 855.

(f) 3 Stark. Evid. 859.

(g) *Rex v. Browne*, M. & M. 315. 3 C. & P. 572.

(h) *Reg. v. Schlesinger*, 10 Q. B. 670.

(i) *Reg. v. Bray*, 9 Cox C. C. 218. The Recorder, after consulting Bramwell, B., and Byles, J.

off was inadmissible, as at most it was only secondary evidence; and the objection was held good. (*j*)

Proof of a trial at the Central Criminal Court.

On a trial for perjury at the Central Criminal Court the caption of the same court ofoyer and terminer or gaol delivery at which the indictment for perjury is preferred, the former indictment with the indorsement of the prisoner's plea, the verdict, and sentence of the court thereon, together with the minutes of the trial, made by the officer of the court, are sufficient evidence of the former trial, without a regular record or any certificate thereof. (*k*)

Evidence of a trial and appearance in a county court.

An indictment alleged that there being a certain plaint lodged against the prisoner in a county court, the same came on to be tried, and that the prisoner was duly sworn, &c. It was proved by the clerk of the court that such a plaint had been filed, (*l*) and it was proposed to give parol evidence of the proceedings on the trial; but it appearing that there was a minute book wherein were entered the plaints, the appearance of the parties and the result of the trial, it was objected that that book ought to be produced, in order to prove the plaint and the appearance of the prisoner. That the evidence of the prisoner could not be proved by parol if it was taken down in the book. And lastly, the summons must be proved in order to give the court jurisdiction. Maule, J., 'I think the want of the proof of the summons is answered by the fact of the prisoner's appearance, which may be proved by parol. That is sufficient to carry the case on; but, if it should be necessary, I will reserve the other points;' and the evidence was received. (*m*)

Where an indictment is preferred for perjury committed on the hearing of a plaint in the county court, the only proper course to prove the proceedings in that court is to produce the clerk's book or a copy having the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court under the 9 & 10 Vict. c. 95, s. 111. (*n*)

Proof of a suit in the Prerogative Court.

An indictment for perjury alleged that a certain suit was instituted in the Prerogative Court of Canterbury, in which M. S. Merryweather was plaintiff, and J. Turner, J. H. Turner, W. B. Wood, and W. T. Abud, defendants; and in order to prove this allegation, an officer from the registrar's office in the Prerogative Court produced from the office an original allegation put in on behalf of M. S. Merryweather, and the original allegation put in on behalf of the executors in answer to it, and proved the signatures of two advocates, who acted as advocates in the court, to each of the allegations; and Erle, J., held that this was sufficient proof of the suit having been instituted as alleged. (*o*)

In a bastardy case the sum-

An indictment alleged that the prisoner appeared at a petty sessions in pursuance of a summons requiring him to answer a

(*j*) *Rex v. Stovell*, 6 C. & P. 489. Lord Denman, C. J.

(*k*) *Reg. v. Newman*, 2 Den. C. C. 390. The trial for perjury was in December, 1851; the trial on which the perjury was committed was at a session held on the 12th of May, 1851, and the caption was dated on that day.

(*l*) It is not stated how this was proved.

(*m*) *Reg. v. Ward*, 3 Cox C. C. 279.

It is not stated how the evidence given by the prisoner was proved. He was convicted.

(*n*) *Reg. v. Rowland*, 1 F. & F. 72. Bramwell, B., who said he had ruled in the same way previously, and held that the proceedings on hearing the plaint could not be proved by the assistant clerk of the court.

(*o*) *Reg. v. Turner*, 2 C. & K. 732.



complaint of A. Jones touching a bastard child of which she alleged him to be the father, and alleged that he committed perjury on the hearing of that complaint. The magistrate's clerk produced a book containing the minutes made by him on the occasion, headed 'Ann Jones v. Richard Newall, affiliation,' and then the evidence was set out. There was no other evidence of the proceedings before the justices. It was objected that the summons ought to have been produced, or notice to produce it served on the prisoner. Wightman, J., 'The 7 & 8 Vict. c. 101, provides that "upon complaint by the mother, the justices shall have power to summon the putative father, and upon the appearance of the person so summoned, or upon proof of the service of the summons, to hear and adjudicate upon the case." A summons is, therefore, necessary to give the magistrates jurisdiction; and to prove that they had jurisdiction in this case you must prove that the prisoner was duly summoned, either by production of the summons, or by secondary evidence after notice to the prisoner to produce it. The minutes of examination in this case are no more than the minutes of a shorthand writer, and only answer the purpose of refreshing the memory of the witness.' (p)

An information for perjury was preferred against one Purdue at a police court, and on that information a summons was issued, upon which Purdue appeared, and he was told what he was charged with by reading the charge out of the summons. The information was not read to Purdue. Gurney, R., 'I think the summons must be produced. It appears the charge Purdue was called upon to answer was contained in the summons; he may have never seen or heard of the information; the information does not seem to be brought to his knowledge in any way. We must know what the charge was in order to see whether the evidence given by the prisoner was material or not. The summons not being here, we have no evidence of the charge.' (q) So where on an indictment for perjury which stated that certain proceedings had taken place before justices of the peace upon a certain summons (setting it forth), and that the prisoner was examined, &c., the justices' clerk was not present, but a clerk to the attorney engaged in the case proved the original depositions taken on the charge before the justices; the heading of the depositions showed what the charge was, and they were signed. It appeared that a summons had been issued, and a duplicate summons was produced; but this was not the one on which the charge was heard, but a prior one. Martin, B., held that the basis of the whole case was the charge or summons, on which the case before the magistrates had been heard, and the indictment necessarily alleged it; and there being no proof thereof, the case failed. (r)

Where, upon an indictment for perjury alleged to have been

(p) Reg. v. Newall, 6 Cox C. C. 21, A. D. 1852. Three duplicate orders had been made, but none of them was produced, or notice to produce any of them given. See the subsequent cases of Reg. v. Berry, *ante*, p. 9, and Reg. v. Simmons, *ante*, p. 10.

(q) Reg. v. Whybrow, 8 Cox C. C. 438.

(r) Reg. v. Hurrell, 3 F. & F. 271. It is the information or charge (upon which

the summons issues), which gives the justices jurisdiction, and not the summons. The information or charge ought, therefore, to be alleged and proved in these cases; and *quære* whether a deposition, signed by the party making it, which recites the charge, is not sufficient evidence thereof as against him? See Reg. v. Westley, *ante*, p. 93.

mons must be proved; it is not sufficient to prove the minutes of the proceedings before the justices.

Where perjury is charged on the hearing of an information before justices, the information must be proved.

Proof of the trial of an appeal.

committed on the trial of an appeal against an order of removal, the sessions book was produced by the clerk of the peace in order to prove the trial of the appeal, and the clerk of the peace stated that he would, if applied to, have drawn up a record of the trial of the appeal on parchment; it was held that the sessions book was not sufficient evidence of the trial of the appeal. (*s*) But it has since been held that the sessions book containing the orders and other proceedings of the court made up and recorded after each sessions, with an entry containing the style and the date of the sessions, and the name of the justices in the usual form of a caption, no other record being kept, is good evidence of the trial of an appeal against an order of removal. (*t*)

Amended bill in chancery evidence of the original bill.

Where perjury was assigned on the answer to a bill in chancery as it originally stood, which bill had afterwards been amended, and the bill was produced by a clerk from the six clerks' office, who stated that it was an amended bill, but that it was the original record which was filed in the six clerks' office in the first instance, but altered by the amendments, which were made by altering the original record, and that these alterations were all made by a clerk in the six clerks' office, whose handwriting he knew, and that that person wrote the word 'amendment' against each alteration; but none of the alterations related to the particular parts of the answer upon which the perjury was assigned. It was contended that this was not sufficient evidence of what the bill was before the alterations, and that the person who made the alterations ought to be called. But Lord Tenterden, C. J., was of opinion that the amendments were sufficiently proved, and also thought them not material to the case. (*u*)

A copy of a bill in chancery containing abbreviations is insufficient.

In order to prove a bill in chancery by an office copy, such copy must be a correct copy of the words in the bill, and if it contain abbreviations of words which are written at length in the bill, it is insufficient. Upon an indictment for perjury, in order to prove a suit in chancery, an office copy of the bill was produced, which contained many abbreviations, (*v*) and had all the dates in figures, and it was proved that in the original bill all the words were written at full length, and all the dates expressed by words; and it was held that this copy was not sufficient evidence of the bill in chancery. (*w*)

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It seems that if a party produce an affidavit, purporting to have been made by him before commissioners in the country, and make use of it in a motion in the cause, it will be evidence against him that he made it. (*x*)

Proof of taking the freeholder's oath at an election.

Upon an indictment for perjury, in falsely taking the freeholder's oath at an election of a knight of the shire, in the name of J. W.; it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election, by the name of J. W., who swore to his freehold, and place of abode; and that there was no such person; and that the defendant voted on the second day, and was no freeholder, and

(*s*) *Rex v. Ward*, 6 C. & P. 366, Park, J. A. J.

(*t*) *Reg. v. Yeoveley*, 8 A. & E. 806.

(*u*) *Rex v. Laycock*, 4 C. & P. 326.

(*v*) Such as 'possd of consible pul este.'

(*w*) *Reg. v. Christian*, MSS. C. S. G. and C. & M. 388, Lord Denman, C. J.

(*x*) *Rex v. James*, Show. 397. 3 Stark. Evid. 857. And see *Brickell v. Hulse*, 7 A. & E. 454.



some time afterwards boasted that he had *done the trick*, and was not paid enough for the *job*, and was afraid that he should be pulled for his *bad vote*; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or any other than the name of J. W.; it was holden that there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge as alleged in the indictment. (y)

Where, upon an indictment for perjury committed upon a trial, the supposed perjury arose upon evidence given in reply to the testimony of one of the defendants on the former trial, who was acquitted and examined as a witness, and the indictment for perjury did not state his acquittal, nor did the minute of the verdict produced show it; it was held, that although the evidence of a shorthand writer, who stated that the defendant was acquitted and then examined, was not any proof of his acquittal, yet it was good proof that he was examined. (z)

If perjury is assigned upon an affidavit made by a marksman, either the jurat must state that the affidavit was read over to the defendant, or it must be proved that it was so read. Upon an indictment for perjury in an affidavit, which was signed with the mark of the defendant, but the jurat to which omitted to state that it was read over to the defendant; *Littledale, J.*, said, 'as the defendant is illiterate, it must be shown that she understood the affidavit. In those cases where the affidavit is made by a person who can write, the supposition is that such person was acquainted with its contents, but in the case of a marksman it is not so. If in such case the master by the jurat authenticates the fact of its having been read over, we give him credit; but if he does not, and the fact were so, he ought to be called to prove it. I should have difficulty in allowing the evidence of any other person to that fact.' And no evidence being adduced to show that the affidavit was read over in the presence of the defendant, it was held that the assignments of perjury on this affidavit could not be supported. (a)

It was held in the same case, that where one affidavit, which has a perfect jurat, refers to another affidavit which is inadmissible for want of proof that it was read over to the defendant, the former affidavit cannot be read. (b)

Where an indictment for perjury, alleged to have been committed in the Insolvent Debtors Court, stated that the defendant gave in his schedule on oath that the same and all its contents were true, and contained a full, true, and perfect account of all his just debts, credits, &c., and then went on to state that the said schedule and its contents were not true, and that certain persons whose names were set out were debtors to the defendant at the time of giving in his schedule; *Lord Tenterden, C. J.*, held that the evidence must be confined to the cases specified in the indictment.

The fact of a defendant in a cause having been examined may be proved by parol.

An affidavit of a marksman is inadmissible unless it is shown to have been read over to the deponent; *secus* if made by a party who can write.

An affidavit referring to an inadmissible affidavit.

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Where the assignments of perjury allege that certain persons by name were debtors, evidence of others being so is inadmissible.

(y) *Rex v. Price, alias Wright*, 6 East, 323.

(z) *Rex v. Browne, M. & M.* 315. *Lord Tenterden, C. J.*, after consulting the other judges of the Court of King's Bench. See this case as to another point,

*ante*, p. 95.

(a) *Rex v. Hailey, R. & M. N. P. C.* 94. 1 C. & P. 258.

(b) *Rex v. Hailey*, 1 C. & P. 258. The report does not state in what manner the one affidavit referred to the other.



ment, as the defendant could only come prepared to answer those cases, and that evidence that other persons, whose names were not set out in the indictment, were also debtors to the defendant and were omitted in the schedule, was inadmissible. (c)

Where there is a general assignment and also an assignment mentioning particular names.

An indictment for perjury alleged that the defendant made an affidavit, which stated that the creditors of the defendant were all, with two exceptions (which were explained) paid in full; whereas the said creditors were not all, with two exceptions only, paid in full; and whereas divers creditors of the defendant exceeding the number of two, naming several creditors, were not paid in full: and evidence being tendered of debts to other persons than those named being unpaid; it was objected that the first assignment was bad as too general, and that evidence as to debts due to others than those named ought not to be admitted. Tindal, C. J., ‘You might have demurred to this assignment only, if it be too general, and as you have not done so, I do not see how I can exclude the evidence.’ But ‘I think that omitting the names in one assignment of perjury and inserting them in the next is likely to mislead the defendant; as he would be very likely to suppose that the debts, mentioned in general terms in one assignment, were those particularised in the other;’ whereon the evidence was not pressed. (d)

Averment of a partnership not supported by the facts.

Where an indictment for perjury alleged that Hallett exhibited a bill in chancery, by which he set forth that he, Bowden, and Tucker (the defendant), entered into a verbal agreement to become joint dealers and co-partners in the trade or business of druggists; and assigned perjury against the defendant in swearing that he, Hallett, and Bowden did not become joint dealers in the trade or business of druggists; and it appeared that Hallett was a druggist, but the defendant and Bowden were drug brokers, and had nothing to do with Hallett’s shop, or the drugs sold there, but were continually in the drug market; but being brokers of the city of London they could not deal in their own names, and it was agreed that they should buy and sell drugs in Hallett’s name, and then they were to divide the profit and loss. Abbott, C. J., held that the allegation in the bill in chancery could only apply to an ordinary partnership, and not to such a transaction as this, and, consequently, that the indictment could not be supported. (e)

Declaration by an agent at the time of paying money into a bank.

Where an indictment for perjury alleged that a bill was pending in the Court of Chancery, and that it became material to ascertain whether an annuity granted by G. Hawkins to the defendant, or granted to J. B. Bostock, as trustee for the defendant, had been paid up to the year 1828, and that the defendant falsely swore that the annuity had not been paid up to 1828; and in order to show that Bostock, who was abroad, had paid the money to the defendant, it was proved that Bostock had sent money to his banker’s by his clerk; it was held that what the clerk said about the money at the time he paid it into the banker’s was admissible in evidence, on the ground that it was a declaration made by an agent acting at the time within the scope of his authority. (f)

(c) *Rex v. Mudie*, 1 M. & Rob. 128.  
S. C. as *Rex v. Moody*, 5 C. & P. 23.  
The indictment is set out in the note to the latter report.

(d) *Reg. v. Parker*, C. & M. 639.

(e) *Rex v. Tucker*, 2 C. & P. 500.

(f) *Reg. v. Hall*, 8 C. & P. 358, *Lit-tledale, J.*

Upon an indictment for perjury alleged to have been committed upon the hearing of an information for sporting without a game certificate, in order to prove what the defendant swore before the magistrate, his deposition taken in writing before the magistrate was put in, and it was held that evidence was not admissible of other things stated by the defendant, when he was examined as a witness before the magistrate, but which were not contained in the written deposition. (*g*)

Parol evidence to add to a deposition.

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An indictment alleged that the prisoner was a member of a benefit society, the rules of which were duly certified, and a transcript of them filed with the clerk of the peace, and that by a rule of the society it was provided that if any free member should have his property destroyed by fire, he should produce a certificate, and if the property was not insured the society would indemnify him to a certain amount if the claim were authenticated by a solemn declaration before a magistrate, and then charged the prisoner with making a false declaration before a magistrate contrary to the 5 & 6 Will. 4, c. 62, s. 18, that he had sustained a loss by fire. In order to prove the rules of the society a copy of the rules was produced, and the 24th rule, which was applicable to the allegations in the indictment, was proved to have been examined with the transcript at the clerk of the peace's office; but no other rule had been so examined; and Erskine, J., held that all the rules ought to have been compared. To prove the rules, either the original transcript should have been produced, or an examined copy of the whole of it. It was then objected that the indictment was not proved. But Erskine, J., held that all the statements in the indictment with reference to the society might be rejected as surplusage, if there was enough on the face of the indictment to show that an offence was committed without any reference to the society or its rules, which appeared to be the case. The making of the declaration was then proved, and it referred to the certificate, which was put in; and Erskine, J., allowed the persons whose names purported to be signed to it to prove that their names were forgeries, as it might go to show that the declaration was wilfully false. (*h*)

Insufficient examination of rules of a benefit society. Prefatory averments held to be surplusage.

The prisoner was indicted for falsely swearing that the signature to a paper was not his signature. On a trial in a county court the paper was produced, and the prisoner swore that he

A signature of the prisoner during the examination

(*g*) *Rex v. Wylde*, 6 C. & P. 380, Park, J. A. J. The correctness of this decision seems questionable. In the case of summary convictions there is no statute which requires magistrates to take down the evidence in writing, and therefore what a party says in an examination before a magistrate on such an occasion may be proved by parol, whether any person took it down or not. *Robinson v. Vaughton*, 8 C. & P. 252, Alderson, B. Inasmuch, therefore, as all the defendant said might have been proved by parol, it is difficult to see how the deposition being put in could prevent other matters not contained in it from being proved by parol. The distinction between depositions in felony and in summary convictions was not noticed in this case, nor was any

reference made to *Rex v. Harris*, R. & M. C. C. R. 338. And the decision in the text appears at variance with the ordinary practice of cross-examining a witness in cases of felony as to other statements made by him before the committing magistrate, after his deposition has been put in and read. C. S. G.

(*h*) *Reg. v. Boynes*, 1 C. & K. 65. The declaration mentioned the name of the society, and that the prisoner had 'forwarded to the said society a certificate as required by the 24th rule of the said society.' *Quære* whether this was not sufficient evidence against the prisoner when connected with the 24th rule, proved to have been examined with the transcript, of the allegations in the indictment? See *Reg. v. Westley*, *ante*, p. 93.



in which the perjury was alleged to be committed.

never signed it: the judge directed him to write his name on a piece of paper; which he did, and the judge compared it with the signature to the disputed document. Wightman, J., inclined to think that the jury might look at and compare the two signatures. The signing of the name by the prisoner during his examination on oath formed in fact part of the transaction out of which the charge arose; and the counsel for the prisoner not objecting, the paper was handed to the jury. (*i*)

Description of a house.

An indictment alleged that the prisoner falsely swore in a county court that the words J. S. were written by J. S. at the house of M. P. in the parish of St. Mellon's, in the county of G. The proof by the judge's notes was that the prisoner swore as alleged, except that he did not describe M. P.'s house as in the parish of St. Mellon's; but Rolfe, B., held that the allegation might well be made out by showing that M. P.'s house was in that parish. (*k*)

The award of an arbitrator is not admissible on an indictment for perjury in an affidavit made before the cause was referred to him.

Upon an indictment against Moreau for perjury alleged to have been committed in an affidavit in a cause wherein Moreau was plaintiff, and Encontre defendant, by deposing that Encontre owed him £50, evidence is not admissible that the cause and all matters in dispute were, after the making of the affidavit, referred by consent, and an award made that Encontre owed nothing to Moreau; because the decision of the arbitrator in respect of that fact is no more than a declaration of his opinion, and there is no instance of such a declaration of opinion being received as evidence of a fact against a party to be affected by proof of it in any criminal case. (*l*)

Conviction before justices, when not admissible.

Where perjury is assigned upon the evidence of a witness examined before magistrates on the hearing of an information, the conviction is not admissible in evidence on the trial of the indictment for perjury, as it is irrelevant to the matter in issue. (*m*)

Count for perjury on a charge of receiving stolen goods not supported by proof of perjury on hearing an information under the 17 Geo. 3, c. 56.

Where a count alleged perjury to have been committed before magistrates in examining a charge of feloniously receiving stolen silks, knowing them to have been stolen, and it appeared that the evidence was given upon the hearing of an information, under the 17 Geo. 3, c. 56, for having possession of silks suspected to have been purloined or embezzled; Patteson, J., held that the count was not supported, as the evidence was given upon the specific charge contained in the information. (*n*)

Evidence of the corrupt intent of the defendant.

Evidence is essential, not merely to show that the defendant swore falsely in fact, but also, as far as circumstances tend to such proof, to show that he did so corruptly, wilfully, and against his better knowledge. For it has been justly and humanely said that a jury ought not to convict where it is probable that the fact was owing rather to the *weakness* than the *perverseness* of the party; as where it was occasioned by surprise or inadvertency, or by a mistake of the true state of the question. (*o*) The jury may infer

(*i*) Reg. v. Taylor, 6 Cox C. C. 58.

(*k*) Reg. v. Withers, 4 Cox C. C. 17.

(*l*) Reg. v. Moreau, 11 Q. B. 1028.

The real objection in this case was that the finding of the arbitrator was not necessarily inconsistent with the fact of £50 being due; as it might proceed on the absence or loss of the only evidence that

ever existed of the debt, and it rather seems that the prisoner was not examined on the reference.

(*m*) Reg. v. Goodfellow, MSS. C. S. G. and C. & M. 569. See Rex v. Dowlin, 5 T. R. 311.

(*n*) Reg. v. Goodfellow, *supra*.

(*o*) 3 Stark. Evid. 860, citing 1 Hawk.



the corrupt motive of the defendant from the circumstances of the case, (*p*) and in order to show that the defendant swore wilfully and corruptly what was not true, evidence may be given of expressions of malice used by the defendant towards the person against whom he gave the false evidence. (*q*) The evidence appears to have been received in this case without objection.

The prisoner was indicted for perjury on the hearing of an information against Blackburn for trespassing in pursuit of game; the occupier of the land and two of his men swore that they saw Blackburn on the land on a particular Sunday morning. The prisoner was called by Blackburn as a witness, and swore that Blackburn lodged with him, and that he never was absent from his lodgings on any Sunday morning during the whole time that they lodged together, which included the Sunday on which the alleged offence was committed. Pollock, C. B., was of opinion that the attention of the prisoner ought to have been called to the particular day on which the transaction took place as to which he was asked to speak; and that a general allegation, such as had been made in this case, including all Sundays between two fixed dates, was not sufficiently precise upon which to found an indictment for perjury, and directed an acquittal. (*r*)

The defendant, although perjury be assigned on his answer, affidavit, or deposition in writing, may prove that an explanation was afterwards given qualifying or limiting the first answer. (*s*)

Thus where the perjury was assigned upon an answer in chancery, in which the defendant had sworn that she had received no money; the defendant proved that, upon exceptions taken to this answer for the insufficiency thereof, she had put in another answer, which explained the generality of the first answer, and stated that she had received no money before such a day; and it was held, upon a trial at bar, that nothing could be assigned as perjury which was explained by the second answer, because the second answer clearly showed that that which at first appeared to be perjury, was not perjury. (*t*)

Swearing as to the presence of a person on every Sunday within a certain time.

Defence.

General expressions in an answer explained by another answer.

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c. 69, s. 2. *Rex v. Melling*, 5 Mod. 349. *Reg. v. Muscott*, 10 Mod. 192. As where a man swore that he had seen and read a deed, and on the trial it appeared that he had read the counterpart only.

(*p*) *Rex v. Knill*, 5 B. & Ald. 929, note (*x*), *ante*, p. 81.

(*q*) *Rex v. Muntion*, 3 C. & P. 498, Lord Tenterden, C. J.

(*r*) *Reg. v. Stolady*, 1 F. & F. 518. This case is very unsatisfactorily reported; no date is given, or anything more than is above stated. As the proof of the offence was on 'a particular Sunday morning,' the prisoner, if present, *must* have had his attention drawn to that particular date; and, if absent, still the date would have been known to Blackburn from the summons, and, as he called the prisoner as his witness, he no doubt had communicated the day to him, so that the ground of the decision really did not exist. But supposing the decision to be as reported, it is very confidently submitted that it is erroneous. Suppose a man called to prove an *alibi* swears that he

and the prisoner were in Paris during all the month in which the offence was committed, can it be the law that he is not guilty of perjury because he is not asked as to the particular day? If a man swears that he was not absent from church on any Sunday in January, is not that as precise a swearing as to each and every Sunday as if he were asked as to each in succession? An information, which charges the defendant with killing ten deer between the 1st of July and the 10th of September, without showing the particular days on which they were killed, is good. *Rex v. Chandler*, 1 Ld. Raym. 581. 1 Salk. 378. And where, on a similar information, the evidence was that the defendant did, within such a time and such a time, steal a deer, so that the time was left as uncertain in the evidence as in the information, it was held sufficient. *Reg. v. Simpson*, 10 Mod. R. 248.

(*s*) 3 Stark. Evid. 860.

(*t*) *Rex v. Carr*, 1 Sid. 418. 2 Keb. 576. 3 Stark. Evid. 860. The reporter

Evidence for  
the defendant.

Where an indictment for perjury contains several assignments of perjury, and no evidence is adduced upon one of the assignments, the defendant is not entitled to give any evidence to show that the matter, charged by such assignment to be false, was in fact true. (*u*)

It is no defence  
that an  
affidavit is in-  
admissible by  
reason of a  
defective jurat.

The crime of perjury is complete at the time when an affidavit is sworn; it is no defence, therefore, that the affidavit cannot, through certain omissions in the jurat, be received in the court for which it is sworn. Upon an indictment for perjury, in an affidavit relating to the service of a petition upon a bankrupt, it appeared that the affidavit was signed with the mark of the defendant, and the jurat did not state either where it was sworn, or that the affidavit was read over to the party, and it was proved by a clerk in the Master's office in Southampton Buildings that in cases where the party swearing the affidavit cannot write, the jurat ought, after stating the place where it was sworn, to state that the witness to the mark of the deponent had been first duly sworn, that he had truly, distinctly, and audibly read over the affidavit to the deponent, and saw the mark affixed; and that no affidavit would be received which did not contain this form of jurat when the party could not write. Littledale, J., 'The omission of the form directed by this and other courts to be used in the jurat of affidavits may be an objection to their being received in the court, whose rules and regulations the party has neglected to comply with; but I am of opinion that the perjury is complete at the time the affidavit is sworn, and although it cannot be used in the court for which it is prepared, that nevertheless perjury may be assigned upon it.' (*v*) So where an affidavit when sworn had been marked by the judge's clerk with his initials, but through mistake not then presented to the judge for his signature, but some days afterwards it was signed by the judge; Alderson, B., in the presence of the other Barons of the Exchequer, expressed a clear opinion that perjury might be assigned upon the affidavit, although the judge's signature was omitted. (*w*)

So it is no  
defence that  
the affidavit  
has not been  
used for the  
purpose for  
which it was  
made.

Upon an indictment for perjury, it appeared that the defendant had filed a bill in chancery for an injunction, and had made the affidavit, on which the perjury was assigned, in support of the allegations in that bill. The indictment averred the bill to have been filed, and the affidavit exhibited in support of it; and it stated the matters assigned as perjury to be material to the questions arising on the bill; but it did not contain any statement that a motion had been made for an injunction, and it did not appear by the evidence that any such motion had in fact been made. It was submitted that the defendant was entitled to an acquittal. By the practice of the Court of Chancery, an injunction could not be obtained, except for want of an answer, or on the insufficiency of the answer, or on evidence disproving the answer, in none of which cases is the affidavit of the plaintiff admissible; or else *ex parte*

adds, 'at which unexpected evidence and resolution the counsel for the prosecution were surprised.'

(*u*) *Rex v. Hemp*, 5 C. & P. 468.

(*v*) *Rex v. Hailey*, R. & M. N. P. C. 94. 1 C. & P. 258. See *Rex v. Cross-*

ley, *ante*, p. 48, and *Reg. v. Phillpotts*, *ante*, p. 16, that it is perjury as soon as the evidence is given, whatever may afterwards occur.

(*w*) *Bill v. Bament*, 8 M. & W. 317.

before the time allowed to the defendant for answering has elapsed. In the last case, and in that only, could the plaintiff's affidavit be used. The averment, therefore, that the perjury was assigned on the matter material to the bill was not true; it could only be material to an application of a peculiar nature, and it did not appear, and was not alleged, that such an application was ever made. It was answered that the objection, if tenable at all, amounted to this, that perjury could not be assigned upon an affidavit which had not been used. Lord Tenterden, C. J., 'I do not think the averment or proof, the absence of which is objected to, can be necessary. The statements in the affidavit are material to the matters contained in the bill, which is for an injunction; and it may well have been filed in anticipation of a contemplated motion for an injunction, on which it might have been used. Can it make any difference that it afterwards turns out that the motion is not made? The crime, if any, is the same, morally, in each case; and I certainly shall not, where the objection is open hereafter, hold it necessary to give proof of a fact which does not vary the conduct of the party in taking the oath in question. (x) And it has been since held that an affidavit sworn for the purpose of being used in a cause, but which is neither used or filed, is nevertheless the subject of perjury. (y)

Where an indictment for perjury alleged that the defendant produced before a Master in Chancery an affidavit, 'entitled, in the said Court of Chancery, and in the said suit therein at the suit of the said E. J. C., and also in the said suit therein at the suit of the said *Commissioners* of Charitable Donations and Bequests in Ireland,' and the affidavit, when produced, appeared to be entitled 'between the *Commissioner* of Charitable Donations and Bequests in Ireland, against J. E. D., &c. (naming the other defendants), and between E. J. C. and J. E. D., the *Commissioners* of Charitable Donations and Bequests in Ireland, and *others*.' It was objected that this affidavit was not one on which perjury could be assigned, as there was no such suit as that in which the *Commissioner* of Charitable Bequests were plaintiffs; and the affidavit was improperly entitled, as the names of all the defendants were not stated, and therefore the affidavit was not admissible in the Court of Chancery. Lord Denman, C. J., 'The courts are quite right in not receiving affidavits which are not properly entitled; but I do not think the question whether there be perjury or not depends on the rule as to entitling being strictly complied with.' (z)

Where perjury was charged to have been committed in an affidavit of service of notice of an application for leave to issue execution against a shareholder in a joint stock company, and the affidavit was produced, but the notice was not annexed to it; Cockburn, C. J., held that the affidavit was inadmissible. (a)

If any one distinct assignment of perjury be proved, the defendant ought to be convicted. (b)

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Or that it has a defective title.

Affidavit without notice annexed to it.

Verdict.

(x) *Rex v. White*, M. & M. 271. The defendant was acquitted.

(y) *Hammond v. Chitty*, Q. B., E. T. 1846, MSS. C. S. G.

(z) *Reg. v. Christian*, C. & M. 388.

(a) *Reg. v. Hudson*, 1 F. & F. 56.

(b) *Reg. v. Rhodes*, 2 Lord Raym. 886, 887. 3 Stark. Evid. 860. And see *Compagnon v. Martin*, 2 Black. Rep. 790. *Reg. v. Virrier*, 12 Ad. & E. 317.



Proof upon a prosecution for subornation of perjury.

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Where an indictment contained four counts, and the venire and verdict spoke of 'the perjury and misdemeanor aforesaid,' and there was a judgment for a single term of imprisonment, it was held right.

One judgment on several counts.

In a case of a prosecution against T. Reilly for suborning one Macdaniel to commit perjury, it was contended on the part of the crown that the bare production of the record of Macdaniel's conviction was of itself sufficient evidence that he had, in fact, taken the false oath as alleged in the indictment. But it was insisted, for the prisoner, that the record was not of itself sufficient evidence of the fact; that the jury had a right to be satisfied that such conviction was right; that Reilly had a right to controvert the guilt of Macdaniel; and that the evidence given on Macdaniel's trial ought to be submitted to the consideration of the present jury: and the Recorder obliged the counsel for the crown to go through the whole case in the same manner as if the jury had been charged to try Macdaniel. (c)

The first count assigned perjury on an affidavit of the defendant, which alleged that the defendant did not retain or employ W. U. to act as attorney for him and J. I., or for either of them, in and about the business mentioned in the said W. U.'s bill of costs; and that he, the defendant, never retained or employed the said W. U. to act as attorney or agent for him in any cause or manner whatever. The second count assigned perjury on the statement in the affidavit as follows:—'that he the said defendant did not retain or employ (meaning that he the defendant did not alone, or jointly with the said J. I., retain or employ) W. U. to act as attorney for him and J. I.' The third count was the same as the first, and the fourth as the second. The plea was that the defendant was not guilty of the premises in the indictment specified. The venire was 'to recognize whether the defendant be guilty of the perjury and misdemeanor aforesaid, or not guilty.' The verdict was that the defendant 'is guilty of the perjury and misdemeanor aforesaid,' and the judgment that the defendant 'be imprisoned and kept to hard labour for ten calendar months.' It was urged that the venire, the verdict and judgment, were uncertain for not showing to which of the counts they referred. That they were in the singular number, speaking of 'the perjury and misdemeanor aforesaid,' and that this could only mean one perjury and misdemeanor; and that as four were alleged in the indictment, it was uncertain which of them the jury was summoned to try, and of which of them the defendant was found guilty; but the Courts of Queen's Bench and Exchequer Chamber held that 'misdemeanor' was *nomen collectivum*, and meant 'the misconduct aforesaid.' The consequence was that the venire applied to all the counts of the indictment, and that the defendant had been found guilty by the verdict on all the counts. (d)

Where on an indictment for perjury containing several counts the judgment was that the prisoner for the offence charged upon

Reg. v. Gardiner, *ante*, p. 57. In *Rex v. Nicholls*, Gloucester Sum. Ass. 1838, perjury was alleged to have been committed by the defendant in evidence given on a trial for larceny, in which he denied having been at a particular house on a particular occasion, and denied having had a conversation with certain persons there, and the indictment contained many distinct assignments on the going to the house, and the conversation, upon all of

which evidence was given; and Patten-son, J., directed the jury simply to consider whether the defendant had been to the house, and if they were satisfied that he had to convict him, which they did. MSS. C. S. G.

(c) Reilly's case, 1 Leach, 454. See vol. 1, p. 77.

(d) *Ryalls v. The Queen*, 11 Q. B. 781. *Rex v. Powell*, 2 B. & Ad. 75, was recognized as good law by both courts.

him in and by each and every count be imprisoned for the space of eight calendar months now next ensuing; it was held by the Court of Exchequer Chamber that the judgment was good, on the ground that it meant that the prisoner was to be imprisoned for the same period of eight months for each offence. (e)

The punishment of perjury and subornation of perjury, at common law, has been various, being anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods. (f) At the present time it is fine and imprisonment, at the discretion of the court, (g) to which, as we have already seen, the 2 Geo. 2, c. 25, (h) superadds a power for the court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period; (i) and makes it felony, without benefit of clergy, to return or escape within the time. If the prosecution proceeds upon the 5 Eliz. c. 9, that statute, as we have seen, (j) inflicts the penalty of perpetual infamy, and a fine of £40 on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory; (k) and punishes perjury itself with six months imprisonment, perpetual infamy, and a fine of £20, or to have both ears nailed to the pillory.

Punishment of perjury and subornation of perjury.

The 3 Geo. 4, c. 114, enacts, that ‘whenever any person shall be convicted of any of the offences hereinafter specified and set forth, that is to say (*inter alia*), of wilful and corrupt perjury, or of subornation of perjury, it shall and may be lawful for the court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour, for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this Act; and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such court shall think fit to direct.’

3 Geo. 4, c. 114. Hard labour.

It has been holden that the punishments directed by the 18 Geo. 2, c. 18, to be inflicted upon perjury, in falsely taking the freeholder’s oath at an election of a knight of the shire, are cumulative under the 5 Eliz. c. 9, s. 6, (l) and 2 Geo. 2, c. 25, s. 2, (m) to which the 18 Geo. 2, c. 18, refers. (n)

(e) King v. Reg. 14 Q. B. 31.

(f) 4 Black. Com. 138.

(g) 4 Black. Com. 138. Rex v. Nueys and Galey, 1 Black. R. 416. Rex v. Lookup, 3 Burr. 1901. In this last case the form of the sentence was that the defendant ‘should be set in and upon the pillory at C. cross, for an hour between the hours of twelve and two, and that he should afterwards be transported to some of his Majesty’s colonies or plantations in America, for the space of seven years; and be now remanded to the custody of the marshal, to be by him kept in safe custody, in execution of the judgment aforesaid, and until he shall be transported as aforesaid.’ The 1 Vict. c. 23, abolishes the punishment of the

pillory in all cases, ‘provided that nothing herein contained shall extend, or be construed to extend, in any manner to change, alter, or affect any punishment whatsoever, which may now be by law inflicted in respect of any offence except only the punishment of pillory.’

(h) *Ante*, p. 25.

(i) Penal servitude for any term not exceeding seven and not less than five years by the 20 & 21 Vict. c. 3 and 27 & 28 Vict. c. 47, *ante*, vol. 1, p. 4.

(j) *Ante*, p. 23.

(k) See note (g), *supra*.

(l) *Ante*, p. 24.

(m) *Ante*, p. 25.

(n) Rex v. Price, *alias* Wright, 6 East,



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Judgment in  
case of perjury.

Upon a conviction for perjury at the Chester Assizes, after the entry of the verdict the record proceeded, 'it is therefore *ordered* that the said L. K. be transported to the coast of New South Wales, or some one or other of the islands adjacent, for and during the term of seven years;' and upon a writ of error the following errors were relied upon; that the judgment was erroneous in form, being, 'it is ordered;' whereas it should have been 'it is considered;' that it was bad in substance, being a judgment of transportation only, whereas the 2 Geo. 2, c. 25, s. 2, enacts that judgment of transportation may be pronounced, *besides* the punishment that might before be inflicted; that the place, to which the prisoner was to be transported, ought not to have been fixed by the court, the power of appointing that being given to the King in council by the 56 Geo. 3, c. 27; and that at all events the appointment of the place was bad, being to one or other of various places, and, therefore, uncertain. And the Court of King's Bench held that by the 2 Geo. 2, c. 25, s. 2, two things were required to be done by the court before which the party was tried; an order for transportation is to be made, and thereupon judgment is to be given; and here the court had made an order not followed up by a judgment. Inasmuch, therefore, as no judgment had been entered in the court below, and the Court of King's Bench had no power to supply the deficiency, as the punishment was discretionary, that court awarded a procedendo, commanding the court below to proceed to give judgment on the conviction. (*a*)

The court  
may require  
the prisoner  
to find sureties  
for his good  
behaviour  
after the ex-  
piration of his  
imprisonment.

The court may also adjudge the defendant to give surety to keep the peace and be of good behaviour for a reasonable time, to be computed from and after the expiration of the term of his imprisonment, himself in a sum named in such judgment, with two sufficient sureties, each in a sum therein also mentioned, and may adjudge the defendant to be further imprisoned until such security be given; and such sentence does not amount to perpetual imprisonment, as in default of sureties being given the defendant would be entitled to be discharged at the expiration of the term during which the sureties were required. (*p*)

Conviction for  
perjury inca-  
pacitated the  
offender from  
giving evi-  
dence.

A consequence of a conviction for perjury, though it formed no part of the judgment, was, that the offender was incapacitated from giving evidence in a court of justice. (*q*) But a pardon restored his competency; except in the case of a conviction for perjury or subornation of perjury on the 5 Eliz. c. 9, (*r*) which

323. Grose, J., passed sentence upon the defendant and two other persons who had been convicted of similar perjuries in the following form:—'That each of them for this offence should lose and forfeit £20, and be imprisoned in Newgate by the space of six months without bail or mainprize, and that his oath from thenceforth be not received in any court of record within England or Wales, or the marches of the same, until such time as this judgment should be reversed by attain or otherwise; and that after the expiration of the said six months he be transported to such place beyond the seas as his Majesty, with the advice of his

privy council, should think fit to direct and appoint, for the term of six years.'

(*a*) *Rex v. Kenworthy*, 1 B. & C. 711.

(*p*) *Reg. v. Dunn*, 12 Q. B. 1026, decided on the authority of *Rex v. Hart*, 30 How. St. Tr. 1131, 1194, and 1344, where the judges, in answer to a question from the House of Lords, delivered their unanimous opinion that in all cases of misdemeanor the court might give sentence in that form.

(*q*) *Gilb. Ev.* 126. *Bull. N. P.* 291. 4 *Black. Com.* 138. 2 *Hawk. P. C.* c. 46, s. 101.

(*r*) *Ante*, p. 24.



provides that the offender shall never be admitted to give evidence in courts of justice until the judgment be reversed; and, therefore, the King's pardon would not in such case make him a competent witness. (s) But by the 6 & 7 Vict. c. 80, s. 1, now no person is incompetent by reason of crime. (t)

A very summary mode of proceeding is given, where persons convicted of perjury practise as attorneys or solicitors in courts of law or equity. The 12 Geo. 1, c. 29, s. 4, enacts, 'that if any person who hath been or who shall be convicted of forgery, or of wilful and corrupt perjury, or subornation of perjury, or common barratry, shall act or practise as an attorney, or solicitor or agent, in any suit or action, brought or to be brought in any court of law or equity within that part of Great Britain called England, the judge or judges of the court, where such suit or action is or shall be brought, shall, upon complaint or information thereof, examine the matter in a summary way in open court; and if it shall appear to the satisfaction of such judge or judges that the person complained of, or against whom such information shall be given, hath offended contrary to this Act, such judge or judges shall cause such offender to be transported for seven years to some or one of his Majesty's colonies or plantations in America, by such ways, means, and methods, and in such manner, and under such pains and penalties as felons in other cases are by law to be transported.' (u)

Summary proceeding where persons convicted of perjury practise as attorneys or solicitors.

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The following cases, which have occurred with reference to some of the statutes mentioned in the course of this chapter, seem deserving of being introduced in this place.

An indictment for perjury, alleged to have been committed in the Insolvent Debtors Court, stated that the defendant gave in his schedule on oath that the same contained a true and correct account of all his debts, credits, &c., and then went on to state that certain persons, whose names were set out, were debtors to the defendant at the time of giving in his schedule, and that they were omitted in the schedule. It was objected that no indictment for perjury would lie on such omissions; that the offence of wilfully making such omissions was made punishable as a misdemeanor by the 7 Geo. 4, c. 57, s. 70, and the offence of perjury created by sec. 71 only applied to positive affirmations contained in the schedule. Lord Tenterden, C. J., 'I think the legislature contemplated the particular case of omissions, and provided for them in the seventieth section, the debts omitted being comprehended under the terms "effects or property" there used. The Act then goes on in the seventy-first section to make other falsehoods in the oath of the party punishable as perjury. I therefore think the defendant must be acquitted.' (v)

An indictment for perjury will not lie under the 7 Geo. 4, c. 57, s. 71, against an insolvent debtor for omissions of property in his schedule.

Upon an indictment against the defendant under the 2 Will. 4, c. 45, s. 58, for giving a false answer to the question whether he had the same qualification to vote as that for which he was registered, it appeared that the defendant had occupied a house at the time of the registration, for which he was on the register as a

Indictment for a false answer to the third question under the Reform Act.

(s) 1 Phil. on Evid. 21, and the authorities there cited.

(t) See this Act, *post*, Evidence.

(u) Kept in force by the 6 & 7 Vict.

c. 73, s. 1, and schedule.

(v) *Rex v. Mudie*, 1 M. & Rob. 123. S. C. as *Rex v. Moody*, 5 C. & P. 23.

Determination of tenancy.

Although a party who has given up the property he rented at the time he was registered cannot vote, still he ought not to be convicted of a false answer to the question in sec. 58 of the 2 Will. 4, c. 45, if he *bonâ fide* believed he had a right to vote.

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voter, but he had left it before the election, and the landlord's agent had, before the election, given the key of the house to another person, who had put horses into the stable and beer into the cellar, but the rent of such person did not commence till after the election; it was held that the defendant must be acquitted, as there was no evidence as to the determination of the defendant's tenancy. (*w*)

Upon an indictment against the defendant under the 2 Will. 4, c. 45, s. 58, for falsely answering that he had the same qualification for which his name was originally inserted in the register of voters, it appeared that the defendant at the time of the registration was occupying a house at Turnham Green, as tenant to Mr. Kay, at the rent of £60 per annum, but he left that house at Lady Day following, and in April commenced the occupation of another house at Turnham Green, as tenant to Mr. L., at a rent of £50 and upwards per annum, and he continued in the occupation of this house from April till the time of the election. The defendant had been told that he had no right to vote before he did so, but he said that he believed he had a right to vote, and that he had been so informed by a committee of two of the candidates, and that their opinion was sufficient to warrant him in voting. It was held that the nature of the qualification being the same, did not give the party a right to vote, merely because it fell within the general terms of the description which he had given to the revising barrister. The identity of the qualification must continue; and if a voter ceased to occupy the premises in respect of which he was registered, he thereby ceased to have a right to vote; and it was no answer to say that, although he had ceased to occupy those premises, he had entered upon the occupation of other premises of equal value. It had been urged that if the statement of the defendant was untrue, he made it under the advice of a committee; but that made very little difference, for if a party made a statement which he knew to be untrue, the opinion of an election committee (which generally had a pretty strong bias one way or the other) did not alter the character of the offence. But still the term 'same qualification' was undoubtedly an equivocal expression, and almost necessarily implied something of opinion as to a matter of law, and the jury ought not to convict a person of a misdemeanor who possessed property of equal value to that which he held at the time of the registration, if he had acted *bonâ fide*, and had been guided in his conduct in a matter of law by persons who were conversant with the law, and who had told him that he possessed the same qualification for which his name was originally inserted in the register of voters. (*x*)

(*w*) *Rex v. Harris*, 7 C. & P. 253, Lord Denman, C. J.

(*x*) *Reg. v. Dodsworth*, 8 C. & P. 218. 2 Moo. & Rob. 72, Lord Denman, C. J. In *Reg. v. Irving*, 2 M. & Rob. 75, note (*a*), the same points arose, and Bosanquet, J., was decidedly of opinion that in point of law the qualification was not the same, but said that if the answer was given by the prisoner under a *bonâ fide* belief that he still retained his qualification, he should be acquitted. In the same note

the learned reporters advert to the case where a voter is registered for 'land,' described as in his own occupation, or for 'freehold houses,' in some specified street, and after the registration he sells part of the land which was in his own occupation at the time of the registration, or some of the houses of which he then possessed the freehold; in each case, however, retaining enough in point of value to confer a qualification, and intimate a doubt whether such a party could

The 'same qualification' in the 2 & 3 Will. 4, c. 45, s. 58, means the same identical property. If therefore a party who is registered for a borough as a £10 householder gives up the house in respect of which he is registered, and takes another of superior value within the same borough after the registration and before the election, he loses his vote, and if before and at the time of the election a new tenant has taken possession of the house that the voter has left, and is paying rent for it, the fact that a few articles of the voter's furniture remain in the house, and that the voter retains one of the two keys of it, will make no difference. (*y*)

Meaning of the 'same qualification.'

So a voter in a borough, who is registered as a £10 householder in respect of a house in Eldon Place, loses his vote, if after the registration and before the election he removes to another house in Eldon Place, although the house to which he removes is in every respect within the description contained in the register, and both houses are of the same size and value. (*z*) If therefore in such a case the party at an election states, in answer to the question put to him, that he has the same qualification for which his name was inserted in the register, he is indictable under the 2 & 3 Will. 4, c. 45, s. 58. (*a*)

In a register of a borough the word 'Penkhull,' which denoted a portion of the borough, was put at the head of several names, including that of the defendant, who was on the register in respect of a house in Eldon Place, and it was held that if there was no other Eldon Place in the borough, it was not necessary for the deputy returning officer, in putting the third question under the Reform Act, to add the word 'Penkhull' as part of the description. (*b*)

Mode of putting questions at an election.

On an indictment under the 2 & 3 Will. 4, c. 45, for giving a false answer at the poll at an election of members of Parliament for a borough, it is not necessary that the returning officer should himself put the questions to the voters under sec. 58. But it is sufficient if the town clerk do it in his presence and by his direction; neither is it necessary to show that the agent who required the questions to be put was expressly appointed by the candidate; it is sufficient to show that he has acted as agent for the candidate. (*c*)

The word 'wilfully' in an indictment on the 2 & 3 Will. 4, c. 45, s. 58, for giving a false answer at the poll, should be construed in the same way, and supported by the same sort of evidence, as in an indictment for perjury. To be untrue is not enough; for to be wilful it must have been false to the knowledge of the party at the time; and if he really misconstrues the facts, or misconstrues the law, he would not be guilty of the offence. (*d*)

Wilfully.

An indictment against a voter for giving a false answer at the poll, which stated that at a certain election for a member of Parliament for the borough of Stoke-upon-Trent, the defendant appeared as a voter, and tendered his vote as such, and that he

Indictment.

truly answer the question in the affirmative. C. S. G.

(*y*) Reg. v. Bowler, C. & M. 559, Patteson, J.

(*z*) Reg. v. Ellis, C. & M. 564, Patteson, J.

(*a*) Ibid.

(*b*) Reg. v. Ellis, *supra*.

(*c*) Reg. v. Spalding, C. & M. 568, Patteson, J.

(*d*) Reg. v. Ellis, *supra*.



gave a false answer that he had the same qualification for which he was put on the register, whereas in truth he had not, appears to be bad, because it states all the matters by way of recital, and neither states the writ nor the precept for holding the election, nor that the defendant's name was on the register. (e)

The description in the register must be read, or the party is not indictable.

Where on the trial of an indictment on the 2 & 3 Will. 4, c. 45, s. 58, against the defendant for giving a false answer to the question, 'Have you the same qualification for which your name was originally inserted in the register of voters now in force for the city of Bristol,' the sheriff's deputy stated that on the defendant tendering his vote he had asked him the question as set out in the indictment, but did not, at the end of the question, read from the register the line in which his name and qualification were inserted, 'Lucy William, House, Lodge Street.' Wightman, J., held that the defendant must be acquitted, as the particular qualification ought to have been read over. (f)

An indictment for making a false answer to the questions under the 5 & 6 Will. 4, c. 76, s. 34, at a municipal election must aver that the defendant 'wilfully' made the false answer.

The first four counts of an indictment upon 5 & 6 Will. 4, c. 76, s. 34, stated that the defendant, upon delivering in a voting paper, in the name of a burgess entitled to vote at the election, was asked by the presiding officer the three questions in the terms of the Act, and then alleged, 'to which questions (each of the two first) the defendant then and there falsely and fraudulently answered, "I am;"' and Williams, J., after consulting Patteson, J., held that these four counts were bad for omitting the word '*wilfully*.' 'Wilfully to make a false answer to the question' proposed was the definition of the offence by the legislature itself, and it was a safe and certain rule that the words of the statute must be pursued. (g)

A father and son of the same name and residence, and the son votes at a municipal election.

The prisoner was indicted for falsely answering a question at a municipal election under the 5 & 6 Will. 4, c. 76, s. 34. The prisoner's father, William Goodman, had been a burgess of St. Alban's, and those names remained on the overseer's lists; but he had been absent from home for a considerable time; and the prisoner, whose name was also William, resided in the same house, and paid the parish rates, &c. At a municipal election the prisoner offered to vote, and being asked, 'Are you the person whose name appears as "William Goodman" on the burgess roll now in force,' answered 'Yes.' There was only one William Goodman on the roll. Wightman, J., held that there was no case against the prisoner. (h)

Indictment for falsely swearing to a qualification to sit as a member of Parliament.

Where a person is indicted for a misdemeanor in taking a false oath, it must be proved, not only that the matter sworn was false, but that the defendant knew it to be so at the time he took the oath. Upon an indictment against the defendant for a misdemeanor, in falsely swearing that he *bonâ fide* had such an estate in law or equity of the annual value of £300, above reprises, as qualified him to be a member of Parliament for a borough; a surveyor stated that the fair annual value of the property was about £200 a year, but another witness stated that it was badly let, and be-

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(e) Reg. v. Bowler, C. & M. 559, per Patteson, J. The defendant was acquitted in this case. In Reg. v. Ellis, C. & M. 564, the indictment was in a similar form, the defendant convicted, and the judgment arrested in the Queen's Bench, no

cause being shown.

(f) Reg. v. Lucy, C. & M. 510.

(g) Reg. v. Bent, 1 Den. C. C. R. 157  
2 C. & K. 179.

(h) Reg. v. Goodman, 1 F. & F. 502.

lieved it was worth more than £300 a year, and that he told the defendant so, and that he did not think that the defendant had any reason to believe that the qualification, in point of value, was not sufficient. It was held that the jury must be satisfied, beyond all doubt, that the property was not of the value of £300 a year, and that, at the time the defendant made the statement, he knew that it was not of that value. (i)

The first count of an indictment upon the 5 & 6 Will. 4, c. 62, s. 13, charged that the defendant, being a justice of the peace, did unlawfully administer to and receive from J. Huxtable a certain voluntary oath touching certain matters and things whereof the defendant had not jurisdiction or cognizance by any statute. The second and third counts slightly varied, and the fourth count negatived the proviso in sec. 13. There were other counts charging the defendant with administering oaths to two other persons. The defendant had made a complaint to the bishop against two clergymen, who officiated in his parish, that one had played at thimble-rig, and that both had neglected the duties of the parish. The bishop intimated that, before he could call on the clergymen to answer the complaint, the defendant must either bring before him the persons who proved the charges, or obtain statements in writing of the facts. The defendant obtained statements from the three persons mentioned in the indictment, and swore them before himself, as a justice of the peace, to the truth of the statements. The bishop had before appointed a day for hearing the charges, and had summoned the clergymen to attend; but on finding that the depositions had been thus sworn, he declined to look at them; he went, however, into the charges on other evidence. It appeared that the defendant was ignorant of the statute rendering the administering voluntary oaths illegal. It was contended, that the enacting part of the statute must be construed with reference to the preamble; that the enacting clause, which prohibits ‘any justice of the peace, or other person,’ from administering oaths, other than in matters over which jurisdiction was given by statute, if taken by itself, would render unlawful the taking of many oaths which could be administered by the common law, that the enactment construed together with the proviso<sup>e</sup> was still too stringent, and that the enactment and proviso must be governed by the preamble. Coleridge, J., in summing up, said, he was of opinion, that the enacting part of the statute was not governed by the preamble; that he considered the enacting part of the section and the proviso preserved to justices of the peace all the jurisdiction they had, as well at the common law as by statute, to administer oaths; and that the inquiry before the bishop was clearly a matter in respect of which the defendant had no jurisdiction, either at common law, or by statute. He directed the jury, that, if they were satisfied the defendant did administer the oaths, they should find him guilty. The jury found the defendant ‘guilty of inadvertently administering an oath or oaths;’ and Coleridge, J., held that that was a verdict of guilty. (j)

But the judgment was afterwards arrested upon the ground that the indictment did not in any count show what the nature of

Indictment against a magistrate for administering an oath contrary to the 5 & 6 Will. 4, c. 62, s. 13.

The substance of the oath

(i) *Rex v. De Beauvoir*, 7 C. & P. 17, Lord Denman, C. J.

(j) *Reg. v. Nott*, C. & M. 288. See the section, *ante*, p. 33.

must be set out.

The 5 & 6 Will. 4, c. 62, s. 18, applies to all declarations.

Declaration in support of an application to a building society.

A declaration under the Pawnbroker's Act must be proved to have been made within the jurisdiction of the justice.

the oath was. There ought to have been a distinct allegation of the subject-matter of the oath, showing affirmatively that it was out of the jurisdiction of the magistrate. The question was matter of law for the court, and though it was not necessary to set out the whole of the oath, still the facts should have been so stated as to enable the court to form its opinion upon the question whether the oath was within the jurisdiction of the magistrate or not. (*k*)

Where a prisoner was indicted for making a false declaration before a justice in pursuance of the rules of a benefit society, which required a loss by fire in certain cases to be verified by such a declaration: it was objected that the 5 & 6 Will. 4, c. 62, s. 18, did not extend to any declarations except those mentioned in the preamble of that section; but Erskine, J., held that the section extended to all declarations generally. (*l*)

The prisoner was indicted for swearing a false declaration under the 5 & 6 Will. 4, c. 62, s. 18, that he had done no act to encumber certain lands, and that he was in possession of those lands, and in the receipt of the rents and profits thereof. The declaration was duly sworn and made in support of an application to a building society in 1861, for an advance of £150. The mortgage deed of 1861 to the building society was produced, but the attesting witness was not called to prove it. The original conveyance of the property to the prisoner was put in. It was objected that the declaration was confirmatory of the mortgage deed, and as that was not proved, it was not shown that the matter sworn was material. It was answered that the declaration was made to confirm the original conveyance, and not the mortgage, which was executed after the declaration. Byles, J., 'I am of opinion that the objection is fatal. The preamble of the 5 & 6 Will. 4, c. 62, s. 18, (*m*) must be read with the enacting part; and as the deed, which rendered the declaration necessary, is not proved, this indictment cannot be sustained.' (*n*)

The prisoner was indicted under the 5 & 6 Will. 4, c. 62, s. 12, (*o*) for making a false declaration before a justice for the borough of Liverpool that she had lost the pawn ticket of certain goods pledged by her. The clerk to the justice could only speak to the handwriting of the justice on the declaration, and, from the great number of these declarations, he could not remember when or where it was made. It was contended that there was no evidence that the declaration had been made before the justice acting as such or even within the borough; and Gurney, B., held that the objection was good. The justice might at all events have proved that he had never taken such a declaration out of the borough. (*p*)

(*k*) Reg. v. Kent, 4 Q. B. 768. In the argument it was contended that the defendant on the finding of the jury had been guilty of no offence, and Lord Denman, C.J., said, 'If the statute in terms creates an offence, all persons are bound to know it. But if a statute enacts something, without in terms making it an offence, and you would convict a person of misdemeanor in having disobeyed such an enactment, are you not bound to show that the disobedience was wilful, and in

the nature of a contempt?' But no opinion was pronounced upon this point. See vol. 1, p. 86.

(*l*) Reg. v. Boynes, 4 C. & K. 65. See this case, *ante*, p. 101.

(*m*) *Ante*, p. 34.

(*n*) Reg. v. Cox, 9 Cox C. C. 301.

(*o*) *Ante*, p. 33.

(*p*) Reg. v. Morgan, 1 Cox C. C. 109. No case was cited, and this decision requires reconsideration. See the next case, and the note to it.



The prisoner was indicted for having at Stroud, in the county of Gloucester, made a false declaration before E. G. Hallewell, a justice of the peace, that he had lost a pawnbroker's ticket. It was opened that the prisoner told the pawnbroker that he had lost the ticket, and the pawnbroker told him he must make a declaration of the loss before a magistrate, and for that purpose handed the prisoner a copy of the ticket and a form, to be filled up according to the Act; the prisoner paid for the form, saying he would go to a magistrate; he returned the same day with the form properly filled up, and with his name and that of Mr. Hallewell attached; but Mr. Hallewell was not able to recollect the fact of the declaration having been made, and therefore was not present; but the pawnbroker identified the declaration. But there was only one witness to prove that the prisoner had not lost the duplicate. Platt, B., 'As regards the proof of the declaration having been made by the prisoner, I think there may be sufficient evidence to support the indictment, if you can bring home to him a knowledge of its contents; but I am of opinion that the falsity of that declaration must be proved by the oaths of two witnesses as in a case of perjury, otherwise there would be but oath against oath.' (q)

Evidence of making a declaration under the Pawnbroker's Act. Two witnesses necessary to prove the falsity of the declaration.

(q) *Reg. v. Browning*, 3 Cox C. C. 437. The ruling of the learned Baron was right on both points; though an idle doubt has been raised on the first point. If a man in writing admitted that he had made a declaration before a justice under the Act, no doubt can exist that such writing would be sufficient evidence against him; and in this case the prisoner produced a declaration in the form under the Act, signed by himself and the justice, and dealt with it, and obtained the goods by it, as a valid declaration; and it is perfectly clear that this was abundant evidence that he had made

that declaration in the manner and with the formalities described in it. In *Rex v. Spencer*, 1 C. & P. 260, *ante*, p. 91, Lord Tenterden, C. J., said, 'The courts always give credence to the signature of the magistrate or commissioner; and if his signature to the jurat is proved, that is sufficient evidence that the party was duly sworn; and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that it was sworn at that place. And see *Rex v. James*, and *Brickell v. Hulse*, *ante*, p. 98, and *Reg. v. Westley*, Bell C. C. 423, *ante*, p. 93.

## CHAPTER THE SECOND.

## OF CONSPIRACY.

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Descriptions  
of conspiracy.

THE conspiring to obstruct, prevent, or defeat the course of public justice; (*a*) to injure the public health, as by selling unwholesome provisions; (*b*) or to effect any public mischief, as by raising the price of the public funds by illegal means; (*c*) are offences punishable by indictment. And it appears that an indictment lies, not only wherever a conspiracy is entered into for a corrupt or illegal purpose, but also where the conspiracy is to effect a legal purpose by the use of unlawful means: and this, although such purpose be not effected. (*d*) And it is laid down in a book of great authority that all confederacies whatsoever wrongfully to prejudice a third person are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter, whether it be true or false. (*e*) The conspiracy or unlawful agreement, though nothing be done in prosecution of it, is the gist of the offence. (*f*) The nature of conspiracy, therefore, requires that more than one person should be concerned in it. In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement amongst themselves, would not have been illegal; as in the case of journeymen conspiring to raise their wages, each may insist on raising his wages if he can, but if several meet for the same purpose it is illegal, and the parties may be indicted for a conspiracy. (*g*) It has been said that perhaps few things are left so doubtful in the criminal law, as the point at

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(*a*) *Rex v. Mawbey*, 6 T. R. 619, *et seq.* 4 Black. Com. 136. 1 Hawk. P. C. c. 72, s. 2.

(*b*) *Reg. v. Mackarty*, 2 Lord Raym. 1179. 2 East, P. C. c. 18, s. 5, p. 823. 4 Black. Com. 162. And see the remarks upon *Reg. v. Mackarty* in 6 East, 133, 141.

(*c*) *Rex v. DeBerenger*, 3 M. & S. 67.

(*d*) *Rex v. Journeymen Tailors of Cambridge*, 8 Mod. 11. *Reg. v. Best*, 2 Lord Raym. 1167. 6 Mod. 185. 1 East, P. C. c. 11, s. 11, p. 462. But an action will not lie for a conspiracy unless it be put in execution, 9 Co. 57. *W. Jones*, 93. *Savile v. Roberts*, 1 Lord Raym. 378. And see 8 Mod. 320, that conspiring to do a lawful act, if for an unlawful end, is indictable. See *post*, note (*f*).

(*e*) 1 Hawk. P. C. c. 72, s. 2. It is not

necessary in an indictment for conspiring to charge a man with being the father of a bastard child, to state that the charge was false, *Reg. v. Best*, *post*, p. 126.

(*f*) *Reg. v. Best*, 2 Lord Raym. 1167. *Rex v. Spragg*, 2 Burr. 993. *Rex v. Rispal*, 3 Burr. 1320. Per *Tindal, C. J.*, *O'Connell v. Reg.* 11 Cl. & F. 155, *post*, p. 155.

(*g*) By *Grose, J.*, in *Rex v. Mawbey*, 6 T. R. 636. And see *Rex v. The Journeymen Tailors of Cambridge*, 8 Mod. 11. If one man alone be guilty of an offence, which, if practised by two, would be the subject of an indictment for a conspiracy, he is civilly liable in an action for reparation of damages at the suit of the person injured. By *Buller, J.*, in *Pasley v. Freeman*, 3 T. R. 58. See *Reg. v. Rowlands*, 17 Q. B. 671, *post*, p. 140.

which a combination of several persons, in a common object, becomes illegal. (*h*) It appears, however, to have been holden that if such persons illegally concur in doing an act they may be guilty of conspiracy, though they were not previously acquainted with each other. (*i*) It has been laid down that conspiracy is 'a crime which consists either in a combination and agreement by persons to do some illegal act, or a combination and agreement to effect a legal purpose by illegal means.' (*j*) And also that 'the crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent, or even lawful.' (*k*)

Amongst the most flagrant instances of conspiracies against the public justice of the kingdom, may be mentioned a case in which the defendants were charged with a conspiracy, in causing a man to be executed for a robbery, which they knew he was innocent of, with intent to get into their possession the reward offered by Act of Parliament. (*l*) And it would have been equally a conspiracy, though the defendants had failed in their infamous design, and the man had been acquitted. Indeed one of the more ancient descriptions of conspiracy is 'a consultation and agreement between two or more to appeal, or indict an innocent person falsely and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterwards the party is lawfully acquitted by the verdict of twelve men.' (*m*) But of this description it is observed, that the lawful acquittal of the party grieved does not appear to be required in order to make the offenders guilty of conspiracy. (*n*) The description of conspirators in the old statute, 33 Edw. 1. st. 2 (sometimes cited as 21 Edw. 1), is 'that conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move and maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprizes; and this extendeth as well to the

Conspiracies against the public justice of the kingdom by agreeing to make false charges and accusations.

(*h*) 3 Chit. Crim. L. 1139.

(*i*) By Lord Mansfield in the case of the prisoners in the King's Bench, Hil. T. 26 Geo. 3. 1 Hawk. P. C. c. 72, s. 2, in the notes. See *post*, p. 166.

(*j*) Per Alderson, B. *Reg. v. Vincent*, 9 C. & P. 91, and in *Rex v. Seward*, 1 A. & E. 713, Lord Denman, C. J., said, 'An indictment for conspiracy ought to show either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means;' but in *Reg. v. Peck*, 9 A. & E. 686, the very learned Chief Justice, upon this dictum being cited, said, 'I do not think the antithesis very correct;' and in *Reg. v. King*, 7 Q. B. 782, the same learned Chief Justice said, 'The words "at least" should accompany that statement.' In *Rex v. Jones*, 4 B. & Ad. 345, 1 N. & M. 78, however, several learned judges gave a similar definition of the crime of conspiracy. And see *ante*, note (*d*). C. S. G.

(*k*) Per Tindal, C. J., delivering the

opinion of all the judges in *O'Connell v. Reg.* 11 Cl. & F. 155, *post*, p. 155.

(*l*) *Rex v. Macdaniel*, 1 Leach, 45. And see *Fost.* 130. See also *ante*, vol. 1, p. 686. It should seem that the only objection to this being treated as a conspiracy was that which might arise from its being considered as a crime of the highest degree (*i.e.* murder) in which the misdemeanor would be merged.

(*m*) 3 Inst. 143. 4 Black. Com. 136.

(*n*) 1 Hawk. P. C. c. 72, s. 2. In the case of *Rex v. Spragg*, 2 Barr. 998, Serjt. Davy said, 'There is a distinction between a writ of conspiracy and an indictment for conspiracy. In an action the damage is the gist of the action; and therefore the writ and declaration must charge "that he was indicted and sustained damage;" but that is not necessary in an indictment, which is for an offence against the public. And this distinction explains Lord Coke's meaning in 3 Inst. 143.'



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takers as to the givers, and to stewards and bailiffs of great lords, who by their seigniority, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than such as touch the estate of their lords or themselves.' From which definition of conspirators it is said that it seems clearly to follow that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not; for the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be any prosecution or not. (*o*) But it is also said that since it does not appear to have been solemnly resolved that persons offending by a false and malicious accusation against another are indictable upon this statute, it seems to be more safe and advisable to ground an indictment for such offence upon the common law than upon the statute. (*p*)

The false charge need not be prosecuted.

A conspiracy of this kind appears, therefore, to consist in the unlawful agreement to injure a person by a false charge; though it be in no way prosecuted. And whether the conspiracy be to charge a temporal or an ecclesiastical offence on an innocent person, it is the same thing. (*q*)

A conspiracy to indict a person for the purpose of extorting money from him is a misdemeanor, whether the charge be or be not false. (*r*)

The confederacy to make false charges, &c., will be equally criminal, though the proceedings intended to be instituted were defective.

It seems not to be any justification of a confederacy to carry on a false and malicious prosecution, that the indictment or appeal which was preferred, or intended to be preferred in pursuance of it, was insufficient, or that the court wherein the prosecution was carried on or designed to be carried on had no jurisdiction of the cause, or that the matter of the indictment did import no manner of scandal, so that the party grieved was, in truth, in no danger of losing either his life, liberty, or reputation. For notwithstanding the injury intended to the party against whom such a confederacy is formed may perhaps be inconsiderable, yet the association to pervert the law, in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law. (*s*) Therefore, on an indictment for wickedly and unlawfully conspiring to accuse another of taking hair out of a bag, without alleging it to be an unlawful and felonious taking, it was said by Lord Mansfield that the gist of the offence was the unlawful conspiracy to do an injury to another by a false charge, and that whether the conspiracy be to charge a man with criminal acts, or such only as may affect his reputation, it is sufficient. (*t*)

Such confederacy will be equally criminal, though

Neither is it any plea for one who is prosecuted for such an unlawful confederacy, that nothing more was intended by him but only to give his testimony in a legal course of justice against the

(*o*) 1 Hawk. P. C. c. 72, s. 2.

(*p*) Ibid.

(*q*) Reg. v. East, 2 Lord Raym. 1167.

1 Salk. 174.

(*r*) Rex v. Hollingberry, 4 B. & C. 329.

6 D. & R. 315. S. P. Reg. v. Jacobs,

1 Cox C. C. 173; but whether the charge

be true or false is material on the question whether the prosecution was *bona* or *malâ fide*. Ibid.

(*s*) 1 Hawk. P. C. c. 72, s. 3.

(*t*) Rex v. Rispal, Black. R. 368. 3 Burr. 1329. And see Pippet v. Hearn, 5 B. & A. 634, *ant*, p. 58, note (*s*).

party, to whose prejudice such confederacy is supposed to have been formed; for notwithstanding it may be said that it would be a great discouragement to legal proceedings to make persons liable to a criminal prosecution for barely intending to give their evidence, and it would be a prejudging of a cause to try the truth of the testimony intended to be given in it before the cause itself is determined, yet the law will rather venture this mischief than suffer so flagrant a villany to go unpunished. However, if there be any probability that the principal cause will ever be tried, it seems proper to apply to the court to stay the trial of the confederacy until the merits of the principal cause be determined. (*u*)

It is observed that it appears not only from the words of the statute, but also from the plain reason of the thing, that no confederacy whatsoever to maintain a suit can come within the words of the 33 Edw. 1, stat. 2, unless it be both false and malicious. (*v*) And several persons may lawfully meet together and consult to prosecute a guilty person, or one against whom there is probable cause of suspicion; but not to prosecute one that is innocent, right or wrong. (*w*) And associations to prosecute felons, and even to put the laws in force against political offenders, are lawful. (*x*)

In the following case it was holden that a certificate by justices of the peace that an indicted highway is in repair, is a legal instrument, recognized by the courts of law, and admissible in evidence after conviction, when the court are about to impose a fine; and that, consequently, it was illegal to conspire to pervert the course of justice by producing a false certificate in evidence to influence the judgment of the court. The indictment stated that a highway was indicted as being out of repair, and a plea of not guilty, but that it was intended to apply to withdraw the plea and plead guilty; that two justices of the county, and two other persons, conspired to pervert the course of justice and impose on the court by producing a false certificate from the two defendants, who were justices, that the road was in repair, and that they did so. There was a verdict against the two justices, and a rule was obtained to arrest the judgment. Upon showing cause against this rule the counsel for the prosecution went at large into a discussion of the doctrine and nature of conspiracies. He said that it follows from the very nature of the offence of conspiracy that there is no charge of any specific crime, but it consists wholly in the unlawful combination; and this will appear fully by adverting to the several sorts of conspiracy to be found in the Books. 1. Where the subject-matter is neither *malum prohibitum*, nor *malum in se*, as referred to the individual; but the criminality in law arises wholly from the conspiracy. Such as an agreement to maintain each other, right or wrong; (*y*) or a combination amongst labourers or mechanics to raise their wages. (*z*) So where several conspired to hiss at the Birmingham Theatre, Lord Mansfield

the parties may say that they intended only to give testimony in a legal course of justice.  
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But the confederacy must be false and malicious, and persons may consult to prosecute a guilty person.

Mawbey's case. Conspiracy to pervert the course of justice, by producing a false certificate of a highway being in repair.

Argument of the counsel for the prosecution.

(*u*) 1 Hawk. P. C. c. 72, s. 4.

(*v*) 1 Hawk. P. C. c. 72, s. 7.

(*w*) Reg. v. Best, 1 Salk. 174. And see 1 Hawk. P. C. c. 72, s. 7.

(*x*) Rex v. Murray, 1 Chit. Burn's Just.

817. Matth. Dig. 90. Abbott, C. J., Guildhall, 1823.

(*y*) 9 Co. 56.

(*z*) 8 Mod. 10; but see Reg. v. Rowlands, 17 Q. B. 671, *post*, p. 140.

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held it indictable, although each might have done so separately. (*a*) So a combination between officers in the service of the East India Company to resign their commissions was held an illegal act; and consequently a resignation tendered under those circumstances was held not to be a determination of the service. (*b*) 2. Where the subject-matter is not *malum prohibitum*, as referred to the individual, though *malum in se*; but the criminality in law arises from the conspiracy, such as a malicious combination against a trader to ruin him in his trade. (*c*) So the taking up dead bodies, even though for the purposes of science in dissecting them, is now held an indictable offence *per se*; (*d*) yet formerly it was not so considered, but even then it was held that an indictment lay for conspiracy to do so. (*e*) A false indictment is no crime as referred to the individual, (*f*) but a conspiracy for that purpose subjects the offenders to the villanous judgment. (*g*) The private slander of another by an individual is not indictable; but conspiring to charge another with slanderous matter is so, (*h*) though no legal charge be actually preferred. (*i*) And in this latter case it was held that the Quarter Sessions had jurisdiction over conspirators. It is the same with private immorality, which is only indictable when coupled with a conspiracy. (*j*) So two or more joining to do legal acts with a corrupt intent may be indicted. (*k*) And private deceits, coupled with a conspiracy, are indictable on that account. (*l*) 3. The third head of conspiracy is where the subject-matter is *malum prohibitum*, as referred to the individual, and the criminality in law is thereby aggravated if executed. Of this nature is the bare attempt to subvert religion, (*m*) or public justice; and the latter will apply to both descriptions of counts in the indictment. Such also is the endeavour to dissuade witnesses from giving evidence, (*n*) or the preparation of witnesses, (*o*) or the tampering with jurors. (*p*) Such are public frauds in trade, (*q*) or public cheats, (*r*) or deceit or collusion in the King's courts, or any consent thereto. (*s*) 4. Where there is a bare conspiracy unexecuted, (*t*) or where the conspiracy by the execution merges in a higher offence. (*u*) And he then argued that the offence charged against the defendants fell within the principles of the

(*a*) Anon. B. R. 18 or 19 Geo. 3.

(*b*) 4 Burr. 2472.

(*c*) 1 Stra. 144. 1 Lev. 125. Rex v. Eccles, 1 Leach, 274, *post*, p. 131. Reg. v. Rowlands, 17 Q. B. 671, *post*, p. 140.

(*d*) Rex v. Lynn, 2 T. R. 733.

(*e*) Rex v. Young, cited in 2 T. R. 733. This was an indictment for a conspiracy to prevent the burial of a corpse. And see a precedent for such a conspiracy, 2 Chit. Crim. L. 36.

(*f*) 1 Edl. 3, stat. 2, c. 11. 2 Black. Rep. 1328, 9.

(*g*) Hal. See as to the judgment, *post*, p. 175.

(*h*) 1 Lev. 62. 1 Vent. 304.

(*i*) 1 Salk. 174. 1 Stra. 193. 3 Burr. 1320.

(*j*) 1 Salk. 382, 552. 3 Burr. 1434, 178. 2 Lord Raym. 1031. 1 St. Tr. 515.

(*k*) Rex v. Robinson, 1 Leach, 37.

8 Mod. 321. 1 Wils. 41. 3 Burr. 1439.

(*l*) 6 Mod. 42, 301. 2 Barr. 1127. 2 Stra. 866.

(*m*) Fitzg. 66.

(*n*) 1 Hawk. P. C. c. 21, s. 15. 2 Stra. 904. And see Rex v. Steventon, 2 East, R. 362.

(*o*) Hob. 271. 3 Inst. 106. 2 Show. 1. (*p*) 1 Saund. 300. 1 Lord Raym. 148. 1 Burr. 510. Rex v. Jolliffe, 4 T. R. 285. Co. Lit. 157.

(*q*) 1 Sess. Cas. 217. Comb. 16. 1 Sid. 409. 1 Vent. 18.

(*r*) 5 St. Tr. 486. 1 Latch. 202. 1 Roll. Rep. 2. 2 Lord Raym. 865. 1 Barnard, 330.

(*s*) 3 Edw. 1, c. 29. 2 Inst. 212, 217.

(*t*) 1 Lev. 62, 125. 1 Vent. 304. 3 Burr. 1320. 1 Lord Raym. 379. 1 Salk. 174. 1 Stra. 193. T. Raym. 417.

(*u*) 1 Lord Raym. 711.



above cases. In giving his judgment in this case, Ashhurst, J., said, 'The principal question is, whether a conspiracy to pervert the course of justice by producing in evidence a false certificate be or be not a crime? It seems to me that a greater offence can hardly be stated than that of obstructing or perverting the course of justice, on which the lives and properties of all the subjects depend.' And Grose, J., said, 'It is laid down in some of the cases that an attempt to persuade another not to give evidence in a court of justice is indictable; then it cannot be doubted but that an attempt to mislead the court by misrepresentation is equally criminal. The course of justice is perverted if the certificate of the justices be false. If they agree to certify that a road is in repair for the purpose of perverting the course of justice it is a crime and indictable; and it is not necessary that they should know at the time of such agreement that the road is out of repair; it is sufficient that they did not know that the fact which they certified to be true was true.' And Lawrence, J., said, 'The question is, whether a conspiracy to do an act from which the public may receive any damage be or be not indictable? At first I thought this a very doubtful case, because it struck me that this was an act by which the public would not suffer, as the court at the Assizes were not bound to receive the certificate of the defendants, it not being on oath. But on examination it appears that the practice of receiving the certificates of magistrates respecting the state of roads, has existed as far as the memory of living persons extends, and the Books carry it still farther back. I have not been able to discover how or when the practice of receiving these certificates arose; but a practice that has been adopted in the courts at least as long back as the reign of Charles the First, goes a great way to show what the law is upon the subject. And this is not the only instance of receiving certificates in evidence; certificates of bishops with respect to marriages are received; the customs of London are certified by the recorder; so formerly were certificates received from the captain of Calais; and in Cro. Eliz. 502, this court said that they would give credit to the certificates of the judges in Wales respecting the practice of their court, and that the custom of the court is a law in that court.' (v)

Opinions of  
the judges.

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Where one brother had executed a conveyance of land to another for the avowed object of giving the latter a colourable qualification to kill game, and to get rid of an information then pending against him, it seems to have been considered as quite clear that they were both guilty of an indictable conspiracy. (w)

A conspiracy  
to defeat an  
information.

A count alleged that C. Staden, J. James, and J. Broome had been committed for trial for having, by cheating and false pretences, obtained from W. Hamp £300, and that W. Hamp had been bound by recognizances to prosecute them; and that W. Hamp, W. Watkins, and W. Probert, intending to defeat the due course of law, did agree amongst themselves and with the wife of the said J. Broome that W. Hamp should not attend to prosecute or give evidence, and should receive, in consideration thereof, £400 from the said wife of J. Broome; and then alleged that W. Hamp

A conspiracy  
to cause a  
person, who  
had been  
bound over to  
prosecute, not  
to do so.  
If the neces-  
sary effect of  
a conspiracy  
be to defeat  
the ends of

(v) *Rex v. Mawbey*, 6 T. R. 619 to 638.

(w) *Doe dem. Roberts v. Roberts*, 2 B. & A. 367.

justice, it must be taken that that was the object of the conspiracy.

did receive the £400. The three following counts alleged the object to be to defeat and obstruct the due course of law. The prefatory averments were proved, and the wife of J. Broome proved that, prior to the trial for cheating Hamp, she met the now defendants at a tavern; they said that they were sorry to carry on the prosecution; and if she would give them £500 they would not do so; and after some conversation it was arranged that a cheque for £400 should be given, and it was given, and W. Hamp thereupon told her that they would not further prosecute her husband. W. Hamp had been bound by recognizances in £500 to prosecute. For the defendants it was alleged that J. Broome had such influence over W. Hamp that the latter had made an affidavit exculpating J. Broome from any participation in the fraud, and that he was thus placed in the dilemma that, if he did not prosecute, he forfeited his recognizances, and, if he did prosecute, he might be indicted for perjury; and that Probert, who was his guardian, in order to extricate his ward from this position, had been a party to the compromise, but without any intention to do wrong, or to obstruct the course of justice. But Lord Campbell, C. J., held that, if the necessary effect of the agreement was to defeat the ends of justice, that must be taken to be the object; and the jury were directed to say, on the first and second counts, whether the defendants did agree not to prosecute as therein alleged; and on the third and fourth counts whether they conspired to obstruct and defeat the ends of justice. If they did so agree and conspire, whatever might be their private reasons, it was the duty of the jury to convict the defendants. (x)

Conspiracy by a bail and others to obtain security from the defendant.

Where the plaintiff had been arrested for £38 at the suit of Cohen, and Blake had become bail for her, and some proceedings had been taken against him as bail, and Blake, Cohen, Swaysland, and Solomon went to the plaintiff's lodgings, and Blake said he must have his money or the plaintiff must go to gaol, and stated that Swaysland and Solomon were officers, which was not the fact; and the plaintiff being frightened, delivered to Blake a watch and other articles, and Swaysland and Solomon wrote two papers, which were signed by the plaintiff and Blake, and which papers stated that the articles were deposited with Blake as a security, and that he should be at liberty to sell them within forty-two days unless he was paid in the meantime; Lord Lyndhurst, C. B., held that, as the defendants all acted in concert, they were guilty of a conspiracy, for which they might all have been indicted. (y)

De Berenger's case.

Conspiracy to raise the price of the public funds on a particular day

It has been held to be an indictable offence to conspire on a particular day by false rumours to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day, and that the indictment was well enough without specifying the particular persons who purchased as the persons intended to be injured, and that the public government

(x) *Reg. v. Hamp*, 6 Cox C. C. 167. Lord Campbell, C. J., held that the facts did not support counts charging a conspiracy to obtain money from the wife of J. Broome, with intent to cheat him of it. The first count had only the word 'agree,'

and not conspire, and on its being said that this count did not charge a conspiracy, Lord Campbell said, 'Nothing turns on that. Conspire is nothing: agreement is the thing.'

(y) *Bloomfield v. Blake*, 6 C. & P. 75.

funds of this kingdom might mean either British or Irish funds, which since the Union were each a part of the United Kingdom. After argument in arrest of judgment, Lord Ellenborough, C. J., said, 'I am perfectly clear that there is not any ground for the motion in arrest of judgment. A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumours to raise the price of the public funds and securities, and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous: it strikes at the price of a vendible commodity in the market, and if it gives a fictitious price by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day.' Bayley, J., 'It is not necessary to constitute this an offence that it should be prejudicial to the public in its aggregate capacity, or to all the King's subjects, but it is enough if it be prejudicial to a class of the subjects. Here then is a conspiracy to effect an illegal end, and not only so, but to effect it by illegal means, because to raise the funds by false rumours is by illegal means. And the end is illegal, for it is to create a temporary rise in the funds without any foundation, the necessary consequence of which must be to prejudice all those who become purchasers during the period of that fluctuation.' Dampier, J., 'I own I cannot raise a doubt, but that this is a complete crime of conspiracy according to any definition of it. The means used are wrong, they were false rumours; the object is wrong, it was to give a false value to a commodity in the public market, which was injurious to those who had to purchase.' (z)

by false rumours.

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In the argument upon the foregoing case an authority was cited where the defendants being acquitted of all but conspiring to impoverish the farmers of the excise, it was objected that there was no offence; but the court held it well, because the information showed that the excise was parcel of the revenue of the crown, and so the impoverishment of the farmers of excise tended to prejudice the revenue of the crown. (a)

Conspiracy to impoverish the farmers of the excise.

It seems that parties may be guilty of a conspiracy to raise the price of oil by making fictitious sales. (b)

To raise the price of oil.

A conspiracy to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs is a misdemeanor at common law. The counsel for the defendant proposed to argue that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of a coast waiter, and that, however reprehensible such a practice might be, it could only be made an indictable offence by Act of Parliament. But Lord Ellenborough, C. J., said, 'If that be a question it must be debated on a motion in arrest of judgment, or on a writ of error. But after reading the

Pollman's case. Conspiracy to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs.

(z) *Rex v. De Berenger*, 3 M. & S. 67.

(a) *Rex v. Starling*, 1 Sid. 174.

(b) *Rex v. Hilbers*, 2 Chitty Rep. 163.

This was a motion for a criminal information for a conspiracy to raise the price

of oil by making fictitious sales, and the court held that it must appear that two combined together, as it was no offence for an individual separately to endeavour.



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Conspiracies  
to commit  
riots.

case of *Rex v. Vaughan*, (c) it will be very difficult to argue that the offence charged in the indictment is not a misdemeanor.' And Grose, J., in passing sentence, likewise observed that there could be no doubt that the indictment was sufficient, and that the offence charged was clearly a misdemeanor at common law. (d)

Precedents are to be met with in the Books of indictments for conspiracies to commit riots, (e) And in one case, it was said by a learned judge, with respect to premeditated and systematic tumults at a theatre, that 'the audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment;' (f) and this doctrine has been recently approved. (g)

Conspiracies  
to excite  
discontent and  
disaffection.

Where some of the counts of an indictment charged the defendant with conspiring to cause a great number of persons to meet together for the purpose of exciting discontent and disaffection in the minds of the subjects of the Queen, and for the purpose of exciting the said subjects to hatred and contempt of the government and constitution, and it appeared that a large number of persons had assembled at meetings, at which violent speeches had been made respecting the government and constitution and the people's charter. Alderson, B., told the jury, 'The purpose which the defendants had in view, as stated by the prosecutors, was to excite disaffection and discontent, but the defendants say that their purpose was by reasonable argument and proper petitions to obtain the five points mentioned by their learned counsel. If that were so, I think it is by no means illegal to petition on those points. The duration of Parliaments and the extent of the elective franchise have undergone more than one change by the authority of Parliament itself; and with respect to the voting by ballot, persons whose opinions are entitled to the highest respect are found to differ. There can also be no illegality in petitioning that members of Parliament should be paid for their services by their constituents; indeed, they were so paid in ancient times, and they were not required to have a property qualification till the reign of Queen Anne, and are now not required to have it in order to represent any part of Scotland or the English Universities.' And the learned Baron directed the jury to say whether they were satisfied that the defendants conspired to excite disaffection, and if they were to find them guilty of conspiracy. (h)

Conspiring to  
marry paupers  
in order to

Several cases have occurred in which the conspiring and contriving, by sinister means, to marry a pauper of one parish to a settled inhabitant of another, in order to bring a charge upon it,

(c) 4 Burr. 2494. *Ante*, vol. 1, p. 214.

(d) *Rex v. Pollman*, 2 Campb. 229.

(e) 2 Chit. Crim. L. 506, note (a). See *Rex v. Vincent*, 9 C. & P. 91.

(f) By Mansfield, C. J., in *Clifford v. Brandon*, 2 Campb. 369.

(g) *Gregory v. The Duke of Brunswick*, 6 M. & G. 953. 3 C. B. 481. 1 C. & K. 24.

(h) *Reg. v. Vincent*, 9 C. & P. 91. See *O'Connell v. Reg.* 11 Cl. & F. 155, *post*.

have been considered as indictable offences. (i) It is observed respecting a conspiracy of this kind, that, considering the offence is a prostitution of the sacred rites of marriage, for corrupt and mercenary purposes, and that, by artful and sinister means, persons are seduced into a connection for life without any inclination of their own, and contrary to that freedom of choice which is peculiarly required in forming so close an union, and on which the happiness of them both so entirely depends; and this for the sake of some gain or saving to others who bring about such marriage; in this light it seems a fit ground for criminal cognizance, not only as being a great oppression upon the parties themselves more immediately interested, but as an offence against society in general, being an abuse of that institution by which society is best continued and legal descents preserved, and a perversion of the purposes for which it was ordained. (j) But where, upon an indictment against parish officers for a conspiracy of this kind, it appeared that a man of one parish having gotten a woman with child belonging to another, the defendants had agreed with the man (who was of the age of 29), with the approbation of his father, to give him two guineas if he would marry the woman, and that he afterwards married her on such condition, and received the money from the defendants immediately after the marriage; and it was also sworn, both by the man and the woman, that they were willing to marry at the time; Buller, J., directed an acquittal, notwithstanding the proof of the money having been given to procure such consent; and this after the putative father had been taken up under a magistrate's warrant, and was in custody of the overseers. And that learned judge held it necessary, in support of such an indictment, to show that the defendants had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage without the voluntary consent or inclination of the parties themselves; and that the act of marriage, being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue means. (k)

charge a  
parish.

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In a case where the indictment stated the marriage to have been procured by threats and menaces against the peace, &c., it was holden to be sufficient, without averring in terms that the marriage was against the will or consent of the parties, though that must be proved. (l)

And it has since been held that an indictment does not lie for conspiracy merely to exonerate one parish from the charge of a pauper and to throw it on another, nor for conspiring to cause a male pauper to marry a female pauper for that purpose, it not being stated that the conspiracy was to effect such marriage by force, threats, or fraud, or that it was so effected in pursuance of the conspiracy. (m) An allegation in such an indictment that a poor unmarried woman in a parish was with child is not equivalent

Rex v. Seward.

(i) *Rex v. Tarrant*, 4 Burr. 2106. *Rex v. Herbert*, 1 East, P. C. c. 11, s. 11, p. 461. *Rex v. Compton*, Cald. 246. 8 Mod. 320.

(j) 1 East, P. C. c. 11, s. 11, p. 461.

(k) *Rex v. Fowler*, 1 East, P. C. c. 11, p. 461. And the learned judge said that

this point had been so ruled several times by several judges.

(l) *Rex v. Parkhouse*, 1 East, P. C. c. 11, s. 11, p. 462, Buller, J.

(m) *Rex v. Seward*, 1 A. & E. 706. 3 N. & M. 557.

to an allegation that she was chargeable to such parish. (*n*) And it has been doubted whether an allegation that the defendants conspired together for the purpose of exonerating, is equivalent to an allegation that they conspired to exonerate. (*o*)

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Upon an indictment for conspiring together, and giving the husband money to marry a poor helpless woman, who was an *inhabitant* of B., in order to settle her in the parish of A., where the husband was settled, judgment was arrested, because it was not averred that she was last legally settled in B. (*p*) But it is observed, that it seems to be perfectly immaterial where the woman's settlement was, if it were not in A., provided that fact distinctly appeared. (*q*) It is further said, however, that it is usual to aver the settlements of the parties in their respective parishes, and also that the woman was chargeable to her own parish at the time, though this latter has never been adjudged to be necessary, nor seems to be required according to the general rules which govern the offence of conspiracy. (*r*) It should seem that in such cases both the purpose and the means used are clearly unlawful.

Conspiring to let a pauper land to the intent that he may gain a settlement is illegal. (*s*)

Conspiracy to charge a man with being the father of a bastard child.

Conspiring to charge a man with being the father of a bastard child, with intent to extort money from him, is indictable; and where the object is stated to be to extort money, it is immaterial whether the woman is or is not pregnant. (*t*) And conspiring to make such a charge, though without any intent to extort money, is indictable; and it is not necessary to state in the indictment that the charge was false, or that the child was likely to be chargeable. The court doubted upon the objection that the charge was not stated to be false, but ultimately they held the indictment to be sufficient, as the defendants were at least charged with conspiring to accuse the prosecutor of fornication, and although that was spiritual defamation, conspiring to do it was a temporal offence. (*u*)

Conspiracies to defraud.

Hevey's case. Conspiring to make a fraudulent acceptance of a bill of exchange.

The frauds practised by swindlers may sometimes be indictable as conspiracies. In a case which has been mentioned in a former part of this work, (*v*) where the prisoner had been acquitted upon a charge of forgery, he was afterwards indicted with two of his associates for a conspiracy to defraud. The indictment charged that the defendants Hevey, Beatty, and McCarty, fraudulently and unlawfully conspired that Beatty should write his acceptance to a certain paper-writing, purporting to be a bill of exchange, &c. (the tenor of which was set out) in order that Hevey might, by such acceptance, and by the name McCarty being indorsed on the back thereof, negotiate the said paper-writing as a good bill of exchange.

(*n*) Per Lord Denman, C. J., and Taunton, J., *ibid*.

(*o*) Per Williams, J., *ibid*, citing *Rex v. Nield*, 6 East, 417. But see *Rex v. Ridgway*, 5 B. & Ald. 527, where it was held, that in a conviction for attending a meeting for carrying on a combination of journeymen for the purpose of obtaining an advance of wages, the words 'for the purpose of obtaining,' were synonymous with the words 'to obtain,' in the 39 &

40 Geo. 3. c. 106, s. 4, and *Rex v. Nield*, was doubted by Lord Tenterden, C. J.

(*p*) *Rex v. Edwards*, 8 Mod. 320.

(*q*) 1 East, P. C. c. 11, s. 11, p. 462.

(*r*) *Id. ibid*.

(*s*) Per *cur*. *Rex v. Edwards*, 8 Mod. 320.

(*t*) *Rex v. Armstrong*, 1 Vent. 304. 1 Lev. 62. S.d. 68.

(*u*) *Reg. v. Best*, 2 Lord Raym. 1167.

(*v*) *Ante*, vol. 2, p. 722.



truly drawn at Bath, by one Jer. Connell, for Smith and Co., as partners in the business of bankers, under the style of Bath Bank, as persons well known to them the said defendants, and thereby fraudulently to obtain from the King's subjects goods and monies; that Beatty, in pursuance of such conspiracy and agreement, did fraudulently and unlawfully *write his acceptance* to the said paper-writing to the tenor following, viz., 'Accepted, 20 Nov.—81, R. B.,' well knowing the firm of Smith and Co. to be fictitious; that the defendants procured the indorsement 'B. M'Carty' to be written on the same, and that the said Hevey, in pursuance of such fraudulent conspiracy, did utter the said paper-writing to one S. Read, as and for a good bill of exchange, truly drawn, &c., and accepted by the said Beatty as a person able to pay the said sum of £30, in order to negotiate the same, and by means thereof did fraudulently obtain a gold watch, value twelve guineas, and £7 8s. in money; whereas, in truth, at the time of drawing, accepting, and uttering the said bill, there were no such persons as Smith and Co. in the business of bankers at Bath, and the said Beatty was not of sufficient ability to pay the said £30, they, the defendants, well knowing the same, &c., whereby they defrauded the said S. Read of the said goods and monies. The facts so charged being fully proved, the defendants were convicted. (*w*)

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A conspiracy to raise money by means of a bill importing to be a country bank bill, where there is no such bank, and none of the parties are of ability to pay the bill, is indictable. (*x*)

In a case of later occurrence the defendants were convicted on an indictment which charged them with a conspiracy to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen. (*y*)

Robert's case.  
Conspiracy to  
defraud  
tradesmen.

Where in an action for slander it appeared that certain brokers were in the habit of agreeing together to attend sales by auction, and that one of them only should bid for any particular article, and that after the sale they should have a meeting, consisting of themselves only, at another place, to put up to sale among themselves, at a fair price, the goods that each had bought at the auction, and that the difference between the price at which the goods were bought at the auction, and the fair price at this private resale, should be shared among them; Gurney, B., was of opinion that, as owners of goods had a right to expect at an auction that there would be an open competition from the public, if a knot of men went to an auction upon an agreement among themselves of the kind that had been described, they were guilty of an indictable offence, and might be tried for a conspiracy. (*z*)

Conspiracy of  
brokers at-  
tending sales  
by auction.

Where an indictment alleged that a certain joint stock company had been established, the capital of which was to consist of 2,000 shares, and charged the defendants with conspiring to fabricate a great number of other shares in addition to the said 2,000,

Conspiring to  
fabricate  
shares in ad-  
dition to the  
limited num-

(*w*) *Rex v. Hevey*, 2 East, P. C. c. 19, s. 5, p. 858, note (*a*).

(*x*) Anonymous, 1782. MSS. Bayley, J., Rose. Cr. Evid. 363. *Quære* whether this be not a note of the preceding case.

(*y*) *Rex v. Roberts*, 1 Campb. 399. Lord Ellenborough, C. J. See Reg. v. Whitehouse, 6 Cox C. C. 38, *post*.

(*z*) *Levi v. Levi*, 6 C. & P. 239.

ber of which  
a joint stock  
company  
consists.

Conspiracy to  
barter un-  
wholesome  
wine.

Mackarty and  
Forden-  
borough's case.

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and it appeared that the company had not been legally established; Abbott, C. J., was of opinion that if, in point of fact, a combination to the effect stated in the indictment were made out, such conduct, in point of law, constituted an offence punishable in a criminal way, notwithstanding the original imperfection of the company's formation. (*a*)

The selling unwholesome provisions is, as we have seen, an indictable offence; and the following case of bartering bad and unwholesome wine appears to have been treated as a conspiracy. The indictment charged that the defendants, falsely and deceitfully intending to defraud Thomas Chowne of divers of his goods, &c., together deceitfully bargained with him to barter, sell, and exchange a certain quantity of pretended wine, as good and true new Portugal wine, of him the said Fordenborough, for a certain quantity of hats of him the said Chowne; and that, upon such bartering, &c., the said Fordenborough pretended to be a merchant of London, and to trade as such in Portugal wines, when, in fact, he was no such merchant, nor traded as such in wines; and the said Mackarty, on such bartering, &c., pretended to be a broker of London, when, in fact, he was not, and that the said Chowne, giving credit to the said fictitious assumptions, personating, and deceits, did barter, sell, and exchange to Fordenborough, and did deliver to Mackarty, as the broker between the said Chowne and Fordenborough, for the use of Fordenborough, a certain quantity of hats, of a certain value, for so many hogsheads of the pretended new Portugal wine; and that Mackarty and Fordenborough, on such bartering, &c., affirmed that it was true new Lisbon wine of Portugal, and was the wine of Fordenborough, when, in fact, it was not Portugal wine, nor was it drinkable or wholesome, nor did it belong to Fordenborough, to the great deceit and damage of the said Chowne, and against the peace, &c. (*b*) It is observed of this indictment, which was for a cheat at common law, that though it did not charge that the defendants *conspired co nomine*, yet it charged that they together, &c., did the acts imputed to them, which might be considered to be tantamount. (*c*) The case was considered as one of doubt and difficulty, but it seems that judgment was ultimately given for the crown, on the ground that the offence was conspiracy. (*d*)

Conspiracy to  
cheat by a  
fraudulent  
wager.

A count alleged that the prisoners unlawfully did conspire by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to win from A. Rhodes the sum of £2 10s. of his money, and unlawfully to cheat him of the same; the prisoners and Rhodes were in a public-house, and, in concert with the other two prisoners, J. Dewhurst placed a pen-case on the table, and left the room to get writing-paper. Whilst he was absent the other prisoners, Hudson and Smith, were alone with Rhodes, and Hudson took up the pen-case, and took the pen from it, placing a pin in the place of it, and put the pen he had taken out under the bottom of Rhodes' drinking-glass, and Hudson then proposed to Rhodes to bet Dewhurst, when he returned, that there was no pen in the pen-case. Rhodes was induced by Hudson

(*a*) *Rex v. Mott*, 2 C. & P. 521.

(*b*) *Reg. v. Mackarty*, 2 Lord Raym.

1179. 2 East, P. C. c. 18, s. 5, p. 823.

(*c*) 2 East, P. C. c. 18, s. 5, p. 824.

(*d*) 2 East, *ibid.* And see *ante*, vol. 2, p. 612.

and Smith to stake fifty shillings in a bet with Dewhurst that there was no pen in the pen-case, which money Rhodes placed on the table, and Hudson snatched up to hold. The pen-case was then turned up into Rhodes' hand, and another pen with the pin fell into his hand, and then the prisoners took his money. It was contended, on a case reserved, that this was a mere deceit not concerning the public, and that there was no false pretence on which any of the prisoners could have been convicted of obtaining money by false pretences. The prosecutor intended to cheat Dewhurst, and was a party to the fraud, and could not maintain this indictment. Pollock, C. B., 'We are all of opinion that the conviction is good. The expression "by false pretences" used in the count is not to be construed in the technical sense contended for by the counsel for the prisoners. We think that there was abundant evidence of a conspiracy to cheat. Though it be an ingredient in that conspiracy to induce the man who is cheated to think that he is cheating some one else, that does not prevent those who use that device from being amenable to punishment.' (e)

We have seen that all confederacies, wrongfully to prejudice a third person, are considered as highly criminal at common law. (f) And where a woman, living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnize a marriage with her, which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master: the gist of the indictment was for the conspiracy, and the conviction was founded on that ground. And it was considered in this case that, though no actual injury was proved, yet it was the province of the jury to collect, from all the circumstances of the case, whether there was not an intention to do a future injury to the person whose name was assumed. (g)

And a conviction has taken place upon an indictment, which charged that M. A. Wrench was a person of ill-fame and bad character, and a common prostitute, and that W. B. Serjeant was an infant within the age of 21 years, and that M. A. W. and P. D. and S. J., intending to defraud the said W. B. S. of his property, conspired for the purpose aforesaid to procure a marriage to be solemnized between the said W. B. S. and the said M. A. W., by means of a false oath to be taken by the said M. A. W., and by divers false pretences, and without the consent of the mother of the said W. B. S., his father being dead, and that the said M. A. W. and P. D. and S. J., in pursuance of the said conspiracy, did prevail on the said W. B. S. to consent to marry the said M. A. W., and by means of such persuasion, and by means of a false oath taken by the said M. A. W., in order to obtain a license for the solemnization of marriage between the said W. B. S. and the said M. A. W., did cause the said W. B. S. to

Conspiracy to solemnize a marriage.

Conspiracy to procure a marriage with a minor by a license obtained by a false oath.

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(e) Reg. v. Hudson, Bell C. C. 263. Channell, B., 'If the count had omitted the words "by false pretences," it would have been good.' Blackburn, J., 'If proof was given of an agreement by fraudulent devices to obtain the money, which is the substance of the third count, is there not evidence for the jury?' See the case on another point, ante, vol. 1,

p. 628.

(f) Ante, p. 116.

(g) Rex v. Taylor. 1 Leach, 37. 2 East, P. C. c. 20, s. 6, p. 1010. See Wade v. Broughton, 3 Ves. & B. 172, that persons conspiring to procure the marriage of a female for the sake of her fortune may be indicted for a conspiracy.



marry the said M. A. W., and a marriage by such license was accordingly solemnized between them, without the leave of the mother of the said W. B. S., who then was such infant as aforesaid. (*h*)

Conspiracy to seduce a young woman.

The seduction of a young woman may be attended with such circumstances as to be indictable as a conspiracy. A case is reported where Lord Grey and others were charged, by an information at common law, with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkeley (she being under the custody, &c., of her father), and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him: and, further, the defendants were charged, that in prosecution of such conspiracy, they took away the Lady Henrietta at night from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey, to the ruin of the lady and to the evil example, &c. The defendants were found guilty, though there was no proof of any force, but, on the contrary, it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure and subsequent concealment. It was not shown that any artifice was used to prevail on her to leave her father's house; but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his control. (*i*)

A conspiracy to procure a girl to have illicit connection with a man.

A count charged that the prisoners did between themselves conspire, combine, confederate, and agree together knowingly and designedly to procure, by false representations, false pretences, and other fraudulent means, J. C., a poor child, under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man whose name is to the jurors unknown, and, upon a case reserved, the judges were unanimously of opinion that this count charged an indictable offence at common law. (*j*)

Conspiracy to carry away a female under the age of twenty-one, without the consent of her parents.

An indictment has been held to lie against several persons for conspiring to carry away a young female under the age of twenty-one from the custody of her parents and instructors, and afterwards to marry her to one of the offenders, contrary to the provisions of the 4 & 5 Ph. & M. c. 8. ss. 3 & 4, and also for conspiring to commit the capital felony (under the 3 Hen. 7, c. 2, s. 1) of taking away an heiress against her will, and afterwards marrying her to one of the defendants. The young lady, who was the heiress of a gentleman of large fortune, and was only fifteen years of age, had been placed under the care of some ladies at Liverpool, for the purpose of finishing her education, and was

(*h*) *Rex v. Sergeant*, R. & M. N. P. R. 352.

(*i*) *Rex v. Lord Grey*, 3 St. Tri. 519. 1 East, P. C. c. 11, s. 10, p. 460. See also *Rex v. Delaval*, 3 Burr. 1434.

(*j*) *Reg. v. Mears*, 2 Den. C. C. 79.

The indictment also contained two counts framed to charge an attempt to commit the offence created by the 12 & 13 Viet. c. 76; but no opinion was expressed as to these counts. See *ante*, vol. 1, p. 936.

induced to leave their house by means of a fictitious letter, fabricated by the defendants, who conveyed her to Gretna Green, where she was induced by means of false representations to go through the ceremony of a Scotch marriage, and to consent to become the wife of one of the defendants: and the defendants were convicted. (*k*)

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A case is reported where several persons were convicted on an indictment which charged them with conspiring to impoverish one H. B., a tailor, and to prevent him, by indirect means, from carrying on his trade. (*l*) This, however, appears to have been considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public. (*m*)

Conspiracy to impoverish a man in his trade.

If traders conspire to defeat their creditors by disposing of their goods in contemplation of bankruptcy, they are guilty of a conspiracy at common law. (*n*)

Conspiracy to cheat creditors.

So if bankers combine to deceive and defraud their shareholders by publishing false balance sheets, they are indictable for a conspiracy. (*o*)

Bankers publishing false balance sheets.

Where the prisoners were indicted for a conspiracy to cheat one Edwards, and the case was that the prisoners had made false representations as to the amount of profits of a business carried on by one of them, and thereby induced Edwards to enter into partnership with one of them; it was held, that they were liable to be indicted for the conspiracy, although no action might lie for the false representation, as it was not in writing, so as to satisfy the 9 Geo. 4, c. 14, s. 16. (*p*)

Conspiracy to cheat by false statements of the profits of a trade.

An indictment will not lie for conspiring to commit a civil trespass upon property, by agreeing to go, and by going into, a preserve for hares, the property of another, for the purpose of snaring them, though it be alleged to be done in the night-time, and that the defendants were armed with offensive weapons, for the purpose of opposing resistance to any endeavours to apprehend or obstruct them. And Lord Ellenborough, C. J., in pronouncing the judgment of the court, said, 'I should be sorry that the cases in conspiracy against individuals, which have gone far enough, should be pushed still farther. I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment.' (*q*) It may be observed

An indictment was once held not to lie for conspiring to commit a civil trespass. Turner's case.

(*k*) *Rex v. Wakefield*, 2 Lew. 1. The marriage being in Scotland, an indictment for felony under the 3 Hen. 7, c. 2, s. 1, could not have been supported, and there was no evidence to support an indictment under the 4 & 5 Ph. & M. c. 8, s. 4. See vol. 1, p. 942, 950. An indictment was preferred upon the 4 & 5 Ph. & M. c. 8, s. 3, but no judgment given upon it.

(*l*) *Rex v. Eccles*, 1 Leach, 274.

(*m*) By Lord Ellenborough, C. J., in *Rex v. Turner*, 13 East, 228. See per Lord Campbell, C. J., *Reg. v. Rowlands*, 17 Q. B. 671.

(*n*) *Reg. v. Hall*, 1 F. & F. 33, Watson, B.

(*o*) *Reg. v. Esdaile*, 1 F. & F. 213.

(*p*) *Reg. v. Timothy*, 1 F. & F. 39, Chamell, B.

(*q*) *Rex v. Turner*, 13 East, 228, 231.

But *quæ*, as to that which is reported in this case (p. 230) to have been said by Lord Ellenborough in the course of the argument, viz. that 'all the cases in conspiracy proceed upon the ground that the object of the combination is to be effected by some falsity.' The facts stated in this case would constitute an offence within the 9 Geo. 4, c. 69, *ante*, vol. 1, p. 631, and it is conceived that a conspiracy to commit an offence within that statute would be indictable, although not carried into effect. See *Rex v. Wakefield*, *supra*.

that it was not stated in the indictment that the weapons were *dangerous*, nor that the defendants conspired to go, &c., *with strong hand*.

But this case is overruled.

But this case is overruled by *Reg. v. Rowlands*, (*r*) where Lord Campbell, C. J., said, 'I have no doubt whatever that it was wrongly decided. Going into the prosecutor's close against his will, armed with offensive weapons for the purpose of opposing any persons who should endeavour to apprehend, obstruct, or prevent them, would in itself be an indictable offence; and conspiring to commit such an offence must be an indictable conspiracy.'

An indictment said not to lie for a conspiracy to cheat and defraud a man by selling him an unsound horse. Pywell's case.

In a case where the defendants were charged with conspiring to cheat and defraud General Maclean, by selling him an unsound horse, it appeared that one of the defendants, named Pywell, had advertised the sale of horses, undertaking to warrant their soundness; and that, upon an application by General Maclean, at Pywell's stables, another of the defendants stated to him that he had lived with the owner of a horse, which he then showed to the General; that he knew the horse to be perfectly sound, and, as the agent of Pywell, would warrant him to be sound. General Maclean purchased the horse, taking a receipt, in which the horse was mentioned as warranted sound, and to be returned if not approved of within a week. It was discovered, very soon after the sale, that the animal was nearly worthless. Lord Ellenborough, C. J., was of opinion, that the case did not assume the shape of a conspiracy, and that the evidence would not warrant any proceeding beyond that of an action on the warranty, for the breach of a civil contract. And if this were to be considered as an indictable offence, then, instead of the actions which had been brought on warranties, the defendants ought to have been indicted as cheats, and that no indictment, in a case like this, could be maintained, without evidence of concert between the parties to effectuate a fraud. (*s*)

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An indictment will lie for a conspiracy to cheat in the sale of a horse.

But this case is said really to have been decided on the ground that 'one of the two defendants, though acting in the sale, was not shown to have been aware that a fraud was practised,' (*t*) and it is now settled that persons may be guilty of a conspiracy to defraud another in the fraudulent sale of a horse. Thus where the defendants conspired to make a false representation that horses were the property of a private person and not of a horse dealer, and were quiet to ride and drive, and thereby induced a gentleman to buy them at a large price, they were held to have been rightly convicted on a count which charged them with conspiring by false pretences and subtle means to cheat the gentleman of his money. (*u*)

A conspiracy to defraud of part of the price of a horse by falsely pretending that it was unsound.

An indictment against Brown and Carlisle for conspiracy alleged that one Sibson sold to Brown a mare for £39, and that the prisoners, whilst the said sum was unpaid, conspired by false and fraudulent representations that the said mare was unsound of her wind, and that she had been examined by a veterinary surgeon, who had pronounced her a roarer, and that Brown had sold her for

See also the observations on this case in *Deac. Game L.* 175. C. S. G.

(*r*) 17 Q. B. 671.

(*s*) *Rex v. Pywell*, 1 Stark. R. 402.

(*t*) Per Lord Denman, C. J., *Reg. v. Kenrick*, 5 Q. B. 49.

(*u*) *Reg. v. Kenrick*, *supra*. See this case, *ante*, vol. 2, p. 653.



£27 to induce Sibson to receive a much less sum in payment for the said mare than Brown had agreed to pay Sibson for the same, and thereby to cheat Sibson of a large part of the said sum agreed to be paid for the said mare. The mare had been sold by Sibson to Brown for the price as alleged, and Sibson had agreed to trust Brown for the price till after a fair. The prisoners afterwards conspired to send a false account of the mare to Sibson, and thereby to get him to forego part of the agreed price; and, in pursuance of this conspiracy, they sent a letter to Sibson, stating that the mare was unsound of her wind and had been examined by a veterinary surgeon, and he had pronounced her a roarer. In consequence of this letter Sibson saw Carlisle, who stated that he had examined the mare and that she was unsound, which he knew to be false. Sibson afterwards saw Brown, who told him that he had sold the mare for £27 only (which was false), and persuaded him to receive that sum in satisfaction of his claim, but no receipt or other discharge was given. It was contended that no indictable offence had been proved or charged; for that the facts proved and alleged did not and could not alter the position of Sibson, as the payment of a smaller sum was no satisfaction of the larger sum, for which he had sold the mare, and he might afterwards enforce the payment of the residue. But, upon a case reserved, it was held that the indictment was sustainable, and that the facts given in evidence did sustain it. The substance of the charge is that the prisoners conspired to use unlawful means, namely, false representations, to induce the prosecutor to forego a part of his claim; and there is no force in the argument that, because the prisoners did not by means of their false representations alter the right of the prosecutor to his full claim, the indictment is not sustainable; since in no case where a change is made in the possession of a chattel through a fraud is the property altered. It is not necessary that the fraud should be successful. The offence here charged and proved comes within the legal definition of a conspiracy. (*v*)

An indictment cannot be supported for a conspiracy to deprive a man of the office of secretary to an illegal unincorporated trading company. Lord Ellenborough, C. J., said that the society being certainly illegal, to deprive an individual of an office in it could not be treated as an injury: and that when the prosecutor was secretary to the society, instead of having an interest which the law would protect, he was guilty of a crime. (*w*)

The earlier statutes relating to the combinations of workmen were repealed by the 5 Geo. 4, c. 95. But the 6 Geo. 4, c. 129, recites that the provisions of the former Act had not been found effectual, and that such combinations are injurious to trade and commerce, dangerous to the tranquillity of the country, and especially prejudicial to the interests of all who are concerned in them, and that it was expedient to make further provision, as well for the security and personal freedom of individual workmen in

An indictment will not lie for conspiring to deprive a man of the office of secretary to an illegal trading company.

Combinations amongst journeymen, workmen, &c., 6 Geo. 4, c. 129, repeals former Acts.

(*v*) *Reg. v. Carlisle*, Dears. C. C. 337. In *Reg. v. Read*, 6 Cox C. C. 134, the prisoners were indicted for conspiring to cheat by selling a glandered horse as a sound horse; but Cresswell, J., did not think that there was enough evidence to

leave to the jury.

(*w*) *Rex v. Stratton*, *cor.* Lord Ellenborough, C. J., 1 Campb. 549, in the notes. See *Reg. v. Hunt*, 8 C. & P. 642, *ante*, vol. 2, p. 442.

the disposal of their skill and labour as for the security of the property and persons of masters and employers, and for that purpose to repeal the said Act, and to enact other provisions and regulations in lieu thereof, and then repeals the said Act of 5 Geo. 4, c. 95. It then provides that various enactments repealed by the 5 Geo. 4, c. 95, shall remain repealed.

Compelling journeymen to leave employment, or to return work unfinished, preventing hiring themselves, compelling them to belong to clubs, &c., or to pay fines, or to alter mode of carrying on business.

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By the 6 Geo. 4, c. 129, s. 3, 'if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force, or endeavour to force, any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, or prevent or endeavour to prevent any journeyman, manufacturer, workman, or other person not being hired or employed, from hiring himself to, or from accepting work or employment from any person or persons; or if any person shall use or employ violence to the person or property of another, or threats or intimidation, or shall molest or in any way obstruct (*x*) another for the purpose of forcing or inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied or of his refusing to comply with any rules, orders, resolutions, or regulations made to obtain an advance or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof; or if any person shall, by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any manufacturer or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants: every person so offending, or aiding, abetting, or assisting therein, being convicted thereof in manner hereinafter mentioned, shall be imprisoned only, or shall and may be imprisoned and kept to hard labour for any time not exceeding three calendar months.' (*y*)

Proviso for meetings for settling rates of wages to be received, or hours of work to be employed

Sec. 4. 'This Act shall not extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices, which the persons present at such meeting, or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade, or business, or who

(*x*) In *Hilton v. Eckersley*, 6 E. & B. 47, Lord Campbell, C. J., said, 'If suing upon such a bond (as was in question in that case) could be considered as molesting or obstructing the obligor within the meaning of this section, the bond would be illegal and void. But the obstruction

and obstruction here contemplated would probably be considered to be an unlawful act of the same kind with those specifically described.'

(*y*) See *In re Perham*, 5 H. & N. 30, and *In re Perham*, 2 E. & E. 383, as to the form of conviction under this section.

shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours or time for which he or they will work, in any manufacture, trade, or business; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding.

by the persons meeting.

Sec. 5. 'This Act shall not extend to subject any persons to punishment who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meeting, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours or time of working in any manufacture, trade, or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices, which the parties entering into such agreement, or any of them, shall pay to his or their journeymen, workmen, or servants, for their work, or the hours or time of working in any manufacture, trade, or business; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing, any law or statute to the contrary notwithstanding.' (z)

Proviso for meetings for rates of wages, &c., to be paid by masters to journeymen, &c.

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The 6 Geo. 4, c. 129, was not intended to empower workmen to meet and combine for the purpose of dictating to their masters whom they should employ, and consequently a combination of workmen for such a purpose is indictable as a conspiracy. An indictment charged that the defendant with others did conspire to prevent the workmen of J. Garforth from continuing to work in a colliery, and it appeared that seven colliers had been summoned by Garforth before a magistrate for refusing to work, and that this was done at their own request, as they were afraid to work except under the appearance of being compelled to do so. The body of the other men met and agreed upon a letter addressed to Garforth, to the effect that all the workmen in Garforth's employ would strike in fourteen days, unless the seven men were discharged from the colliery. Patteson, J., held that the statute never meant to empower workmen to meet and combine for the purpose of dictating to the master whom he should employ, and that this compulsion was clearly illegal. (a)

The 6 Geo. 4, c. 129, does not empower workmen to combine and dictate to their masters whom they shall employ.

In his charge to the grand jury at the Stafford Special Commission, 1843, Tindal, C. J., said, 'The first observation that arises is that if the workmen of the several collieries and manufactories, who complained that the wages which they received were inadequate to the value of their services, had assembled themselves peaceably together for the purpose of consulting upon and determining the rate of wages or prices which the persons present at

If workmen are dissatisfied with their wages they may lawfully meet to determine the rate of wages they will re-

(z) Sec. 6 provides that offenders shall be compelled to give evidence, and shall be indemnified; for the summoning offenders before justices of the peace, and for issuing warrants for their apprehension when they do not appear upon sum-

mons; regulates the proceedings before the justices, gives a form of conviction, and an appeal to the quarter sessions.'

(a) *Rex v. Bykerdyke*, 1 M. & Rob. 179.



quire, and may agree to fix that rate; but they cannot lawfully interfere with other workmen in the exercise of the same right.

the meeting should require for their work, and had entered into an agreement amongst themselves for the purpose of fixing such rate, they would have done no more than the law allowed. A combination for that purpose and to that extent (if indeed it can be called by that name) is no more than is recognized as legal by the 6 Geo. 4. c. 129: by which statute also exactly the same right of combination, to the same extent and no further, is given to the masters when met together, if they are of opinion the rate of wages is too high. In the case supposed—that is, a dispute between the masters and the workmen as to the proper amount of wages to be given, it was probably thought by the legislature that if the workmen on the one part refused to work, or the masters on the other refused to employ, as such a state of things could not continue long, it might fairly be expected that the party must ultimately give way, whose pretensions were not founded in reason and justice—the masters if they offered too little, the workmen if they demanded too much. But, unfortunately for themselves and others, those who were discontented did not rest here. Not satisfied with the exercise of their own right to withhold their own labour, if they were discontented with the price they received for it, they assumed the power of interfering with the right which others possessed, of exercising their discretion upon the same point; and accordingly you will have numerous cases laid before you in which large bodies of dissatisfied workmen interfered by personal violence and by threats and intimidation, to compel others, who were perfectly willing to continue to labour in their callings at the rate of wages then paid, to desist from their work, to leave the mine or manufactory, and against their own will to add themselves to the numbers of the discontented party; than which a more glaring act of tyranny and despotism by one set of men over their fellows cannot be conceived. If there is one right which, beyond all others, the labourer ought to be able to call his own, it is the right of the exertion of his own personal strength and skill, in the full enjoyment of his own free will, altogether unshackled by the control or dictates of his fellow workmen; yet, strange to say, this very right, which the discontented workman claims for himself to the fullest extent, he does, by a blind perversity and unaccountable selfishness, entirely refuse to his fellows, who differ in opinion from himself. It is unnecessary to say, that a course of proceeding so entirely unreasonable in itself, so injurious to society, so detrimental to the interest of trade, and so oppressive against the rights of the poor man, must be a gross and flagrant violation of the law, and must be put down, when the guilt is established, by a proper measure of punishment. (b)

On the one hand masters have a right to agree among themselves what wages they will give and what hours of work

The defendants were indicted for a conspiracy to impoverish partners in their trade and business as ironfounders, and for a conspiracy to prevent them from taking into their service journeymen and apprentices, &c.; Rolfe, B., told the jury that, ‘Those who are to employ labour may meet and say, “We will not give more than such and such a rate, or we will stipulate for such and such number of hours’ work; we will make, in short, regulations benefi-

(b) C. & M. 662, note. Parke, B., and Rolfe, B., were present.

cial to ourselves as employers, and we agree that we will not take any workmen that require more." On the other hand, the workmen may meet and say, "We will not work for less than such and such sums, and if anybody thinks to employ us on low wages we will agree we will not work for them, and we agree to form a fund and support one another until we get them to come to proper terms." That being the law, the market in that, as in all other things, will find its own level, and what the value of that labour is will be found out by there being either a redundancy of hands out of work, or a redundancy of capital seeking for labour; and that is the policy of the law. But if any illegal means be taken, the principle of the common law steps in, and says that if any persons conspire and combine together to effect this illegal object, an object that is of itself illegal, any such conspiracy to effect the illegal object is itself criminal.' And with reference to the expressions used by the defendants, Rolfe, B., said, 'A great deal may be said as to the precise words used; what I think you should consider is not so much the very words, as whether the fair result of it was to intimate to the person to whom it was addressed, that some bodily harm would happen to him if he persevered in his intention of working at the prosecutors', when they only said, "It will be the worse for you" and "You will regret it," and so on. There are no particular words necessary to be used if the fair inference is that which has been taken, that it was to prevent the other party from persevering in the intention of working for the prosecutors, and unquestionably that would bring home the charge of intimidation.' And with respect to persuasion to leave their service, Rolfe, B., said, 'It is doubtless lawful for people to agree among themselves not to work except upon certain terms; that being so, I am not aware of any illegality in their peaceably trying to persuade others to adopt the same view. It is lawful for half a dozen people to agree together and say, "We will not work unless the prosecutors raise our wages." So it is perfectly reasonable to say to a third man, "You had better do that too," if they do not use threats, to deter him from doing it; but it is not necessary to use actual threats, if the language used is such as tends to convey the impression of intimidation.' And the very learned Baron afterwards added, 'My opinion is that, if there was no other object than to persuade people that it was their interest not to work except for certain wages, and not to work under certain regulations complied with in a peaceable way, it was not illegal.' (e)

On an indictment for a combination by workmen contrary to the 6 Geo. 4, c. 129, it appeared that the defendants were members of a society called the Philanthropic Society of Coopers. The society had an acting member in every cooper's yard. C. Evans, a member of the society, was working in Mr. Turner's yard; but, with his permission, he did four days' work at the steam mills of other masters, where steam machinery was employed for making casks. When this came to the knowledge of the society, they inflicted a fine of £10, payable by instalments, on Evans for working in a yard where steam machinery was employed. Evans refused to

they will require; on the other workmen have a right to agree among themselves what wages they will require; but neither have a right to enforce these objects by illegal means; and if they agree so to do they are guilty of a conspiracy.

It is not illegal for workmen peaceably to try to persuade others to determine not to work unless on certain terms.

It is not necessary to prove that actual threats were used; it is sufficient if the language used is such as to convey the impression of intimidation; and in determining that question it is not so much the very words that are to be considered, as whether the fair result of them was to intimidate.

A combination to compel workmen to quit their employ unless another workman was discharged.

pay, and the other men in Mr. Turner's yard then left their work, and refused to return whilst Evans was employed. Evans was, in consequence, thrown out of work. Each man who left Turner's yard on account of Evans was paid 9s. for his loss of time by the committee. The fine was imposed in accordance with the rules of the society. Lord Campbell, C. J., was of opinion that the Philanthropic Society was, according to its rules, a lawful institution; but it could not be permitted that, under the guise of its laudable objects, the members should enter into a combination to injure others. By law every man's labour was his own, and he might make what bargain he liked for his own employment; but the men must not associate themselves to do that which might prejudice another man. The men may take care not to enter into engagements of which they do not approve; but they must not prevent another from doing so. It was clear the defendants unlawfully imposed a fine on Evans, and proceeded by unlawful means to induce him to pay that fine. (*d*)

Counts for a conspiracy to force workmen to leave their employment by 'molesting,' 'using threats to,' and 'intimidating' them, are good, as they state the means in the terms of the 6 Geo. 4, c. 129, s. 3.

And so are counts for a conspiracy to 'molest' and 'obstruct' an employer.

And so are counts for a conspiracy to force a master to alter the mode of conducting his business by 'molesting' and 'obstructing' him and persuading his workmen to leave his service.

And so are counts for a conspiracy to prevent workmen from hiring themselves by molesting, obstructing,

The first count stated that R. P. and G. H. P. carried on trade as manufacturers of japanned and tin wares, and that divers persons were workmen, and hired and employed by and worked as workmen for the said R. P. and G. H. P. in their said trade, and that the prisoners unlawfully conspired, &c., by unlawfully molesting the workmen so hired and employed by and working for the said R. P. and G. H. P. in their said trade, to force and endeavour to force the said workmen so hired and employed by and working for the said R. P. and G. H. P., in their said trade, to depart from their said hiring, employment, and work. The second count was like the first, but stated the means to be by unlawfully using threats to the said workmen. The third was like the preceding, but stated the means to be by unlawfully intimidating the said workmen. The fourth, fifth, and sixth were similarly framed for conspiring to force individual workmen to depart from their hiring by the means stated in the first, second, and third counts respectively. The seventh count, like the first, stated that divers persons were workmen, and were hired and employed by and worked for R. P. and G. H. P. in their said trade, and that the prisoners unlawfully conspired, &c., by unlawfully molesting the said R. P. and G. H. P., to force and endeavour to force the said workmen so hired, &c., to depart from their said hiring, &c. The eighth count was like the seventh, but stated the means to be by unlawfully obstructing the said R. P. and G. H. P., so carrying on their said trade, and the said workmen so hired, &c., by and working for the said R. P. and G. H. P. in their said trade. The ninth count stated that R. P. and G. H. P. carried on trade, &c., and that the prisoners unlawfully conspired, &c., by molesting the said R. P. and G. H. P., to force and endeavour to force them to make an alteration in the mode of carrying on their said trade. The tenth count stated that workmen were hired, &c., by R. P. and G. H. P. as in the former counts, and that the prisoners unlawfully conspired by obstructing the said R. P. and G. H. P., and by inducing and persuading the said workmen in the hiring and employment of the said R. P. and G. H. P. to leave their hiring, employment, and work, to force and endeavour to force the said R. P. and



G. H. P. to make an alteration in the mode of carrying on their said trade. The eleventh count stated that R. P. and G. H. P. carried on trade, &c., and that divers persons were being hired and employed as workmen for the said R. P. and G. H. P. in their said trade; and that the prisoners unlawfully conspired by molesting and obstructing such workmen as aforesaid as might be willing to be hired and employed by the said R. P. and G. H. P. in their said trade, and who were not then hired and employed by the said R. P. and G. H. P., or by any other person, to prevent and endeavour to prevent the said workmen so willing to be employed, &c., from hiring themselves to, and from accepting work and employment from the said R. P. and G. H. P. in their said trade. The twelfth count was like the eleventh, but stated the means to be by unlawfully using threats and intimidation to such workmen who might be willing, &c. The thirteenth (e) count stated that R. P. and G. H. P. carried on trade, &c., and that divers persons, being artificers, had contracted with the said R. P. and G. H. P. to serve them as artificers in their said trade for certain times and periods, &c., and had entered into the service of the said R. P. and G. H. P. as such manufacturers. And that the prisoners unlawfully conspired, &c., by divers subtle means and devices, to induce and persuade such artificers so having contracted, &c., and so having entered into the service, &c., unlawfully to absent themselves from the said service of the said R. P. and G. H. P., without the consent of either of them, before the respective terms of the said contracts were completed. The fourteenth count stated that W. H., being an artificer, had contracted, &c., for a period specified, and had entered into the service, and that the prisoners conspired, &c., by divers subtle means and devices, and illegal acts and practices, and by intoxicating the said W. H., to induce and persuade the said W. H., so having contracted, &c., and so having entered into the said service, &c., unlawfully to absent himself from the service of the said R. P. and G. H. P. without the consent of either of them before the term of the said contract was completed. The fifteenth count was like the fourteenth, but related to one T. G. The eighteenth count stated that the prisoners, intending to injure and oppress the said R. P. and G. H. P. in their trade as manufacturers, &c., conspired, &c., by divers subtle means and devices, and by intoxicating and thereby rendering senseless the workmen of the said R. P. and G. H. P. in their trade, to convey to a distance and carry away the said workmen, and thereby to prevent the said workmen from continuing to work for the said R. P. and G. H. P. in their said trade. The twentieth count stated that the prisoners conspired by divers subtle means and devices, and by illegal acts and practices, and by molesting and intoxicating the workmen in the employment of the said R. P. and G. H. P., and by inducing the workmen to depart from the said employment and to break their contracts with the said R. P. and G. H. P., to force and compel the said R. P. and G. H. P. to alter, and thereby increase, the amount of wages which the said R. P. and G. H. P. then were in the habit of paying to the workmen in their employment. Each count concluded 'to the

and threatening such workmen.

And so are counts (framed with reference to the 4 Geo. 4, c. 34, s. 3) for a conspiracy to induce workmen to absent themselves from their employment before the end of their hiring.

(e) This and the two following counts were framed with reference to the 4 Geo. 4, c. 34, s. 3, which relates to work-

men who unlawfully absent themselves from their service before the end of the term for which they have been engaged.

great damage of the said R. P. and G. H. P.; &c. In arrest of judgment it was urged that the first ten counts were too vague, and the words, 'molest,' 'threats,' 'intimidating,' and 'obstructing,' were objected to as not necessarily importing anything unlawful. To the eleventh and twelfth counts it was further objected that they ought to have alleged that the prisoners knew of the intended hiring, and that the names of the workmen ought to have been stated. That to follow the words of a statute was only sufficient where the indictment was on the statute, and here the charge was at common law. The offences created by the 6 Geo. 4, c. 129, s. 3, depended entirely upon the means used, and if those were not properly described, there was no sufficient charge of conspiracy to violate the statute. To the thirteenth, fourteenth, and fifteenth counts it was objected that they ought to have stated what the contracts were, and that the absence was without lawful excuse. That conspiring merely to 'induce and persuade,' as alleged in the tenth count, was no offence, even if a contract appeared which made it unlawful not to serve. But the Court of Queen's Bench held that the counts were wholly unexceptionable. Lord Campbell, C. J., 'It is objected that some counts do not disclose the nature of the molestation or intimidation by which the conspiracy was to take effect; but this is quite unnecessary. The words of the legislature are used; the terms in question have a meaning stamped upon them by the 6 Geo. 4, c. 129, s. 3, and we must take it that they are used here in that sense. And they are not employed, as describing the substantive offence for which the indictment is preferred; that offence consists in the conspiracy, which is a misdemeanor at common law.' (f)

Workmen have a right to combine for their own protection and to obtain such wages as they choose to demand; but they have no right to combine for the purpose of

In summing up this case to the jury, Erle, J., said, 'The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand. I say nothing at present as to the legality of other persons not workmen combining with them to assist in that purpose. As far as I know, there is no objection, in point of law, to it; and it is not necessary to go into that matter; but I consider the law to be clear so far only as while the purpose of the combination is to obtain a benefit for the parties who combine; a benefit which by law they can claim. I make that remark, because a combination

(f) Reg. v. Rowlands, 17 Q. B. 671. 2 Den. C. C. 364. Sum. Ass. 1851. The other objections were not noticed. The sixteenth count stated that the prisoners conspired unlawfully to intimidate, prejudice, and oppress R. P. and G. H. P. in their trade as manufacturers of japanned and tin wares, and to prevent the workmen of the said R. P. and G. H. P. from continuing to work for them in their said trade. The seventh count stated that the prisoners conspired, &c., by divers subtle means and devices, and wicked arts and practices, to injure and oppress the said R. P. and G. H. P. in their trade of manufacturers of tin and japanned wares, and to induce the workmen of the said R. P. and G. H. P. to depart from their hiring, employment, and work with the said R. P. and G. H. P. before the

period of their agreement with them was completed. The nineteenth count stated that the prisoners conspired, &c., unlawfully to intimidate, prejudice, and oppress R. P. and G. H. P. in their trade of manufacturers of japanned and tin wares, and to entice and seduce away the workmen of the said R. P. and G. H. P. from their employment, and thereby to injure and oppress the said R. P. and G. H. P. in their said trade; and Lord Campbell, C. J., said, 'We all agree in thinking that the sixteenth, seventeenth, and nineteenth counts are open to objection, as being too vague. We give no final opinion; but on these counts there will be a rule nisi to arrest the judgment, unless a *nolle prosequi* be entered;' which the counsel for the crown consented to enter.

for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations, which have for their immediate purpose the hurt of another. The rights of workmen are conceded; but the exercise of free-will and freedom of action within the limits of the law is also secured equally to the masters. The intention of the law is at present to allow either of them to follow the dictates of their own will with respect to their own actions and their own property; and either, I believe, has a right to study to promote his own advantage or to combine with others to promote their mutual advantage.' Erle, J., then said that in this case there had been a combination to force the prosecutors to agree to a uniform book of prices; and, after advertg to the different counts, added, 'If you should be of opinion that a combination existed for the purpose of obstructing the prosecutors in carrying on their business, and forcing them to consent to this book of prices, and, in pursuance of that concert, they persuaded the free men, and gave money to the free men, to leave the employ of the prosecutors, the purpose being to obstruct them in their manufacture, and to injure them in their business, and so to force their consent, with no other result to the parties combining than gratifying ill-will, I am of opinion that that would also be a violation of the law, and would warrant a conviction on the counts directed against that form of offence.' It was contended that this language led the jury to suppose that, although the combination were for a legitimate object, yet, if the means to be used would have the effect of obstructing the prosecutors in carrying on their business, it was an indictable conspiracy; whereas, if the object of the workmen was to enforce their own rights, they were justified in doing so, though the effect were an obstruction of the prosecutors' business. But Erle, J., said that his words had no such meaning, and the Court of Queen's Bench saw no objection to the summing up. (g)

And on an indictment containing the same counts as the preceding case at the same assizes, Erle, J., told the jury 'that with respect to the law relating to the combinations of workmen, nothing can be more clearly established in point of law than that workmen are at liberty, while they are perfectly free from engagement, and have the option of entering into employ or not; nothing can be more clear than that they have a right to agree among themselves to say, "We will not go into any employ unless we can get a certain rate of wages." But I think it would be most dangerous if that proposition were carried at all wider than the terms in which I put it; that is to say, where workmen are perfectly free from engagement, having the option whether they will hire themselves or not, each man for himself may say, "I will go into no employ unless I can get a certain rate of wages," and all of them, if they choose, may say, "We will agree with one another that in our trade, as able-bodied workmen, we will not take employ unless the employers agree to give a certain rate of wages." But I think it would be most dangerous indeed if that rule of law, so in favour

injuring another. Masters may also combine to promote their mutual advantage.

A conspiracy to obstruct manufacturers in carrying on their business and to force them to consent to a certain scale of prices, and in pursuance thereof persuading the workmen to leave their employ, is illegal, though it be merely to gratify ill-will.

Unengaged workmen have a clear right to agree not to enter into any service unless they obtain a certain rate of wages; but they have no right to combine to induce men in employ to leave their service, in order to compel their masters to raise their wages.

(g) Ibid. p. 686, note (b). The summing up is given at length in 5 Cox C. C. 460, *et seq.*



of workmen protecting their own interests, were at all construed to extend to that which is charged in this indictment; that is to say, to suppose that workmen, who think that a certain rate of wages ought to be obtained, have a right to combine together to induce men, already in the employ of other masters (to leave their service), for the purpose of compelling those masters to raise their wages.' . . . 'I take it for granted that if a manufacturer has got a manufactory, and his capital embarked in it for the purpose of producing articles in that manufactory, if persons conspire together to take away all his workmen, that would necessarily be an obstruction to him; that would necessarily be a molesting of him in his manufactory; and that would certainly be a conspiracy for an unlawful purpose. (h) 'The workmen have a right to agree that none of those who make the agreement will go into employ unless they are to receive a certain rate of wages; but with respect to their fellow workmen, they have no right at all to agree to molest or intimidate or annoy other workmen in the same line of business, who refuse to enter into the agreement, and who choose to go and work for the employers at a lower rate of wages than that which the parties agree to rely on.' 'Let those without engagements agree to any terms they please, but they have no right to interfere with other workmen, who do not come into the agreement, and who are, of course, at liberty to go to any employers on any terms they choose.' (i)

Any combination to molest or obstruct workmen who are willing to work is illegal.

What are threats and intimidation within the 6 Geo. 4, c. 129, s. 3.

The prosecutor was a builder, and employed a large number of men. In 1859 there had been a strike of workmen in the building trade, and the prosecutor determined not to employ any men who declined to work under a certain declaration. In May 1860 the prosecutor had some men in his employ who were working under this declaration, and the defendant and two others brought a paper signed by himself and about thirty other workmen, which informed the prosecutor that 'unless the men, who are working under the declaration in his shop, are discharged, and we have a definite answer by dinner-time to that effect, we cease work immediately.' The defendant, in reply to questions put by the prosecutor, said they had no fault to find with him, his foremen or clerks, or with the wages the defendant received; but, being asked what he wanted, he said, 'You must discharge those two men who are working under the declaration, and if you do not we will leave work.' The prosecutor refused to be dictated to, and the defendant and all the men who had signed the paper left his employment; and it was held that the defendant was rightly convicted, under the 6 Geo. 4, c. 129, s. 3, of unlawfully by threats endeavouring to force the prosecutor to limit the description of his workmen. (j)

(h) *Reg. v. Duffield*, 5 Cox C. C. 494.

(i) *Per* Lill, J., *Id.* See *Hilton v. Eckstein*, 6 H. & B. 47, where there was much discussion as to rights of masters and workmen to combine to protect their interests; and Lord Campbell, C. J., after citing the dictum of Gross, J., in *Reg. v. Mawbey*, 6 T. R. 636, there said, 'I cannot bring myself to believe, without authority much more cogent, that if two workmen, who sincerely believe their

wages to be inadequate, should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence, or any illegal means for gaining their object, they would be guilty of a misdemeanor.'

(j) *Walsby v. Anley*, 3 Law T. 666, s. d. 1861. Cockburn, C. J., 'Every workman in the service of an employer is entitled to the full exercise of his discretion as to whether he will continue in

So where one Longman was a member of the United Boiler Makers and Iron Shipbuilders Society, and in the employ of Messrs. Kruger; and they had ordered one Norfolk, who was not a club-man, to work on boilers by bending angle iron, and he did so. Longman attended a meeting of the club, summoned 'to stop an encroachment,' and found the encroachment was 'Norfolk's working at the angle iron;' a resolution was passed that the men belonging to the society should not be allowed to work at Messrs. Kruger's if Norfolk was allowed to work at angle iron work. O'Neill, the chairman of the meeting, told Longman and others that, being club-men working in Kruger's yard, they would have to come out if Norfolk was not knocked off angle work. A deputation from the club waited on Messrs. Kruger, but produced no effect. Longman was then summoned to another meeting, at which a report of the deputation was made, and Longman was asked by O'Neill, from the chair, whether he intended to remain an honourable member, and leave the shop (Kruger's), or stay in the shop, and be despised by the club, and have his name sent round all over the country in the report, and be put to all sort of unpleasantness. Longman told O'Neill that, if there were anything to undergo, he would bear the consequences. He had further time granted him for consideration, but ultimately refused to leave his employment. It was held, chiefly on the authority of the preceding case, that O'Neill was guilty of having unlawfully, by threats and intimidation, endeavoured to force Longman to depart from his service. What was said would operate most formidably on the mind of a person who felt that he would be deprived of all the benefit he would otherwise obtain from the club, and be dismissed from it, and put to all sorts of unpleasantness. It was difficult to conceive what sort of threat could be intended to come within the meaning of the Act, short of personal violence, if this were not such a threat. (k)

The 22 Vict. c. 34, (l) recites that 'different decisions have been given on the construction of the 6 Geo. 4, c. 129;' and then enacts that 'no workman or other person, whether actually in employment or not, shall, by reason merely of his entering into an

Agreements in certain cases not to be deemed 'molestation'

that employment, so long as he is not bound by any contract, and to give his employer the alternative of either losing his services, or discharging obnoxious persons with whom he might not choose to work; and more than that, several men, who might consider other workmen as obnoxious, have a perfect right to put the same alternative to their employer. But if the men go farther than that, and seek to coerce the master by the threat of what is likely to operate to his injury, that comes within the meaning of the Act. In the present case, it was not one man who went to the employer, but several, who adopted the same course; not with the view of giving him an opportunity of exercising his discretion, but, by threatening to leave his employ, to compel and coerce him to discharge the obnoxious persons.' Crompton, J., 'My opinion is, that a number cannot combine together to do what would tend to the mischief of

another person. One man may go and say, "I will not work for you unless you turn away such and such persons;" but a number could not do that, as it would amount to a threat that they would do an illegal act.' Hill, J., 'The word "threat" in the Act must be construed with those which precede and follow. It may be a threat to do an illegal act; and the question is, whether the act threatened to be done is an illegal act. A man has a perfect right to go to an employer, and say all that was said in this case, or several might do it; but if they acted in combination, not honestly and independently, but for the purpose of coercing the master, they are guilty of a conspiracy at common law. The combination, and the attempt to carry it out, were illegal.'

(k) O'Neill v. Longman, 9 Cox C. C. 360, A.D. 1863. 4 B. & S. 376. O'Neill v. Kruger, 4 B. & S. 389.

(l) Passed the 19th of April, 1859.

or 'obstruction,' within the meaning of the recited Act.

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Of the prosecution and proceedings in conspiracy. More than one person must have conspired.

A verdict finding two not guilty and that the third conspired with one of the others, but with which the jury could not say.

agreement with any workman or workmen, or other person or persons, for the purpose of fixing or endeavouring to fix the rate of wages or remuneration at which they or any of them shall work, or by reason merely of his endeavouring peaceably, and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work in order to obtain the rate of wages or the altered hours of labour so fixed or agreed upon or to be agreed upon, shall be deemed or taken to be guilty of "molestation" or "obstruction," within the meaning of the said Act, and shall not therefore be subject or liable to any prosecution or indictment for conspiracy: provided always, that nothing herein contained shall authorize any workman to break or depart from any contract, or authorize any attempt to induce any workman to break or depart from any contract.'

We have seen that from the nature of conspiracy it is an offence which cannot be charged as having been committed by one person only. (*m*) And upon this ground it has been holden that no prosecution for a conspiracy can be maintained against a husband and wife only, because they are esteemed but one person in law, and presumed to have but one will. (*n*) But husband, wife, and another may be convicted of a conspiracy. (*o*) So if all the defendants who are prosecuted for a conspiracy be acquitted but one, and the conspiracy be not stated as having been had with persons unknown, the acquittal of the rest is the acquittal of that one also. (*p*) But if two persons be indicted for a conspiracy, and one only of them appear and take his trial, he may be found guilty, though the other defendant be absent, and has not pleaded; (*q*) and this, although the other conspirator named in the indictment was dead before the indictment was preferred, (*r*) or after pleading not guilty. (*s*)

All the counts of an indictment alleged that Thompson, Tillotson, and Maddock conspired, &c., 'with divers other persons to the jurors aforesaid unknown;' the jury stated their opinion, upon the evidence, to be that Thompson had conspired with either Tillotson or Maddock, but that they did not know with which. No evidence was given of participation by any other party; and thereon the judge directed a verdict of not guilty, as to Tillotson and Maddock, and a verdict of guilty as to Thompson; and it was held that as Tillotson and Maddock had been acquitted, the verdict could not be supported against Thompson. (*t*)

(*m*) *Ante*, p. 116.

(*n*) 1 Hawk. P. C. c. 72, s. 8.

(*o*) *Reg. v. Whitehouse*, 6 Cox C. C. 38, Platt, B.

(*p*) 1 Hawk. P. C. c. 72, s. 8. 3 Chit. Crim. L. 1141.

(*q*) *Rex v. Kimmsley*, 1 Str. 193.

(*r*) *Rex v. Nicholls*, 2 Str. 1227. But see the case better reported in 13 East, 412, in the notes.

(*s*) *Reg. v. Kennick*, 5 Q. B. 49.

(*t*) *Reg. v. Thompson*, 16 Q. B. 832. Erle, J., *dissentiente*. Lord Campbell, C. J., Patteson, J., and Coleridge, J., rested the decision on the ground that

'other persons' must mean persons other than Tillotson and Maddock; and that the acquittal of those defendants, therefore, must have the same effect as if Thompson, Tillotson, and Maddock had alone been charged with the conspiracy; in which case it was clear Thompson must have been acquitted: and Patteson, J., said, 'I cannot see how Thompson can be convicted of conspiring with persons unknown; upon the evidence he conspired, if at all, with Tillotson or Maddock.' Erle, J., was of opinion that, 'according to the rules of pleading, this charge, as to each individual,



Where to an indictment against four for a conspiracy, two pleaded not guilty; one pleaded in abatement, to which plea there was a demurrer; and the fourth never appeared; and before the argument of the demurrer the record was taken down for trial, and one of the defendants who had pleaded not guilty acquitted,

Judgment passed on one defendant before the trial of another defendant.

must be construed as if he were charged solely, and it follows that the acquittal of the two becomes immaterial; and the verdict may be found in any terms comprised in the indictment. The finding may be that Thompson conspired with Tillotson, or with Maddock, or with other persons unknown; and so there may be similar findings as to the others. Therefore if any one be found guilty, the verdict must stand as against him; the judge must take the opinion of the jury as to each, whatever be the finding as to the others. "Are you of opinion that Thompson conspired with Tillotson?" "No." "With Maddock?" "No. But we are satisfied that he conspired with some one; we do not know whom." The conspiracy, then, cannot be truly predicated of either Tillotson or Maddock, because the jury do not know which of these two was the conspirator; they do, however, know that one of them was; so that against Thompson, the verdict should be that he conspired with some one, it is not known with whom.' This decision deserves reconsideration. It is a fallacy to suppose that the expression 'a person to the jurors unknown,' means a person absolutely unknown: it merely means any person whose identity is not sufficiently proved to the satisfaction of the jury; and it cannot be doubted that if Thompson had been charged with conspiring with a person to the jurors unknown, a verdict of guilty ought to have been entered on this finding of the jury. Suppose a count for stealing the coat of A., another the coat of C., and a third of a person unknown, the jury find that the coat belongs to A. or B., but they cannot say which, this is a verdict of guilty on the third count. This indictment was in the form which has been in use for ages in conspiracy and riot, and was originally introduced, and has always been used, for the very purpose of avoiding an acquittal where the evidence might fail to satisfy the jury that any of the persons named were parties to the offence. In *Rex v. Sudbury*, 1 Lord Raym. 484, where two out of four persons charged with a riot had been acquitted, Lord Holt, C.J., said, 'If the indictment had been that the defendants, with divers other disturbers of the peace, &c., had committed this riot and battery, and the verdict had been as in this case, the King might have had judgment.' In *Rex v. Kinnersley*, 1 Str. 193, at p. 195, *Reg. v. Herne* is cited. There the indictment alleged that Herne with A., *et multis aliis*, did conspire to accuse a man of an offence; the grand

jury ignored the bill as to A., but found it as to Herne, who was convicted; and it was moved in arrest of judgment, that there being an *ignoramus* as to A., Herne could not be guilty of conspiring with him; but the whole court held that it was sufficient, it being found that he, *cum multis aliis*, did conspire, and that it might have been laid so at first. See also *Rex v. Scott*, 3 Burr. R. 1262. It is quite an error to suppose that the word 'other,' as used in indictments, means 'different from.' It is a mere word of form, used like 'further' and 'afterwards.' See *Reg. v. Downing*, 1 Den. C. C. 52. If the indictment had contained three counts, the first alleging a conspiracy between Thompson and Tillotson, the second between Thompson and Maddock, and the third between Thompson and divers other persons to the jurors unknown, and the facts had been as in this case, the verdict must have been not guilty on the first two counts, and guilty on the third; and yet each count in this indictment was in point of law exactly the same as such three counts.

The authorities seem to show, that if several persons are indicted for a riot or a conspiracy, and the jury acquit all except two in riot and one in conspiracy, the latter must also be acquitted. It is very confidently submitted that these authorities rest on a fallacy, viz. that because some are acquitted, therefore the others could not have been guilty of the offence together with those that are acquitted. The acquittal of A. necessarily amounts to no more than that A. was not proved to be guilty. Suppose A. and B. are indicted for a conspiracy, and A. has made a written confession that he did conspire with B., and B. with him, but the evidence fails as against B., is A. to be acquitted? Suppose, in such a case, A. had pleaded guilty, is his plea to be set aside because B. for want of evidence is acquitted? This shows that in fact one may be guilty, though the rest are acquitted, and that the doctrine in question rests on an entire fallacy. Again, it is conceived that a still more fatal objection to the doctrine exists. It is apprehended that the acquittal of B. can in no case be admissible in evidence for A. It is obvious that the conviction of A. would not be evidence against B. And the rule is, that 'no record of a conviction or verdict can be given in evidence, but such whereof the benefit may be mutual.' *Rex v. The Warden of the Fleet*, Holt, 133; and see other cases, 2 Phill. Evid. c. 1, s. 1.

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and the other found guilty of conspiracy with him who had pleaded in abatement; and the demurrer was afterwards argued, and judgment of *respondent ouster* given, whereupon a plea of not guilty was pleaded; the Court of King's Bench held that judgment might be pronounced upon the one that had been found guilty before the trial of the other defendant; for although it was possible that such defendant might be acquitted, yet the court were not warranted in coming to the conclusion that that would be so against the verdict that had been found, or in forbearing to pronounce judgment upon the defendant who had been found guilty. (v) So where three prisoners were indicted in Ireland for the capital offence of conspiring to murder, and, having refused to join in their challenges, one of them was tried alone and convicted; it was held, on a case reserved, that he had been properly tried and convicted, and that there was no ground for respiting or arresting the judgment. (v)

Where it is sufficient to state the conspiring.

Gill's case.

Kemrick's case.

Gompertz's case.

Sydesell's case.

With respect to the statement of the charge in the indictment it may be observed, that though it is usual to state the conspiracy, and then show that in pursuance of it certain overt acts were done, it is sufficient to state the conspiring alone. (w) And it is not necessary to state the means by which the object was to be effected, as the conspiracy may be complete before the means to be used are taken into consideration. Therefore an indictment for conspiring by divers false pretences and subtle means and devices to get money from J. S., and cheat him thereof, is not objectionable on the ground that it is too general, or does not sufficiently show the *corpus delicti*, or specify any overt act. (x) So a count alleging that the defendants 'unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together by divers false pretences and subtle means and devices to obtain and acquire to themselves from one G. W. F. divers large sums of money of the monies of the said G. W. F., and to cheat and defraud him thereof,' has been held good. (y) So where a count alleged that the defendants unlawfully, falsely, fraudulently, and deceitfully did conspire, combine, confederate, and agree together, by divers false pretences and indirect means, to cheat and defraud the prosecutor of his monies, the Court of Queen's Bench held that this count was good, on the authority of *Rex v. Gill*, (z) which was founded on excellent reason. (a) So where a count alleged that the defendants 'unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud' the prosecutor 'of his goods and chattels;' upon error in the Exchequer Chamber it was held that this case

(v) *Rex v. Cooke*, 5 B. & C. 538. 7 D. & R. 673. Littledale, J., said, 'If the other defendant shall hereafter be acquitted, perhaps this judgment may be reversed.' *See quare* for such acquittal would not necessarily show that the verdict of guilty on the former trial was wrong, as witnesses might be dead or absent who were examined on the former trial or the one defendant might have been convicted on his own confession, which would not be admissible against the other

defendant. C. S. G.

(w) *Reg. v. Ahearne*, 6 Cox, 6.

(x) *Reg. v. Best*, 2 Lord Raym. 1167. 1 Saik. 174. 3 Chit. Crim. L. 1143. The Poulterers' Case, 9 Rep. 55. *Rex v. Kimberty*, 1 Lev. 62. *Rex v. Sterling*, 1 Lev. 125.

(y) *Reg. v. Gill*, 2 B. & A. 204. See note (l), *post*, p. 149.

(z) *Reg. v. Kemrick*, 5 Q. B. 49.

(a) *Supra*.

(b) *Reg. v. Gompertz*, 9 Q. B. 824.

was not distinguishable from *Rex v. Gill*, (b) and that the count was good. (c) But this is only the case where the conspiracy is to commit some offence, and if it be not to commit some offence, the indictment must show some illegal act done in pursuance of the conspiracy, or it is insufficient. (d)

Where the overt acts must be stated

A count alleged that C. C. died possessed of certain East India stock, and that the defendants conspired, &c., by divers false, fraudulent, and unlawful ways, means, and contrivances, and by false pretences and false swearing, unlawfully, &c., to obtain the means and power to and for S. P. of transferring and disposing of the said stock; and that in pursuance of the said conspiracy the defendants afterwards caused a certain false deposition, purporting to have been made on oath by S. P. as one of the lawful children of the said C. C., wherein S. P. falsely stated that the widow of the said S. P. died without having taken upon her letters of administration of his goods, to be exhibited in the Prerogative Court of Canterbury; and did then fraudulently procure letters of administration to be issued of the goods of C. C. to S. P., as one of the lawful children of C. C. After alleging two other overt acts of a similar kind, the count alleged that the defendants presented such letters of administration to the East India Company, and did, by such false ways, &c., false pretences and false swearing, fraudulently obtain the means and power to and for S. P. of transferring and disposing of the said stock; and that S. P. did transfer and dispose of the said stock, &c., with intent to defraud the widow of C. C. It was objected, 1st, that the conspiracy as alleged did not amount to any offence, as no legal meaning could be ascribed to obtaining 'the means and power' of doing an act. 2nd, that the person intended to be defrauded ought to have been shown with more certainty. 3rd, that it ought to have been stated to whom the stock belonged. But the court held that the statement of the means used for effecting the object of the conspiracy were so interwoven with the charge of conspiracy as to show on the face of the count an unlawful conspiracy. But if that were not so, the overt acts showed an indictable misdemeanor. (e)

A conspiracy to obtain the means and power of transferring stock.

It need not be averred in the indictment that the prosecutor was innocent of the crime imputed to him by the conspirators. (f) And in a case of a conspiracy to charge a person with being the father of a bastard child, it was holden not to be necessary to aver that the prosecutor was not the father, especially when the words of the indictment were 'did *falsely* conspire *falsely* to charge, &c. ;' the principle being that innocence must be intended till the

Indictment need not allege that the prosecutor is innocent.

(b) *Supra*.

(c) *Sydserriff v. Reg.* 11 Q. B. 245.

(d) *Rex v. Seward*, 1 A. & E. 706.

(e) *Wright v. Reg.* 14 Q. B. 148. This judgment was affirmed on error, *ibid.* 180, on the authority of *Sydserriff v. Reg.* *supra*. The indictment contained several other counts, varying the intent to defraud, and omitting some of the overt acts. The seventh count alleged that H. M. C. was entitled to the stock, and that the defendants conspired by false, &c., and unlawful ways and means, and by false pretences

unlawfully to obtain the means and power to and for S. P. of transferring and disposing of the said stock. The eleventh count stated that the defendants unlawfully conspired by false, &c., and unlawful pretences, &c., to obtain and get into their possession of and from one S. B. divers large sums of money with intent to defraud S. B. The Court of Queen's Bench arrested the judgment on these counts.

(f) *Rex v. Kimmersley*, 1 Str. 193.



contrary appears. (*g*) And it should seem that even without those words the indictment would be sufficient, and need not state that the charge was false, nor that the child was likely to become chargeable, &c. (*h*) And an indictment for a conspiracy was holden to be good, although it was not alleged *in the charge itself* that the defendants conspired *falsely* to indict the prosecutor, and although it did not appear of what *particular crime or offence* they conspired to indict him, but only in *general* that the defendants did wickedly and maliciously conspire to indict and prosecute the prosecutor for a crime or offence liable to be capitally punished by the laws of this kingdom. (*i*) The conspiracy is the gist of the charge alleged in such an indictment.

Not necessary  
to state that  
the defendants  
knew, &c.

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Where the defendants were indicted for conspiring to pervert the course of justice by producing in evidence a false certificate of a justice of peace, it was holden not to be necessary to set forth in the indictment that the defendants knew at the time of the conspiracy that the contents of the certificate were false, on the ground that if persons with intent to obstruct the course of justice conspire to state a fact at all events as true, which they do not know to be true, it is criminal; and that the defendants were bound to have known that the fact was true which they agreed to certify as such. (*j*)

Not necessary  
to state the  
means by  
which the  
conspiracy  
was effected,  
where the  
thing intended  
is illegal.  
*Secus*, where  
it is legal.

Where the act is in itself illegal, it is not necessary to state the means by which the conspiracy was effected. Thus, where the indictment charged that the defendants conspired together by indirect means to prevent one H. B. from exercising the trade of a tailor, and it was contended that it should have stated the fact on which the conspiracy was founded, the means used for the purpose; Lord Mansfield, C. J., said, 'The conspiracy is stated and its object; it is not necessary that any means should be stated;' and Buller, J., said, 'If there be any objection it is that the indictment states too much; it would have been good certainly if it had not added "by indirect means," and that will not make it bad.' (*k*) And where the indictment charged that the defendants conspired, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof; it was holden that the gist of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and not necessary to set out the specific

(*g*) *Rex v. Best*, 1 Salk. 174. 2 Lord Raym. 1167.

(*h*) 2 Lord Raym. 1167.

(*i*) *Rex v. Spragg*, 2 Burr. 993. In *Reg. v. King*, 7 Q. B. 782. Tindal, C. J., said of this case, 'The point decided in that case appears to have been merely this, that, in an indictment for a conspiracy, though the conspiracy be insufficiently charged, yet if the rest of the indictment contains a good charge of a misdemeanor, the indictment is good. Lord Mansfield distinguishes between the allegation of the unexecuted conspiracy to prefer an indictment, as to the sufficiency of which he gave no opinion, and that of the actual preferring of the indictment maliciously and without probable

cause, which he calls a completed conspiracy actually carried into execution; and this he holds to be clearly sufficient; and no doubt it was so; for, rejecting the averment of the unexecuted conspiracy, the indictment undoubtedly contained a complete description of a common law misdemeanor.'

(*j*) *Rex v. Mawbey*, 6 T. R. 619. *Ante*, p. 119. Lawrence, J., said that it was not unlike the case of perjury where a man swears to a particular fact without knowing at the time whether the fact be true or false; which is as much perjury as if he knew the fact to be false, and equally indictable. *Ante*, p. 2.

(*k*) Eccles's case in note (*d*) to *Rex v. Turner*, 13 East 230. *Ante*, p. 131.

pretences. Bayley, J., said, that when parties had once agreed to cheat a particular person of his monies, although they might not then have fixed on any means for that purpose, the offence of conspiracy was complete. (l) But where the act only becomes illegal from the means used to effect it, the illegality of it should be explained by proper statements, as in the cases which have been cited of conspiracies to marry paupers. (m)

Where an indictment charged the defendants with conspiring 'to defraud J. W. of divers goods, and in pursuance of that conspiracy defrauding him of divers goods, to wit, of the value of £100;' the Court of King's Bench refused to quash the indictment on motion; for although if this had been an indictment for stealing the prosecutor's goods, it would have been bad for uncertainty, yet in this case the gist of the indictment was the conspiracy, and it might be that there was so much uncertainty in the transaction, which was the subject of the indictment, that the allegation could not be made with greater certainty, as the conspiracy might be to defraud the prosecutor, not of any particular goods, but of any goods the prisoner could get hold of. (n)

Conspiring to defraud J. W. of divers goods.

And so where an indictment stated that the defendants conspired by false rumours to raise the funds, with 'intention thereby to injure and aggrieve all the subjects of the King who should on the 21st of February purchase or buy' any shares in the funds; and it was objected that the persons to be affected by the conspiracy were not particularised, as they ought to be, it was held that the indictment was good; for it followed from the nature of the charge that the persons could not be named, because this was a charge of a conspiracy on a previous day to raise the funds on a future day, so that it was uncertain who would be the purchasers; and the offence being to raise the funds on a future day, its object was to injure all those who should become purchasers on that day, and not some individuals in particular. (o)

[693] Indictment for conspiring to injure all who should purchase shares in the funds.

So where the first count of an indictment stated that the defendants conspired to defraud 'divers of Her Majesty's liege subjects, who should bargain with the defendants for the sale of goods and merchandise of the said subjects' of great value, without making payment or other remuneration or satisfaction for the same, with intent to acquire to the said defendants divers sums of money and other profit and emolument; it was held that it was no valid objection that the count did not state what particular creditors the defendants meant to defraud; for if the offence went no further than the conspiracy, it could not be known what particular persons fell into the snare. But it was further held that the count was defective in not stating with sufficient particularity what the defendants conspired to do. For obtaining goods without making payment was not necessarily a fraud, as the words of the in-

Indictment for conspiring to obtain goods without making payment for them.

(l) *Rex v. Gill*, 2 B. & A. 204. In *Reg. v. Parker*, 3 Q. B. 292, 11 Law, J., N. S. 102, Mag. C., Williams, J., said, 'It has been always thought that in *Rex v. Gill* the extreme of laxity was allowed.'

(m) *Ante*, p. 124. See also *Rex v. Seward*, *ante*, p. 125.

(n) *Anonymous*, 1 Chitty Rep. 698. In *Reg. v. Parker*, *supra*, it was said that the objection in this case was that the particular goods were not specified, and probably only so much as showed that was stated in the report.

(o) *Rex v. De Berenger*, 3 M. & S. 68, *ante*, p. 123.

dictment might apply to the obtaining goods to sell on commission. (*p*)

Indictment for conspiring to obtain goods by a fraudulent deed.

The second count in the same indictment alleged that the defendants being 'indebted to divers persons in large sums of money,' conspired to defraud the said creditors of the defendants of payment of their said debts, and in pursuance of the said conspiracy unlawfully did execute a certain false and fraudulent deed of bargain and sale and assignment of certain fixtures, stock in trade, and goodwill, of great value, belonging to the said defendants, from two of themselves to the third, for divers false and fraudulent considerations, with intent thereby to procure to the said defendants divers sums of money and other emoluments; and it was held that this count was bad for the same reasons as the first: it did not state in what respect the deed was false and fraudulent, and therefore the court had only the prosecutor's general opinion upon this point, not the facts on which it was founded. (*q*)

Indictment for conspiring to defraud of the fruits of a verdict too general.

Where an indictment alleged that an issue in an action between H. B. and G. C. was tried, and that the plaintiff recovered a verdict for the sum of £17, and that the judge certified that execution ought to issue forthwith, and that the defendants 'did conspire falsely and fraudulently to cheat and defraud the said H. B. of the fruits and advantages of the said verdict and certificate:' Lord Denman, C. J., held that the indictment was bad, as the allegation was too general, and did not convey any specific idea which the mind could lay hold of, to judge whether any unlawful act had been done or attempted. The terms used did not import in what manner the plaintiff was to be deprived of the fruits and advantages of his verdict, and it was not even alleged that the verdict would lead to any fruits and advantages. (*r*)

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Too general counts.

So where a count alleged that the defendants conspired 'by divers false, artful, and subtle stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve, and impoverish E. W. and T. W., and to cheat and defraud them of their monies;' the Court of King's Bench arrested the judgment on the ground that this count was in too general a form to be supported. (*s*) So where a count charged that the defendants did 'conspire to cheat and defraud the just and lawful creditors' of F.; Lord Tentenden, C. J., thought that the count was much too general, as it did not state what was intended to be done, or the persons to be defrauded, but refused to stop the case on this point, as, if an acquittal were directed, and the count should turn out to be good, the defendants might plead *autrefois acquit*. (*t*)

(*p*) Reg. v. Peck, 9 A. & E. 686. 1 P. & D. 508.

(*q*) Reg. v. Peck, *supra*.

(*r*) Reg. v. Richardson, 1 M. & Rob. 402.

(*s*) Reg. v. Biers, 1 A. & E. 377. In *Sydesell v. Reg.* 11 Q. B. 245, *ante*, p. 147, Wilde, C. J., in delivering the judgment of the Court of Exchequer Chamber, observed, 'Upon referring to the judgment in *Reg. v. Biers*, there seem strong reason to doubt whether it did not go wholly on the one objection to the special counts.

Neither *Reg. v. Gill*, nor any other authority at all bearing upon the point decided by it, was referred to in that judgment; and it appears distinctly, from *Reg. v. Gompertz*, 9 Q. B. 824, that *Reg. v. Biers* has never been considered by the Queen's Bench as overruling *Reg. v. Gill*. It may therefore be questioned, whether the Court of Exchequer Chamber did not think the count in *Reg. v. Biers*, which is set out in the text, to be good.

(*t*) *Reg. v. Fowle*, 4 C. & P. 592. The defendants were acquitted.



An indictment for a conspiracy to obtain goods, which states that the goods were obtained, must state whose property the goods were, or it will be insufficient. The first count alleged that the defendants, intending to cheat and defraud divers of the liege subjects of the Queen of their goods, &c., unlawfully conspired by divers false pretences to obtain from divers of the liege subjects, &c., then carrying on business in the city of London, to wit, T. Tam and D. Law, warehousemen and copartners, and E. Fennell and R. Fennell, cotton yarn manufacturers and copartners, &c., divers goods and merchandise of great value, to wit, &c., and to cheat and defraud the said liege subjects of the said goods and merchandise. The count then set out several overt acts as to the obtaining goods from the parties above named respectively, and concluded by averring that the defendants did by the means aforesaid obtain from the said T. Tam and D. Law, and E. Fennell and R. Fennell, &c., the goods and merchandise aforesaid, and did cheat and defraud them thereof. The second count was similar, but omitted to state the overt acts. The third count stated the conspiracy to be to cause it to be believed that one of the defendants, who was then an uncertificated bankrupt, was not B. P., but J. P., and that he carried on an extensive shipping business, and was a man of large property, and had a large capital in the business, and by means of the said belief to obtain from divers liege subjects (not naming them) divers goods, wares, and merchandise, and to cheat and defraud the said liege subjects of the said goods, &c. The fourth count charged that the defendants unlawfully combined by divers false pretences to obtain from divers liege subjects (not naming them) divers other goods and merchandise of great value, and to cheat and defraud the said liege subjects of the said goods, &c. The defendants having been convicted, a rule was obtained to arrest the judgment for the insufficiency of the indictment in not stating that the goods, &c., which the defendants were charged with conspiring to obtain, were the property of any person, it being consistent with the statement that they were the goods, &c., of the defendants themselves; and the Court of Queen's Bench held that the indictment was bad for not stating to whom the goods belonged. That where the object charged was a conspiracy to obtain from certain persons named divers goods, and to cheat and defraud them of the same, and they were obtained, and the parties defrauded, no precedent was to be found to show that an indictment was good which omitted to state whose the goods were. The first count, therefore, was imperfect, and the objection applied more strongly to the fourth count, where the language was still more general. The conspiracy charged was to obtain divers goods and to cheat and defraud certain persons named, not with intent to cheat and defraud them of the same, though perhaps that would have made no difference, and as there was no statement to whom the goods belonged, the charge did not, of necessity, import any offence, as it was consistent with an attempt by the defendants to obtain by some means their own goods unlawfully detained from them; and to hold that the use of the words 'to cheat and defraud' necessarily implied that the goods belonged to the parties

An indictment for conspiring to obtain goods and obtaining them held bad for not stating whose property the goods were

who were stated to be defrauded, would be letting in a generality, which was not shown ever to be allowed. (*u*)

A count for conspiring to cause goods, which had been imported, to be delivered without payment of part of the duty, need not describe the goods.

A count alleged that the defendants did unlawfully combine, conspire, confederate, and agree together to cause and procure certain goods, wares, and merchandises, which had been and were theretofore imported into the port of London from parts beyond the seas, and in respect whereof certain duties of customs were due and payable to the Queen, to be taken away from the said port and delivered to the respective owners thereof without payment to the Queen of a great part of the duties of customs so due and payable thereon as aforesaid, with intent to defraud the Queen in her revenue of the customs; it was objected in arrest of judgment that the count was insufficient, because no description of the goods was given, by which the court could judge whether the goods were liable to duty. But the Court of Queen's Bench held that it was not necessary to specify the goods. It was matter of evidence what the goods were to which the conspiracy related; the parties might have conspired without knowing what they were; they might have laid their heads together to cheat the Queen of whatever customable goods they could pass. (*v*)

A count, which charges a conspiracy to cheat certain liege sub-

A count alleged that W. H. King, E. A. Birch, and A. D. Phillips, did unlawfully combine, conspire, confederate, and agree together to cheat and defraud certain liege subjects of our Lady the Queen, being tradesmen, of divers large quantities of their

(*u*) Reg. *v.* Parker, 3 Q. B. 292. 11 Law, J., N. S. Mag. C. 102. See Reg. *v.* Bullock, Dears. C. C. 653. S. P. Although there appears at first sight to be some little discrepancy in the cases upon this point, perhaps they are not irreconcilable. The correct distinction to be drawn from them appears to be this, that where there has been merely a conspiracy for a particular purpose (*e. g.* to raise the funds), and such conspiracy has not been carried into execution, an indictment in general terms will be sufficient; but where there has not only been a conspiracy, but such conspiracy has been carried into effect, there the indictment ought to specify precisely what has been effected, as the parties injured, the property obtained, and to whom it belonged. The reason of such a distinction is that in the one case it is impracticable to state with minuteness what never was carried beyond the intention, whereas in the other case what was actually effected may easily be stated. The case may be compared to the cases of burglary with intent to steal, and burglary accompanied by an actual stealing; in the former it is sufficient to state that the prisoner broke and entered the house with intent to steal the goods (without describing them) of one A. B.; and in the latter the goods stolen must be particularised. So where a conspiracy has been detected before it is carried into execution so far as to ascertain the parties intended to be injured by it, an indictment would be good without naming such parties. Rex *v.* De Berenger, *ante*, p. 149. But where

the conspiracy had proceeded so far as to fix the parties intended to be injured, such parties should be expressly named, and if the object was to defraud them of *their* goods, or their goods had been actually obtained thereby, the indictment should state in the one case the intent to defraud them of *their* goods, and in the other that they were defrauded of *their* goods. This position has been fully borne out by Reg. *v.* King, *infra*. It may, perhaps, admit of some doubt whether the possibility of the goods belonging to the defendants in the principal case necessarily rendered the indictment bad; for as a party may be guilty of larceny in stealing his own goods, *ante*, vol. 2, p. 283, there seems no reason why parties who conspired to obtain their own goods from another, and thereby to cheat and defraud him, under such circumstances as did not amount to larceny, should not be indictable for a conspiracy. The better ground to rest the decision upon would seem to be that the indictment did not adopt such a degree of particularity as the facts enabled the prosecutor to do, and the rules of criminal pleading require to be adopted where it is practicable. C. S. G.

(*v*) Reg. *v.* Blake, 6 Q. B. 126. This decision was before Reg. *v.* King, *post*, and all the reasoning in the judgment of the Exchequer Chamber tends to show that this decision was wrong, as the goods had been imported and clearly ascertained. The terms 'a great part of the duties of customs' seem very objectionable.

goods and chattels: and that E. A. Birch, in pursuance of the said conspiracy, did fraudulently order and obtain upon credit from W. A. W. and C. W. divers goods and chattels belonging to the said W. A. W. and C. W.; from F. B. and W. J., divers goods and chattels belonging to the said F. B. and W. J.; and from divers other tradesmen whose names are to the jurors unknown, divers other goods and chattels belonging to the said last mentioned persons; and that E. A. Birch, 'in further pursuance of the said conspiracy,' and in order that the said goods might be taken in execution as hereinafter mentioned, did order the said goods to be delivered at her house; and that the said goods were so delivered, and no payment made for the said goods by any of the defendants at any time; and that, 'in further pursuance of the said conspiracy,' the said E. A. Birch did procure the said goods to remain in her house until they were taken in execution as hereinafter mentioned; and that the defendants, 'in further pursuance of the said conspiracy,' did falsely and fraudulently pretend that certain debts were due from the said E. A. B. to the said W. H. K. and A. D. P. respectively, and that the said W. H. K. and A. D. P., 'in further pursuance of the said conspiracy, and in order to obtain payment of such false and fictitious debts,' did commence by collusion with the said E. A. Birch separate actions against the said E. A. Birch. And that afterwards, 'in further pursuance of the said conspiracy,' judgments were collusively signed by the said W. A. K. and A. D. P. in each of the said actions for want of a plea. And that afterwards, 'in further pursuance of the said conspiracy,' writs of *fiery facias* were collusively sued out upon the said judgments; by virtue of which writs the said goods were, before the expiration of the said respective times of credit, taken in execution and sold in due course of law to satisfy the fictitious debts falsely and fraudulently alleged to be due from the said E. A. Birch. And so the jurors aforesaid find that the defendants, in manner and by the means aforesaid, unlawfully did cheat and defraud the said W. A. W. and C. W., F. B. and W. J., &c., of their said goods. The defendants were convicted, and the Court of Queen's Bench held the count good; but the judgment was reversed in the Exchequer Chamber; and Tindal, C. J., in delivering the judgment of the court, said, 'The charge is that the defendants conspired to cheat and defraud *divers* liege subjects, being tradesmen, of their goods, &c.; and the objection is that these persons should have been designated by their christian and surnames, or an excuse given, such as that their names are to the jurors unknown; because this allegation imports that the intention of the conspirators was to cheat certain definite individuals, who must always be described by name, or a reason given why they are not; and if the conspiracy was to cheat indefinite individuals, as for instance those whom they should afterwards deal with, or afterwards fix upon, it ought to have been described in appropriate terms, showing that the objects of the conspiracy were, at the time of making it, unascertained, as was in fact done in the cases of *Rex v. De Berenger*, (w) and *Regina v. Peck*; (x) and it was argued that if, on

jects of their goods, is bad, as it neither states their names or gives an excuse for not doing so; and it is not aided by a statement of overt acts, which neither in themselves, nor in connection with the statement of the conspiracy, amount to an indictable offence.

(w) 3 M. & S. 67, *ante*, p. 149.(x) 9 A. & E. 686, *ante*, p. 150.



the trial of this indictment, it had appeared that the intention was not to cheat certain definite individuals, but such as the conspirators should afterwards trade with or select, they would have been entitled to an acquittal; and we all agree in this view of the case, and think that the reasons assigned against the validity of this part of the indictment are correct. But then it was urged on the part of the crown that this defect in the allegation of the conspiracy was cured by referring to the whole of the indictment, the part stating the overt acts as well as that stating the conspiracy: and *Rex v. Spragg (g)* was cited as an authority that the whole ought to be read together. But if we examine the allegations in this indictment, there is no sufficient description of any act done after the conspiracy which amounts to a misdemeanor at common law. None of the overt acts are shown by proper averments to be indictable. The obtaining goods, for instance, from certain named individuals upon credit, without any averment of the use of false tokens, is not an indictable misdemeanor; and if it is said that because it is averred to have been done in pursuance of the conspiracy before mentioned, it must be taken to be equivalent to an averment that the conspiracy was to cheat the named individuals of their goods, the answer is, first, that it does not necessarily follow, because the goods were obtained in pursuance of the conspiracy to cheat some persons, that the conspiracy was to cheat the persons from whom the goods were obtained; they might have been obtained from A. in the execution of an ulterior purpose to cheat B. of his goods. And secondly, if the averment is to be taken to be equivalent to one that the goods were obtained from the named individuals in pursuance of an illegal conspiracy to cheat and defraud those named individuals of their goods, it would still be defective, as not containing a *direct and positive averment* that the defendants did conspire to cheat and defraud those persons, which an indictment for a conspiracy, where the conspiracy is itself the crime, ought certainly to contain. The other allegations of what are termed overt acts are open to the same objection. In none is there a complete description of a common law misdemeanor independently of the conspiracy; and the allegation of the conspiracy is insufficient, and not direct and positive. For these reasons the judgment must be reversed. (z)

A count which properly alleges the conspiracy is good, though it may insufficiently allege an overt act.

Where a count charged that Lewis carried on the business of a dyer, and had divers vats and quantities of dye for the carrying on the business, and that the defendants were employed by Lewis as his servants in the management of his business, and that it was their duty as such servants to employ the vats and dye of Lewis for his benefit and for dyeing such materials as might belong to themselves or be intrusted to them by Lewis for those purposes, and for no other purposes and on no other materials; and that the

(g) 2 Burr, 993. See *ante*, p. 148, note (s), for the remarks on this case.

(z) *Reg. v. King*, 7 Q. B. 782. In the argument in the Court of Queen's Bench in this case it was also objected that the conspiracy ought to have been laid to de-

fraud divers tradesmen of their goods '*respectively*,' but the court held that this was not necessary, and this point does not appear to have been raised in the Exchequer Chamber.

defendants unlawfully conspired, fraudulently and without the consent of Lewis, to employ the vats and dye in dyeing materials not belonging to themselves and not intrusted to them by Lewis, and to obtain thereby to themselves large profits, and to deprive Lewis of the use and benefit of the said vats and dye; and that the defendants, in pursuance of the said conspiracy, wilfully and without the consent of Lewis, received into their possession divers large quantities of materials, and wilfully and without the consent of Lewis, at his expense and with his said vats and dye, dyed the said materials for their own profit and benefit; it was objected that the count did not show that the goods which the defendants dyed were not their own, and that it appeared by the record that they had permission to dye their own goods; but the Court of Queen's Bench held that the count was good; it was clear that the essential part of the count was the charge of a conspiracy; so that if the evidence proved the conspiracy and did not prove the overt acts alleged, viz. that the conspiracy was carried into effect, the count would have been sufficiently proved. (a)

The first count alleged that the defendants, intending to create discontent and disaffection amongst the subjects of the Queen, and to excite the said subjects to hatred of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to create discontent and disaffection amongst the subjects of the Queen, and to excite such subjects to hatred and contempt of the government and constitution and to unlawful and seditious opposition to the government and constitution, and to stir up jealousies and ill-will between different classes of Her Majesty's subjects, and especially to promote among Her Majesty's subjects in Ireland feelings of ill-will and hostility towards and against Her Majesty's subjects in the other parts of the United Kingdom, and especially in that part called England; and further, to excite discontent and disaffection amongst divers of Her Majesty's subjects serving in the army; and further, to cause and procure, &c., divers subjects unlawfully and seditiously to meet and assemble together in large numbers, at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition of great physical force at such assemblies and meetings, changes and alterations in the government, laws, and constitution; and further, to bring into hatred and disrepute the courts by law established in Ireland for the administration of justice, and to diminish the confidence of the said subjects in Ireland in the administration of the law therein, with the intent to induce the subjects to withdraw the adjudication of their differences from the cognizance of the said courts, and to submit the same to the determination of other tribunals to be constituted for that purpose. The count then alleged various overt acts done in order to excite discontent with, hatred

O'Connell's case.

Counts which charge a conspiracy to raise discontent and disaffection amongst the subjects of the Queen, to stir up jealousies, hatred, and ill-will between different classes, are good.

Counts which charge a conspiracy to obtain, by means of intimidation and the exhibition of physical force, a change in the government, are bad.

(a) Reg. v. Batton, 11 Q. B. 929. There was another count similar to the above, which was objected to on the ground that it did not allege any duty in the defendants not to employ the dye for their own profit; but the court held it good, as the allegation of the conspiracy

was sufficient. There was also a question as to the conspiracy having merged in the felony decided in this case; but as the 14 & 15 Vict. c. 100, s. 12, has got rid of all such questions for the future, it has been omitted.

of, and disaffection to the government, laws, and constitution. The second count was exactly like the first, but omitted the overt acts. The third count alleged that the defendants, intending to create discontent and disaffection amongst the subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to raise and create discontent and disaffection amongst the subjects of the Queen, and to excite such subjects to hatred and contempt of the government and constitution, and to unlawful and seditious opposition to the said government and constitution, and to stir up hatred, jealousies, and ill-will between different classes of the said subjects, and especially to promote amongst the said subjects in Ireland feelings of ill-will and hostility against the said subjects in other parts of the United Kingdom, and especially in that part called England; and further, to excite discontent and disaffection amongst divers subjects serving in Her Majesty's army; and further, to cause and procure, &c., divers subjects to meet and assemble together in large numbers at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition of great physical force at such assemblies and meetings, changes in the government, laws, and constitution; and further, to bring into hatred and disrepute the courts in Ireland for the administration of justice, &c. The fourth count was the same as the third, omitting the charges as to creating discontent in the army, and the diminishing the confidence in the courts of law. The fifth count alleged that the defendants, intending to cause and create discontent and disaffection amongst the liege subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, &c., unlawfully and seditiously did conspire, &c., to raise and create discontent and disaffection amongst the liege subjects of the Queen, and to excite the said subjects to hatred and contempt of the government and constitution, and to unlawful and seditious opposition to the government and constitution, and also to stir up jealousies, hatred, and ill-will between different classes of the said subjects, and especially to promote amongst the said subjects in Ireland feelings of ill-will and hostility against the subjects in the other parts of the United Kingdom, and especially in England. The sixth count alleged that the defendants unlawfully and seditiously intending, by means of intimidation and the demonstration of great physical force, to procure and effect changes to be made in the government, laws, and constitution, unlawfully and seditiously did conspire, &c., to cause and procure, &c., divers subjects of the Queen to meet and assemble together in large numbers, at various times and at different places in Ireland, for the unlawful and seditious purpose of obtaining, by means of intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such assemblies and meetings, changes in the government, laws, and constitution, &c. The seventh count was like the sixth, with the addition, 'and especially, by the means aforesaid, to bring about and accomplish a dissolution of the legislative union now



subsisting between Great Britain and Ireland.' The eighth count charged a conspiracy to bring the tribunals of justice into contempt, and to cause the subjects to withdraw their differences from the said tribunals, and to submit the same to other tribunals. The ninth was similar to the eighth, but substituted for withdrawing their differences, &c., 'to assume and usurp the prerogative of the Crown in the establishment of courts for the administration of the law.' The tenth count charged a conspiracy to bring into disrepute the tribunals for the administration of justice. And the eleventh count alleged that the defendants, intending by means of intimidation and demonstration of physical force, &c., by causing large numbers of persons to meet and assemble in Ireland, and by means of seditious and inflammatory speeches to be delivered to the said persons, and by means of publishing divers unlawful and seditious writings, to intimidate the Lords Spiritual and Temporal and Commons of the Parliament of the United Kingdom, and thereby to effect changes in the laws and constitution, unlawfully and seditiously did conspire, &c., to cause large numbers of persons to meet together in divers places and at divers times in Ireland, and by means of seditious speeches to be made at the said places and times, and by means of publishing to the subjects of the Queen unlawful and seditious writings, &c., to intimidate the Lords Spiritual and Temporal and the Commons of the Parliament of the United Kingdom, and thereby to effect and bring about changes and alterations in the laws and constitution. Upon a writ of error in the House of Lords, the following question was put to the judges:—'Are all or any, and if any, which, of the counts in the indictment bad in law? so that if such count or counts stood alone in the indictment, no judgment against the defendants could properly be entered up on them.' And Tindal, C. J., thus delivered the answer of the judges:—'My Lords, the answer to the question will depend upon the consideration, whether all the counts of the indictment are framed with that proper and convenient certainty, with respect to the substance of the charge of conspiracy, which the law requires; for, undoubtedly, if any of such counts are framed in so loose, uncertain, or inapt a manner, as that the defendants might have availed themselves of the insufficiency of the indictment upon a demurrer, there is nothing to prevent them from having the same advantage of the objection upon a writ of error. The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent, or even lawful. That it was an offence known to the common law, and not first created by the 33 Edw. 1, st. 2, is manifest. That statute speaks of conspiracy as a term at that time well known to the law, and professes only to be 'a definition of conspirators.' It has accordingly always been held to be the law, that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not. (b) No

(b) *Reg. v. B et al*, 2 Lord Raym. 167, and *Rex v. Edwards*, 8 Mod. R. 520, were here cited.

serious objection appears to have been made against the sufficiency of any of the counts prior to the sixth. Indeed there can be no question but that the charges contained in the first five counts do amount, in each, to the legal offence of conspiracy, and are sufficiently described therein. There can be no doubt but that the agreeing of divers persons together to raise discontent and disaffection amongst the liege subjects of the Queen, to stir up jealousies, hatred, and ill-will between different classes of Her Majesty's subjects, and especially to promote amongst Her Majesty's subjects in Ireland feelings of ill-will and hostility towards Her Majesty's subjects in other parts of the United Kingdom, and especially in England—which charges are found in each of the first five counts—do form a distinct and definite charge in each, against the several defendants, of an agreement between them to do an illegal act; and it therefore becomes unnecessary to consider the other additional objects and purposes alleged in some of these counts to have been comprised within the scope of the agreement of the several defendants. With respect, however, to the sixth and seventh counts, we all concur in opinion that they do not state the illegal purpose and design of the agreement entered into between the defendants with such proper and sufficient certainty as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law. Each of those two counts does in substance state the agreement of defendants to have been “to cause and procure divers subjects to meet together in large numbers, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitution of the realm.” Now, though it may be inferred from this statement, that the object of the defendants was probably illegal, yet it does not appear to us to be so alleged with sufficient certainty. The word “intimidation” is not a technical word: it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use, employed on this occasion in its popular sense; and in order to give it any force, it ought at least to appear from the context what species of fear was intended, or upon whom such fear was intended to operate. But these counts contain no intimidation whatever upon what persons this intimidation was intended to operate: it is left in complete uncertainty whether the intimidation was directed against the peaceable inhabitants of the surrounding places, against the subjects of the Queen dwelling in Ireland in general, against persons in the exercise of public authority there, or even against the legislature of the realm. Again, the mere allegation that these changes were to be obtained by the exhibition and demonstration of physical force, without any allegation that such force was to be used, or threatened to be used, seems to us to mean no more than the mere display of numbers, and consequently to carry the matter no further. Applying the same principle and mode of reasoning to the consideration of the eighth, ninth, and tenth counts, we all concur in opinion that the object and purpose of the agreement entered into by the defendants, as disclosed upon these counts, is an agreement for the performance

of an act, and the attainment of an object, which is a violation of the laws of the land. We think it unnecessary to state reasons in support of the opinion that an agreement between the defendants to diminish the confidence of Her Majesty's subjects in Ireland in the general administration of the law therein, or an agreement to bring into hatred and disrepute the tribunals by law established in Ireland for the administration of justice, are each and every of them agreements to effect purposes in manifest violation of the law. Upon the sufficiency of the eleventh count, no doubt whatever has been raised.' (c)

A count alleged that the defendants, having in their possession two horses, conspired by divers false pretences to obtain large sums of money from such persons as might be desirous of purchasing the said horses, and to cheat and defraud such persons of such sums of money, and that the defendants, in pursuance of the said conspiracy, made certain false pretences, which were set out; and that the defendants, in pursuance of the said conspiracy, did obtain from W. A. an order for the payment of £115 10s. It was objected that this count was bad, because it did not show that W. A. was one of the persons who was desirous of purchasing the horses, and therefore he was not shown to be within the objects of the conspiracy; and the Recorder so held. (d)

An indictment for a conspiracy to conceal and embezzle the personal estate of a bankrupt must state the petitioning creditor's debt, the trading, and the act of bankruptcy, and that the party had actually become bankrupt. (e)

The technical averment of the agreement and conspiracy, generally used in the indictment, charges that the defendants 'did conspire, combine, confederate, and agree together;' but it is said that other words of the same import seem to be equally proper. (f) To the counts for a conspiracy may be joined such other counts as the circumstances of the case may seem to require (not charging a felony), though they do not include a charge of conspiracy. (g)

It has been holden that in an indictment for a conspiracy the venue must be laid where the conspiracy was, and not where the result of such conspiracy was put in execution. (h) But it was said by the court, that there seemed to be no reason why the crime of conspiracy, amounting only to a misdemeanor, might not be tried, wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing

Overt act unconnected with the conspiracy.

Technical averment of conspiracy.

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Place where the offence may be tried.

(c) *O'Connell v. Reg.* 11 Cl. & F. 155. The Lords all concurred in this judgment.

(d) *Reg. v. Ward*, 1 Cox C. C. 101. If this case is correctly reported, the decision is clearly erroneous. The count alleged that the defendants did obtain the money from W. A. 'in pursuance of the conspiracy' which is the regular mode of connecting the overt act with the conspiracy, especially where, as in this case, the overt act could not be foreseen at the time when the conspiracy was entered into. The overt act, therefore, was well laid. But even if it had been otherwise, the count was good without it; for the

conspiracy was clearly well laid; and, where that is the case, an acquittal of the overt act is immaterial. *Rex v. Sterling*, 1 Lev. 125, shows that the overt act is in such a case immaterial.

(e) *Rex v. Jones*, 4 B. & Ad. 345. 1 N. & M. 78. See the case more fully stated, *ante*, vol. 2, p. 528.

(f) 3 Chit. Crim. L. 1143. See per Lord Campbell, *Reg. v. Hamp*, *ante*, p. 122.

(g) See the judgment of Lord Ellenborough, C. J., in *Rex v. Johnson*, 3 M. & S. 550. In *Reg. v. Murphy*, 8 C. & P. 297, counts for libel were joined.

(h) *Reg. v. Best*, 1 Salk. 174.



and imagining the King's death, or in conspiring to levy war. (*i*) And a case was cited in which the trial proceeded upon this principle: and in which, though no proof of actual conspiracy, embracing all the several conspirators, was attempted to be given in Middlesex, where the trial took place, and though the individual actings of some of the conspirators were wholly confined to other counties than Middlesex, yet the conspiracy as against all having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts, done by some of them, in prosecution of the conspiracy in the county where the trial was had. (*j*)

Jurisdiction  
of the justices  
at Quarter  
Sessions.

5 & 6 Vict.  
c. 38, s. 1.

The offence of conspiracy might formerly be tried by justices of peace in their Quarter Sessions. In a case where the question of their jurisdiction was raised, no authority being cited either on the one side or on the other, the court decided in favour of their jurisdiction, upon general principles, saying, that a conspiracy was a trespass, and that trespasses were indictable at sessions, though not committed with force and arms. (*k*) But now by the 5 & 6 Vict. c. 38, s. 1, 'neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons, for (*inter alia*) unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person.'

A count  
showing juris-  
diction in the  
sessions.

A count alleged that the prisoners conspired, by divers false pretences, against the form of the statute in that case made and provided, to defraud the prosecutor of his money; and it was objected that the facts ought to have been set out so as to show that the offence intended to be committed was within the jurisdiction of the sessions, by whom the indictment had been tried; but the Court of Queen's Bench held that the count sufficiently showed that the sessions had jurisdiction. (*l*)

The charge  
must have  
been heard  
before a  
justice, &c.

By the 22 & 23 Vict. c. 17, no bill of indictment for conspiracy is to be presented or found by any grand jury unless the charge has been investigated before a magistrate, or unless the indictment be preferred by the consent of a judge or the attorney or solicitor general. (*m*)

A second  
indictment for  
the same con-  
spiracy as that  
charged before  
a magistrate.

Where three defendants were charged with a conspiracy before a justice and bound by recognizances to appear at the next session of the Central Criminal Court, to plead to such indictment as might be found against them in respect of the said conspiracy; and the prosecutors and witnesses were in like manner bound to prosecute and give evidence; and at the next session of the said court an indictment for the said conspiracy was found against the said three defendants; but the trial postponed, and the recogni-

(i) Rex v. Bussac, 4 East, R. 171.

(j) Rex v. Bowles, cited in Rex v. Bussac, *supra*.

(k) Rex v. Respal, 3 Burr. 1520. 1 Black. R. 328. Barn's Just. in Con-

spiracy, sec. 1. The point was so decided in an earlier case, Rex v. Edwards, 8 M. & W. 9.

(l) Latham v. Rex, 9 Cox C. C. 245.

(m) See the Act in the Appendix.

zances respited, till the next sessions; and before that session the solicitor-general directed an indictment to be preferred against another person for the same conspiracy; and at that session another indictment was found against all four defendants; it was held that the three first mentioned defendants were rightly tried, and convicted on the second indictment, as the 22 & 23 Vict. c. 17, had been sufficiently complied with, the second indictment being for the same conspiracy, with which those defendants had been charged before the magistrate; and that the indictment need not allege that they had been bound over by the magistrate. (*n*)

On a prosecution against several persons for a conspiracy, the wife of one of the defendants has been holden not to be a competent witness for the others, a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. (*o*) And so it has been held, upon an indictment against the wife of W. S. and others for a conspiracy in procuring W. S. to marry, that W. S. was not a competent witness in support of the prosecution. (*p*)

Wife of one defendant no witness for the others.

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An able writer upon the law of evidence lays down the following doctrine with respect to the acts or words of one conspirator being evidence against the others. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of law the act of the whole party, and, therefore, the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and, further, any declarations, made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted as evidence to affect them on their trial for the same offence. (*q*) And, in general, proof of concert and connection must be given, before evidence is admissible of the acts or declarations of any person not in the presence of the prisoner. (*r*) It is for the court to judge whether such connection has been sufficiently established; but when that has been done, the doctrine applies that each party is an agent for the others, and that an act done by one in furtherance of the unlawful design, is in law the act of all, and that a declaration made by one of the parties, at the time of doing such an act, is evidence against the others. Thus, where Stone was indicted for treason, and one of the overt acts charged was conspiring with Jackson and others to collect intelligence, and to communicate it to the

How far the acts or words of one conspirator are evidence against the others.

Proof of concert before declarations of others admissible.

(*n*) Reg. v. Knowlden, 9 Cox C. C. 483.

(*o*) Rex v. Lockyer, 5 Esq. N. P. R. 107. Lord Ellenborough, C. J. Rex v. Frederick, 2 Str. 1095. 1 Phill. Evid. 74.

(*p*) Rex v. Serjeant, R. & M. N. P. R. 352. 1 Phill. Evid. 74.

(*q*) 1 Phill. on Evid. 94, 95, 7th ed. See 9th ed. 201.

(*r*) 1 East P. C. c. 2, s. 37, p. 96. 2 Stark. Evid. 326, and 1 Phill. Evid. 477, citing the Queen's case, 2 Brod. & B. 302. Reg. v. Jacobs, 1 Cox C. C. 173. Reg. v. Duffield, 5 Cox C. C. 404.

King's enemies in France, &c., after evidence had been given to connect the prisoner with Jackson in the conspiracy as charged, the secretary of state for the foreign department was called to prove that a letter of Jackson's, containing treasonable information, had been transmitted to him from abroad, but in a confidential way, which made it impossible for him to divulge by whom it was communicated; and such letter was received in evidence. (*s*) So, in another case, after evidence had been given of a treasonable conspiracy, in which the prisoner was concerned, it was held that papers found in the lodging of a co-conspirator, at a period subsequent to the apprehension of the prisoner, might be read in evidence, upon strong presumptive proof being given that the lodgings had not been entered by any one in the interval between the apprehension of the prisoner and the finding of the papers, and although no absolute proof had been given of their existence previous to the prisoner's apprehension. (*t*) But it seems that if such papers had not been proved to have been intimately and immediately connected with the objects of the conspiracy, they would not have been admissible; as, in the same case, a paper containing seditious questions and answers, and found in the possession of a co-conspirator, was not read in evidence, the court doubting whether it was sufficiently connected by evidence with the object of the conspiracy to render it admissible. (*u*)

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Declarations  
and acts in  
pursuance of  
the conspi-  
racy.

Where, upon an indictment for conspiring to annoy a broker who distrained for church-rates, it was proved that one of the defendants, in the presence of the other, excited the persons assembled at a public meeting to go in a body to the broker's house; it was held that evidence was admissible to show that they did so go, although neither of the defendants went with them, but that evidence of what a person, who was at the meeting, said a few days after the meeting when he himself was distrained on for church-rates, was not admissible. (*v*) And where an indictment charged the defendant with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a Chartist association, and that Jones was also a member, and that in the evening of the 3rd of November the defendant had been at Jones's house, and was heard to direct the people there assembled to go to the race-course, where Jones had gone on before with others; it was held that a direction given by Jones in the forenoon of the same day to certain parties to meet on the race-course was admissible; and it being further proved that Jones and the persons assembled on the race-course went thence to the New Inn, it was held that what Jones said at the New Inn was admissible, as it was all part of the same transaction. (*w*)

Evidence of  
meetings and  
of what took  
place at them.

On an indictment on the 11 & 12 Vict. c. 12, s. 3, which makes it a felony to compass, &c., to deprive the Queen of her crown or to levy war, &c., it appeared that the prisoners from July 26th to August 16th had attended meetings where plans for

(*s*) *Rex v. Stone*, 6 T. R. 527.

(*t*) *Rex v. Watson*, 2 Stark. C. 140.

(*u*) *Rex v. Watson*, *supra*. But they held that if proof were to be given that the instrument was to be used for the purposes of the conspiracy, it would

clearly be admissible.

(*v*) *Reg. v. Murphy*, 8 C. & P. 297, Coleridge, J.

(*w*) *Reg. v. Shellard*, 9 C. & P. 277, Patteson, J.



securing the people's charter and the repeal of the union were organized, and took a prominent part at those meetings: large bodies of men were formed into societies, with class leaders, &c.; some of them were selected and organized as fighting men, and an attempt at insurrection was to be made on the 16th of August; and on that night a great number of the conspirators were found at the several places of meeting previously fixed, provided with arms, &c. A witness stated that at a meeting, at which none of the prisoners were present, he received a leaf of a book from one Bezer, which was to serve as an introduction to a subsequent meeting; and on the 20th of July he attended a second meeting, and produced the leaf; the chairman compared it with a book, and the witness was admitted. The prisoners were not shown to have been parties to the conspiracy at that time. But it was held that the witness might prove what Bezer said to him when he gave him the leaf, and also what took place at the second meeting, on the ground that the prosecution had a right to go into general evidence of the nature of the combination between the persons assembled, though the prisoners might not be present. (x) And it having been proved that a large number of armed men were found assembled at a public-house on the 16th of August, the time which had been fixed for the general outbreak, but none of these men had been previously connected with the conspiracy, nor did it appear that the house had ever been recognized as a place of meeting; it was held that evidence was admissible of what was done at that public-house; because it appeared that on this day there was to be a collection of armed persons. (y)

On an indictment for a conspiracy to prevent workmen from continuing in their service as tinsmiths, it appeared that the workmen had been holding shop-meetings and discussions, and the prosecutor, a manufacturer, had published a placard offering constant employment to tinsmiths, and after that a handbill was circulated about the town, and copies of it stuck up in the windows of beer-shops and public-houses, and one of them in the window of a public-house frequented by the tinsmiths, and another at a public-house at which one Peel, Green, and Winters, alleged conspirators, lodged, and the defendants had been continually into those houses whilst the bill was in the windows. The bill was addressed 'To the members of the several trade societies connected with the National Association of United Trades by the central committee,' and recited that the committee had been called upon for advice by the tinsmiths of the town to enable them to obtain an established book of prices; and that communications had taken place with the prosecutor about the amount of wages, but that no arrangement could be made with him. The bill was signed by Peel as general secretary, and mentioned Green and Winters as having visited the prosecutor, but did not mention any of the defendants. Erle, J., held that the bill was not admissible as the act of the defendants, 'either by themselves or as published or recognized by them.

Admissibility  
of a hand-  
bill.

(x) Reg. v. Lacey, 3 Cox C. C. 517.  
Platt, B., and Williams, J., who con-  
sidered Reg. v. Frost and Rex v. Hunt

expressly in point, and refused to reserve  
the point. See *post*, p. 167.

(y) Ibid.

‘You may make a handbill evidence against a man, if I may so say, by retrospective light arising from his conduct. If a handbill says that certain things will be done by certain persons, and that handbill is circulated, where those persons probably saw it, and they do the very thing that the handbill indicates they would do, when that is in evidence, I am of opinion that the bill would be admissible against them; but we are not at that stage yet.’ (z) But on the trial of another indictment against Rowlands, Green, Peel, Winters, and others, arising out of the same transactions, where, in addition to the evidence in the previous case, it was proved that Rowlands had been at the Swan whilst the bill was exhibited there, and Peel had been seen going in and out, and the bill was in such a situation that he must have seen it; Erle, J., held that it was admissible. ‘If it is evidence against any one of the defendants, it is admissible.’ ‘I believe it is admissible against those in respect of whom I draw the inference that they saw it in the window; those in respect of whom it announces any intention. Green and Winters are the two that are named in it. It purports to be an instrument by Peel, and I think there is evidence before me, from which I am of opinion that Peel had seen that instrument, and it is probable, by his not objecting to it, that he permitted his name to be used to that instrument.’ ‘I am clear that it is evidence as against one of the defendants, it being published in his name, and, according to the evidence, being probably seen by him.’ (a)

On an indictment for a conspiracy to pass imported goods without paying the full duty, an entry made by one of the defendants in the course of passing the goods is admissible against the other; but an entry on the counterfoil of a cheque after the conspiracy has been carried out is not so admissible.

Upon the trial of Blake on an information for a conspiracy with one Tye to pass imported goods without paying the full duty, it appeared that Tye acted as agent for the importer of the goods, and Blake as landing-waiter at the Custom-house, and that it was Tye’s duty to make an entry describing the quantity and particulars of the goods necessary to determine the amount of duty. This entry is called the Perfect Entry, which is left at the Custom-house, and the particulars are there copied into the Blue-book, which was delivered to Blake, the landing-waiter, whose duty was to examine the goods, and, if he found them correspond with the particulars in the Blue-book, to write ‘Correct’ across the Perfect Entry, whereupon the goods would be delivered to the importer upon payment of the duties so ascertained. The goods were passed to Tye, the duty having been paid on the Perfect Entry made out by Tye, which corresponded with the entry in the Blue-book. It was then proposed to put in Tye’s Day-book, and to show by Tye’s own entry therein that the quantity of goods was much larger than appeared by the Perfect Entry and Blue-book, and that the importer had been charged the duties by Tye on such larger amount, and had paid them accordingly. It was objected for Blake—Tye not being on his trial—that the entry in Tye’s book was not evidence against Blake; but Lord Denman, C. J., admitted the evidence; and the Court of Queen’s Bench held, on a motion for a new trial, that the Day-book was evidence of something done in the course of the transaction, and was properly admitted as a step in the proof of

(z) *Reg. v. Duffield*, 5 Cox C. C. 404.

(a) *Reg. v. Rowlands*, 5 Cox C. C.

436. It does not appear that this ruling

was questioned in the Court of Queen’s Bench.

the conspiracy. (*b*) Evidence was given, in the same case, to show that a cheque drawn by Tye for a certain sum, and dated after the goods were passed, had been cashed, and the proceeds traced to Blake. It was then proposed to put in evidence the counterfoil of the cheque in Tye's cheque-book, on which was written an account showing that the cheque was drawn for a sum amounting to half the profit arising from transactions, including the alleged fraud on the revenue, as manifested by the several items in that account. To this evidence a similar objection was taken, but Lord Denman, C.J., admitted it. The Court of Queen's Bench, however, held that the evidence ought not to have been admitted. The conspiracy to defraud the customs had been carried into effect before the cheque was drawn; and the writing on the counterfoil was in effect a declaration by Tye for what purpose he had drawn the cheque, and how the money was to be applied. Now no declaration of Tye could be received in evidence against Blake, which was made in Blake's absence, except it related to the furtherance of the common object; which this did not. (*c*)

On an indictment for conspiring to defraud the shareholders of the British Bank by falsely representing its affairs to be prosperous, the examination of one of the defendants, which had been taken on a petition for winding up the bank after the date of the alleged conspiracy, was tendered in evidence. This examination showed that this defendant was aware of the insolvency of the bank, and alleged that the other directors had the same knowledge. It was objected that this examination was not evidence of any act done in furtherance of the conspiracy; and that it was not admissible until the other defendants were connected with this defendant in the conspiracy. But Lord Campbell, C.J. (after consulting the other judges of the Queen's Bench), said, 'We are all of opinion that the deposition is admissible against this defendant, as tending to show his knowledge before and at the time of his committing the overt act, but not as against the other defendants. Therefore only such parts should be read as refer to the deponent alone.' (*d*)

Examination of one defendant admitted against himself alone.

The evidence in support of an indictment for a conspiracy is generally circumstantial; and it is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy may be collected from the collateral circumstances of the case. (*e*) Although the common design is the root of the charge, yet it is not necessary to prove that the defendants came together, and actually agreed in terms to have the common design, and to pursue it by common means, and so to carry it into execution, because in many cases of the most clearly established conspiracies there are no means of proving any such thing. (*f*) If, therefore, two persons pursue by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object they were pursuing, the jury are at liberty to draw the conclusion that they have been

Proof of the conspiracy.

It is not necessary to prove the actual conspiracy, but it may be inferred from the acts of the parties.

(*b*) Reg. v. Blake, 6 Q. B. 126.

(*c*) Reg. v. Blake, *supra*.

(*d*) Reg. v. Esdaille, 1 F. & F. 213.

(*e*) Rex v. Parsons, 1 Black. R. 392.

(*f*) Per Coleridge, J., Reg. v. Murphy, 8 C. & P. 297. Reg. v. Brittain, 3 Cox C. C. 76, per Colman, J.



engaged in a conspiracy to effect that object. (*g*) It is a mistake to say that a conspiracy must be proved before the acts of the alleged conspirators can be given in evidence. It is competent to prove insulated acts as steps by which the conspiracy itself may be established. (*h*) And in a late case the jury were told that it does not happen once in a thousand times when the offence of conspiracy is tried that anybody comes before the jury to say that he was present at the time when the parties did conspire together, and when they agreed to carry out their unlawful purposes; that species of evidence is hardly ever to be adduced before a jury; but the unlawful conspiracy is to be inferred from the conduct of the parties; and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the jury to say whether those persons had not combined together to bring about that end, which their conduct appears so obviously adapted to effectuate. (*i*) In a case where a husband, wife, and their servants, were indicted for a conspiracy to ruin the trade of the prosecutor, who was the King's card-maker, the evidence against them was, that they had at several times given money to the prosecutor's apprentices to put grease into the paste, which had spoiled the cards; but there was no account given that ever more than one at a time was present, though it was proved they had all given money in their turns; it was objected that this could not be a conspiracy, on the ground that several persons might do the same thing, without having any previous communication with each other. But it was ruled that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy. (*j*) And it appears also to have been considered that if a banker permits a sum of money to be lodged at his house, to be paid over for corruptly procuring an appointment under government, he may be indicted for a conspiracy along with those who are to procure the appointment, and receive the money. (*k*)

[699]

Persons joining for one purpose after the conspiracy is formed.

Persons meeting for one purpose afterwards conspiring for another.

Every person concerned in any of the criminal parts of the transaction alleged as a conspiracy may be found guilty, though there be no evidence that such persons joined in concerting the plan, or that they ever met the others, and though it is probable they never did, and though some of them only join in the latter parts of the transaction, and probably did not know of the matter until some of the prior parts of the transaction were complete. (*l*) So that if several persons meet from different motives, and then join in effecting one common and illegal object, it is a conspiracy. (*m*) Where, therefore, upon an information for a conspiracy to ruin Macklin, the actor, in his profession, it was objected that in support of the prosecution evidence should be given of a *previous* meeting of the parties accused for the purpose of confederating to carry their object into execution; Lord Mansfield, C. J., overruled the objection, saying, that if a number of

(*g*) Per Coleridge, J., Reg. v. Murphy, *supra*.

(*h*) Per Alderson, B., Ford v. Elliott, 4 Exch. R. 78.

(*i*) Per Erle, J., Reg. v. Duffield, 5 Cox C. C. 404.

(*j*) Rex v. Cope, 1 Str. 144.

(*k*) Rex v. Pollman, 2 Campb. 233.

(*l*) Rex v. Lord Grey, 9 St. Tri. 127. Reg. v. Murphy, 8 C. & P. 297, Coleridge, J.

(*m*) Rex v. Lee, 2 Stark. Evid. 324.

persons met together for different purposes, and afterwards joined to execute one common purpose, to the injury of the person, property, profession, or character of a third party, it was a conspiracy, and it was not necessary to prove any previous consult or plan among the defendants against the person intended to be injured. (*n*)

It appears to have been held that upon an indictment for a conspiracy, where, from the nature of the case, it would be difficult to prove the privity of the parties accused, without first proving the existence of a conspiracy, the prosecutor may go into general evidence of its nature, before it is brought home to the defendants. The indictment charged the defendants, who were journeymen shoemakers, with a conspiracy to raise their wages; and evidence was offered on the part of the prosecution of a plan for a combination amongst the journeymen shoemakers, formed and printed several years before, regulating their meetings, subscriptions, and other matters for their mutual government in forwarding their designs. This evidence was objected to by the counsel for the defendants; but Lord Kenyon, C. J., said, that if a general conspiracy existed, general evidence might be given of its nature, and the conduct of its members, so as to implicate men who stood charged with acting upon the terms of it years after those terms had been established, and who might reside at a great distance from the place where the general plan was carried on; and his Lordship, therefore, permitted a person, who was a member of this society, to prove the printed regulations and rules of the society, and that he and others acted under them, in execution of the conspiracy charged upon the defendants, as evidence introductory to the proof that they were members of such society, and equally concerned; but he observed, that it would not be evidence to affect the defendants until they were made parties to the same conspiracy. (*o*) And in several important cases, evidence has been first given of a general conspiracy before any proof of the particular part which the accused parties have taken. (*p*)

General evidence of the nature of the conspiracy.

[700]

It has also been held that the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner the next day, it was held that directions given by one of the party on the day of their meeting as to where they were to go and for what purpose, were admissible, and the case was said to fall within *Rex v. Hunt*, (*q*) where evidence of drilling at a different place two days before and hissing an obnoxious person was held receivable. (*r*)

Either course may be adopted.

But after such general evidence has been received the parties

(*n*) *Lee's case*, 2 M'Nally, Evid. 634, as cited Rosc. Cr. Evid. 385. S. P. per Coleridge, J. *Reg. v. Murphy*, 8 C. & P. 297. See *ante*, p. 117, note (*i*).

(*o*) *Rex v. Hammond*, 2 Esp. N. P. R. 718. Lord Kenyon referred to the cases of the state trials in the year 1745, where from the nature of the charge it was necessary to go into evidence of what was going on at Manchester and in France,

Scotland, and Ireland, at the same time.

(*p*) Lord Stafford's case, 7 St. Tr. 1218. Lord W. Russell's case, 9 St. Tr. 578. Lord Lovat's case, 18 St. Tr. 530. Hardy's case, 24 St. Tr. 129. Horne Tooke's case, 25 St. Tr. 1.

(*q*) 3 B. & Ald. 566.

(*r*) *Reg. v. Frost*, 9 C. & P. 129. Tindal, C. J., Parke, B., and Williams, J.

before the court must be affected for their share of it. And it seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence to prove its existence, although consultations for the purpose, and letters written in prosecution of the design, but not sent, are admissible. (*s*) It results from the principles already stated, and it has been observed as a conclusion to which they lead, that it seems to make no difference as to the admissibility of the act or declaration of a co-conspirator against the party defendant before the court, whether such co-conspirator be indicted or not, or tried or not with the defendant. (*t*) The evidence is admitted on the ground that the act or declaration of one is the act or declaration of both when united in one common design.

Cumulative instances of fraud permitted to be given in evidence.

[701]

Where the indictment charged the defendants with conspiring to cause themselves to be believed persons of large property for the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to one tradesman employed to furnish it as people of large fortune; and then a witness was called to prove that at a different time they had made a similar representation to another tradesman. The evidence of this witness was objected to on the ground that it was not competent to the prosecutor to prove various acts of this kind, and that he was bound to select and confine himself to one. But Lord Ellenborough, C. J., said, 'This is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offence.' (*u*) And, in a similar case, the same course was allowed as to acts done both in and out of the county where the indictment charged the conspiracy to have been. (*v*)

In an indictment for conspiring to defraud D. and others, which charges the obtaining the goods of D. and others, the word *others* means partners of D., and evidence of attempts to defraud persons not the partners of D. is inadmissible.

But where a count alleged that the defendant and others did conspire to defraud J. Donkersley and others of certain goods, and that in pursuance of the said conspiracy the defendant did falsely pretend to the said J. D. that he was a merchant of the name of Grantham, carrying on business at Leeds and Huddersfield; and in further prosecution of the said conspiracy, and under colour of a pretended contract with the said J. D. for the purchase of certain cloth of the goods of the said J. D. and others, did obtain possession of a large quantity of cloth of the goods of the said J. D. and others from the said J. D., with intent to cheat the said J. D. and others, to the great damage of the said J. D. and others; and it appeared that J. D. had partners; and evidence was given to show an intended fraud upon that firm; and it was also proposed to give evidence of attempts made by the defendant to defraud other persons, as well as the firm of J. D. and Co., of their goods: it was objected that the word '*others*' must be taken to mean others the partners of J. D.; that where the goods were stated to be the goods of J. D. and others, it could only mean others his partners, and the word could not have one meaning at one part of the count, and another at another part of

(*s*) 2 Stark. Evid. 327.

(*t*) 2 Stark. Evid. 329. See *post*, *Evidence*, for further points as to the evidence in cases of conspiracy.

(*u*) *Rex v. Roberts*, 1 Campb. 399. *Ante*, p. 127.

(*v*) *Reg. v. Whitehouse*, MSS. C. S. G. 6 Cox C. C. 38.



the same count. The evidence was received; but, upon a case reserved, the judges held the conviction wrong. (*w*)

In the case of a conspiracy to raise the price of the public funds by false rumours, it was holden that the court will take judicial notice that a war exists between this country and a foreign state, such war having been recognized in different Acts of Parliament; and, therefore, that an allegation to that effect need not be proved. (*x*)

The court will take judicial notice of a war.

Where an indictment alleged that the defendants conspired falsely to accuse the prosecutor of having feloniously forged a cheque for the payment of £178, and that in execution of such conspiracy a letter was written by one of the defendants, in which he stated that he had been employed to investigate the circumstances attending the forging of a cheque for £178, and proof was given of the letter, and also of conversations referring in like manner to a cheque, which the defendants charged the prosecutor with having forged, but the cheque itself was not produced; it was objected that the cheque was so incorporated with the evidence, that the prosecutor was not entitled to prove the conversations without producing the cheque, to which they referred, which it appeared from the evidence was in existence, and in the possession of the defendants. Lord Tenterden, C. J., was, however, of opinion that it was not essential to prove the contents of the cheque or to produce it, but that it was enough to take the conversations as they passed. And the Court of King's Bench, upon a rule to show cause why there should not be a new trial, held that it was not necessary to produce the cheque. The whole of the charge against the defendants was founded on the letter set out in the indictment, which was written by one of the defendants upon the application of the other; and they having taken upon themselves to treat as an existing thing a cheque for £178, it was not necessary, on the part of the prosecutor, to produce it in evidence, even although it appeared that it actually existed. But it might be a fabrication on their part: there might be no such cheque, and then it could not be produced. (*y*)

Upon an indictment for conspiring to accuse of forging a cheque, held unnecessary to produce the cheque.

[702]

A count alleged that the defendants, a husband, wife, and daughter, being in low and indigent circumstances, conspired to cause the husband to be reputed and believed to be a person of considerable property, and in opulent circumstances, for the purpose and with the intent of cheating and defrauding divers tradesmen who should bargain with them for the sale to the husband of goods, the property of such tradesmen, of great quantities of such goods, without paying for the same. The wife and daughter usually were together, and on some occasions represented that they were in independent circumstances, their income being interest of money coming in monthly, and in others the wife had said her husband was in independent circumstances. These statements were made in the absence of the husband; but it was

Evidence of a conspiracy to defraud by representing a person to be in opulent circumstances.

(*w*) Reg. v. Steel, 2 M. C. C. R. 246, C. & M. 337. No ground for the decision is stated, but Lord Abinger said at the close of the argument, 'I think the counsel for the defendant is right in saying that the word "others" must have the same meaning in the earlier part of the count as in the

latter part of it; and with respect to the property of the goods, it must mean that they were the goods of J. D. and his partners.'

(*x*) Rex v. De Berenger, 3 M. & S. 67. *Ante*, p. 123.

(*y*) Rex v. Aldridge, 1 N. & M. 776.

proved that he either occupied the lodgings which were hired under these representations, or that the goods were delivered at the places where all the defendants lodged. Platt, B., is reported to have held that there was no evidence of any conspiracy to represent the husband as a person of considerable property. (z) Another count alleged the conspiracy in the same manner as the preceding, but charged the intent to be to defraud persons who should let the husband lodgings for hire, of divers large sums of money, being the sums agreed to be paid for the hire of such lodgings; and Platt, B., is reported to have held that this count was not supported, as well on the ground on which the preceding count was not supported, as because the object of the defendants was to obtain possession of the lodgings, and to deprive the landlord of the use of the rooms, but not to deprive him of the price, which was only incidental to their occupation. They had no object in depriving him of the profits of the rooms, apart from their own occupation of them. (a)

A count for conspiring to defraud A. of his acceptances is proved, though the bills are brought ready prepared by the conspirators, and A. only accepts them.

A count for conspiring to defraud A. of his monies may be proved, though A. has no money or apparent means of obtaining any.

Two counts of an indictment charged the defendants with conspiring to obtain from the prosecutor certain bills of exchange accepted by him, amounting to a large sum of money, and to cheat and defraud him of the proceeds of the said bills; other counts charged a conspiracy to defraud the prosecutor of his monies. Evidence was given to show the obtaining of the acceptances, but it appeared that the prosecutor had not parted with any money, and there was no reason to suppose that he intended to take up the acceptances, and it was not shown that the bills which he accepted were ever in his hands, except for the purpose of his writing his acceptances, they having been brought to him complete, except as to his signature. The jury having found the defendants guilty on these counts, the verdict was impeached as unsupported by the evidence, because the charge was of a conspiracy to obtain acceptances from the prosecutor, whereas he proved that the acceptances were ready written, and in possession of the defendants, or some of them, and nothing was sought but his signature; but the Court of Queen's Bench thought that this was substantially the same thing. It was only by the signature of the prosecutor that the bills became complete; and his acceptance when given, being without any consideration, was at the instant his, and in his possession. It was also urged that the entire transaction, as proved by the evidence, was at variance with the indictment, as all parties well knew that the prosecutor had no money, nor could be defrauded of any; and that the real fraud was on the prosecutor's part, to the prejudice of some expected lender of the sums mentioned in the bills, in return for acceptances of no value. But the court held that, though there might be some ground for this imputation on the prosecutor, yet it would not disprove the fraud practised upon him, by inducing

(z) Reg. v. Whitehouse, 6 Cox C. C. 38.

(a) Ibid. I was counsel for the crown in this case, and my recollection of it is that the case went to the jury on all the counts. The main question in the case was whether every representation made

was the representation of all. The prisoners came to the town together, lived together, and enjoyed the fruits of their frauds together; but the conspiracy could only be inferred from a great number of isolated acts, in none of which were all of the prisoners engaged.

him to accept bills without a corresponding advance of cash. Though there was little appearance of solvency in the prosecutor, those who fraudulently induced him to incur the liability must have speculated on some pecuniary advantage from it; and though the money could in such case only have come from his respectable friends, as he had no funds of his own, the money intended to be so procured might well be described for this purpose as his money. (*b*)

The expression 'false pretences' as used in indictments for conspiracy is not construed in the technical sense in which it is in indictments for obtaining property by false pretences. (*c*) Where, therefore, a count charged the defendants with a conspiracy by divers subtle means and false pretences to obtain goods, it was held that an actual false pretence need not be proved under this count, in the same manner as if it had been a count for obtaining property by false pretences. (*d*)

Absolon and Clark were indicted for conspiring to defraud a railway company by obtaining excursion tickets not transferable, and selling them to others. Absolon had sold the excursion tickets to Clark at Brighton, and Clark attempted to use them for the purpose of sending back to London some children. It did not appear how Absolon got the tickets; he had others in his possession. Wightman, J., left it to the jury to determine whether the prisoners did concert together that the tickets should be obtained and used for the purpose of defrauding the company. (*e*)

On an indictment for a conspiracy to cause tinplate-workers to leave their employment, it appeared that the prosecutors, in consequence of their workmen leaving their service, had employed Frenchmen; and Erle, J., held that it was not competent to prove how much the firm had lost by these Frenchmen, as the amount of loss by any particular set of workmen was clearly unconnected with the issue whether there was a conspiracy or not; but that the sum total of the loss might be proved; for the very issue in the matter was the intention to obstruct the business, and the result of the operations was a relevant fact as to that. (*f*)

Where one of several defendants charged with a conspiracy has been acquitted, the record of acquittal is evidence for another defendant subsequently tried. (*g*)

Where in an indictment for conspiracy, the bankruptcy of one of the defendants was stated in a prefatory allegation, and to prove this allegation, the proceedings under the bankruptcy were put in; Lord Tenterden, C. J., held, that the assignment was not admissible, without calling the subscribing witness to prove the execution of it. (*h*)

Where an indictment charged that the defendant with divers others did conspire to prevent the workmen of one J. G. from

Meaning of the expression 'false pretences.'

Obtaining railway tickets.

Evidence of loss of profits.

Record of acquittal.

Proof of bankruptcy.

Divisible averment.

(*b*) Reg. v. Gompertz, 9 Q. B. 824.

(*c*) Reg. v. Hudson, Bell C. C. 263, ante, p. 129.

(*d*) Reg. v. Whitehouse, 6 Cox C. C. 38. Platt, B.

(*e*) Reg. v. Absolon, 1 F. & F. 498.

(*f*) Reg. v. Rowlands, 5 Cox C. C.

436. All the counts ended 'to the great damage' of the prosecutors. See ante, p. 140.

(*g*) Rex v. Horne Tooke, 1 Chitty, Burn. 823, sed quare. See note, ante, p. 145.

(*h*) Rex v. Pope, 5 C. & P. 208.



continuing to work in a colliery; Patteson, J., held, that a conspiracy to procure the discharge of any of the workmen would support the indictment, which did not necessarily lay the intent as to all the workmen. (*i*)

Questions in  
favour of the  
defendants.

On an indictment for a conspiracy to induce tinplate-workmen to leave their employment, it appeared that three of the defendants had come down by invitation from the tinplate-workers' association, and had held meetings with the workmen; and Erle, J., allowed a witness for the defence to be asked, 'With reference to hired men and apprentices, persons under contract to their employers, what advice did these defendants give to the men?' and also 'Whether the witness ever heard them either use any intimidating language or threats, or recommend force of any kind?' (*j*)

Two persons were indicted for felony, in attempting to poison A. B., by administering certain poisonous ingredients, as set forth in the indictment. At the same time, an indictment was found against them for a conspiracy to poison the same individual by the same means. On the trial of the first indictment, the prisoners were acquitted, there being no proof that the ingredients were poisonous. Parke, J., thereupon directed an acquittal for the conspiracy also, there being no other proof of a conspiracy to poison than that by which it was attempted to establish the felony, viz. that the ingredients were poisonous. (*k*)

Averment as  
to one of the  
conspirators  
not proved.

Where an indictment against A., B., C., and D., charged that they conspired together to obtain, 'viz., to the use of them the said A., B., and C., and certain other persons to the jurors unknown,' a sum of money for procuring an appointment under government; and it appeared that D. (although the money was lodged in his hands, to be paid to A. and B. when the appointment was procured), did not know that C. was to have any part of it, or was at all implicated in the transaction; it was holden, that the averment concerning the application of the money was material, though coming under a viz.: and that as to D., the conspiracy was not proved as laid. (*l*)

[703]  
Variance.

Where an indictment for a conspiracy to procure false witnesses on the trial of an ejectment, at the great sessions for the county of Glamorgan, stated that at the *general* sessions of our Lord the King, holden, &c., an action of ejectment was depending, in which action J. Doe, on the demise of W. Rees and D. Terry, was the plaintiff, and R. Thomas and T. Beavan the defendants, and it appeared that the ejectment was brought on a joint and two several demises of Rees and Terry; it was held, first, that the description of the sessions was erroneous, as it should have been at the great sessions; secondly, that there was a variance between the action described in the indictment and the action proved to have been pending. (*m*)

Variance.

Where the defendants were indicted for a conspiracy to cheat any person whom they should deal with, and the conspiracy proved was to cheat A., B., and C.; Parke, B., thought the offence different, and directed an acquittal. (*n*)

(*i*) *Rex v. Bykerdyke*, 1 M. & Rob. 179.

(*j*) *Reg. v. Rowlands*, 5 Cox C. C. 436.

(*k*) *Maudsley's case*, 1 Lew. 51.

(*l*) *Rex v. Pollman*, 2 Campb. 231.

(*m*) *Rex v. Thomas*, 1 C. & P. 472,  
Park, J. A. J.

(*n*) Anonymous, mentioned by Parke,  
B., in *Reg. v. King*, 7 Q. B. 798.

Where an indictment for a conspiracy stated in the inducement that the defendants knew that the parties conspired against were the proprietors of certain licensed stage carriages, and as such proprietors liable to certain penalties, in which the drivers of such carriages should be convicted of any offence committed by the said drivers, against ‘a certain Act of Parliament made and passed in the second and third years of the reign of his present Majesty, intituled, &c.’ (setting out the title correctly); and that the defendants unlawfully conspired falsely to exhibit a certain information charging, &c., contrary to the form of the statute in such case made and provided; the judgment was arrested, on the ground that a statute cannot be pleaded as made in two years; for in law an Act cannot be made in two years. (*o*)

Misdescription of a statute in an indictment for conspiracy.

Where the counts in an indictment for a conspiracy are framed in a general form, the judge will order the prosecutor to furnish the defendants with a particular of the charges upon which he means to rely, and such particular ought to be so framed as to give the defendants the same information as would be given by a special count: but it need not state the specific acts the defendants are charged with having done, or the times or places at which such acts are alleged to have taken place. (*p*) But where a count alleges overt acts, the court will not order particulars to be delivered, where there is no affidavit on the part of the defendant that he has no knowledge of the overt acts charged, and does not possess sufficient information to enable him to meet them. (*q*)

Particulars of the charges intended to be relied upon.

In the British Bank case an order had been made on the first day of the trial that particulars of Cameron’s debt, which was stated to be £36,000, should be delivered to him; and it was objected that until the particulars had been given that case could not be gone into. It was answered that Cameron had had access to the accounts for some months; and Lord Campbell, C. J., held that the crown could not be precluded from giving evidence on that part of the case. (*r*)

Evidence admitted, though particulars had not been delivered.

Upon the trial of an indictment for a conspiracy, the counsel for the prosecution has a right, before opening his case, to have any of the defendants acquitted, in order that he may call them as witnesses, and the counsel for the other defendants has no power of objecting to this being done. (*s*)

Acquittal of some of the defendants.

Where an indictment contained counts for a conspiracy and counts for a libel contained in a hand-bill, and there was no evidence to affect one of the two defendants as to the libel; Coleridge, J., at the close of the case for the prosecution, put the

Election.

(*o*) *Rex v. Biers*, 1 A. & E. 327. The correct statement is ‘a certain statute made and passed in a session of Parliament, held in the first and second years of the reign of King William the Third.’ Per Patteson, J., *ibid.* *Gibbs v. Pike*, 8 M. & W. 223. S. P.

(*p*) *Rex v. Hamilton*, 7 C. & P. 448. Littledale, J., after consulting several of the other judges. *Reg. v. Rycroft*, 6 Cox C. C. 76. *Williams, J., Reg. v. Probert, Dears. C. C. 32 (a)*. In anonymous, 1 Chitty, 698, the Court of King’s Bench refused to order such particulars to be given on motion, but intimated that

the correct course was to apply to the prosecutor to give some information as to the particulars, upon which he meant to rely in support of the indictment, and if he refused, then an application might be made to postpone the trial in order that the question might be more maturely discussed. From which it is to be inferred that the motion had been made without any previous application for particulars to the prosecutor. C. S. G.

(*q*) *Reg. v. Stapylton*, 8 Cox C. C. 69.

(*r*) *Reg. v. Esdaile*, 1 F. & F. 213.

(*s*) *Rex v. Rowland*, R. & M. N. P. R. 401, Abbott, C. J.

Conspiring to  
commit a  
statutory  
offence.

[704]

Change of  
venue.

Point respect-  
ing cross-  
examination  
where one  
defendant  
only calls  
witnesses.

If the jury  
convict of so  
much of a  
count as  
amounts to  
an indictable  
offence,  
judgment may  
be passed on  
the defend-  
ants.

Proof of part  
of a count.

A verdict of  
guilty may be  
given on  
several counts  
if the evi-  
dence prove  
them, though

prosecutor to elect upon which charge he would go before the defendants' counsel entered upon the defence. (*t*)

As conspiracy is an offence at common law, if parties conspire to commit an offence created by statute, they may be indicted for such conspiracy, although the statute be repealed before the indictment is preferred. (*u*)

The Court of King's Bench have refused to change the venue in an indictment for a conspiracy to destroy foxes and other vermin, on the ground that the gentlemen who were likely to serve on the jury to try the indictment were much addicted to fox-hunting. (*v*)

In a recent case, a point arose as to the extent to which the counsel for the prosecution in a case of conspiracy might cross-examine a witness, called by only one of several defendants. The indictment was against A., B., and C.; and after the case for the prosecution was closed, C. *only* called a witness, whom he examined as to a conversation between himself and A.; and it was ruled, that the counsel for the prosecution might cross-examine such witness as to any other conversation between A. and C., although the evidence should tend chiefly to criminate A. (*w*)

If upon an indictment for conspiracy, the jury find the defendants guilty of so much of the indictment as amounts to a misdemeanor, the court may pass judgment upon the defendants. The defendants were indicted for conspiring falsely to indict A. B. for keeping a gaming-house, for the purpose of extorting money from the said A. B., and the jury found the defendants guilty of conspiring to indict A. B., for the purpose of extorting money, but not to indict him falsely; and it was held that enough of the indictment was found to enable the court to give judgment; for in criminal cases, it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law; and the jury had found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money, and that is a misdemeanor, whether the charge were or were not false. (*x*)

Where a count alleged that the defendants conspired by divers false pretences and subtle means and devices to extort from T. E. a sovereign of his monies, and to cheat him of the same, and the evidence failed to prove any false pretences; it was held that an indictable offence was charged without reference to the false pretences, and therefore it was not necessary to prove the false pretences, but it was sufficient to prove enough to sustain the rest of the count. (*y*)

Upon an indictment for conspiracy containing eight counts the jury found a verdict of guilty on six of the counts; there was only one conspiracy proved, but the evidence proved the allegations contained in each count: it was objected in arrest of judgment that each count charged a distinct conspiracy, and therefore as many distinct conspiracies were found as there were

(*t*) Reg. v. Murphy, 8 C. & P. 297.

(*u*) Reg. v. Thompson, 16 Q. B. 832.

(*v*) Rex v. King, 2 Chitty Rep. 217.

(*w*) Rex v. Kroehl, 2 Stark. N. P. R. 343.

(*x*) Rex v. Hollingberry, 4 B. & C.

329. 6 D. & R. 345.

(*y*) Reg. v. Yates, 6 Cox C. C. 441. Crompton, J., after consulting Coleridge, J. See Reg. v. Hudson, Bell C. C. 263, ante, p. 129.



counts; but the Court of Queen's Bench held that the answer was, that the evidence accorded with and proved the allegations in each count, and the verdict was founded thereon; and if any count were objectionable, it must not be presumed that the defendants would ever receive any sentence in respect of any such count. (z)

Where a count contains only one charge of conspiracy against several defendants, the jury cannot find one of them guilty of more than one charge. Where, therefore, a count charged several defendants with conspiring to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, it was held by the House of Lords that such finding was bad; as it amounted to finding that one defendant guilty of two conspiracies, though the count charged only one. (a) So where a count charged eight defendants with one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, and that five of them are guilty of conspiring to effect some, and not guilty as to the residue of these objects, was held to be bad and repugnant; for the finding that three were guilty was a finding that they were guilty of conspiracy with the other five to effect all the objects of the conspiracy; whereas, by the finding as to the five, it appeared that those five were guilty of conspiring to effect only some of those objects. (b)

Where an indictment contains several counts, one of which is bad, a general judgment for the crown, where the punishment is not fixed by law, is bad; and a bad finding on a good count is no more a warrant for a judgment on that count than a bad count. Where, therefore, an indictment for conspiracy contained some good and some bad counts, and on some of the good counts there were bad findings, and there was a judgment against each defendant that for 'his offences aforesaid' he should be imprisoned for a certain term, it was held by the House of Lords that each count must be considered as charging a separate offence, and that the terms 'his offences aforesaid' must be treated as extending to all the counts on which he had been found guilty; and as some of the counts and some of the findings were bad, the judgment was altogether erroneous. (c)

In former times, persons convicted of a conspiracy at the suit of the King to accuse another person of a capital offence, were liable to receive what was called the *villanous* judgment, that is, to lose their *liberam legem*, whereby they were discredited and disabled as jurors or witnesses; to forfeit their goods and chattels and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their bodies committed to prison. (d) But this judgment was not inflicted upon those who were convicted only of conspiracies of a less aggravated kind, at the suit of the party: and for some time past it appears to have been the

only one conspiracy be shown.

Several findings on one charge of conspiracy are bad.

A general judgment on several counts, some of which are bad, and on others of which the verdict is bad, is erroneous.

Punishment.

(z) Reg. v. Gompertz, 9 Q. B. 824. It should have been added that it must not be presumed that the court would do more than impose a sentence for the one offence.

(a) O'Connell v. Reg. 11 Cl. & F. 155.

(b) Ibid.

(c) Ibid.

(d) 1 Hawk. P. C. c. 72, s. 9. 4 Black. Com. 136.

better opinion, that the villanous judgment is by long disuse become obsolete, not having been pronounced for some ages; and that the punishment for conspiracies in general is, as in the case of other misdemeanors, by fine, imprisonment, and sureties for the good behaviour at the discretion of the court. (*e*)

Hard labour.

By the 14 & 15 Vict. c. 100, s. 28, whenever any person shall be convicted of any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice, the court may award imprisonment for any term now warranted by law, and hard labour during the whole or any part of such imprisonment. (*f*)

Conspiracies to murder.

We have seen that by the 24 & 25 Vict. c. 100, s. 4, provision is made for the punishment of conspiracies to murder. (*g*)

[705]  
All the defendants must be present in court upon a motion in arrest of judgment or for a new trial.

In conclusion of this chapter, it may be mentioned, that, after a conviction for a conspiracy, the defendants must be present in court when a motion is made on their behalf, in arrest of judgment. (*h*) And also, that upon a motion for a new trial, after such conviction, all the defendants must be present. (*i*) And it is not a sufficient excuse for absence, that they are in custody on civil process; but if they were in custody on criminal process, the case would be different, for then they might be charged with the conspiracy also. (*j*) But where an indictment has been removed into the Court of King's Bench, after verdict, but before judgment, and set down for argument, it does not appear to be necessary that the defendants should appear in court upon the argument, the proceeding being in the nature of a special verdict, and the party not being considered as convicted, until after the court have determined upon the verdict. (*k*) A new trial cannot be granted as to one conspirator without granting it as to all who are convicted, though the ground on which the new trial is granted applies only to the one conspirator. (*l*) But where some are acquitted and some convicted, a new trial may be granted as to the latter without disturbing the verdict as to the former. (*m*)

(*e*) *Id. ibid.* The pillory was also very commonly a part of the punishment until taken away by the 56 Geo. 3, c. 138. See also *ante*, p. 107, note (*g*). In a case where the defendants were convicted on an information for a conspiracy to take away the character of one Kempe, and accuse him of murder, by pretended conversations and communications with a ghost that answered by knocking and scratching in Cock-lane, &c., they received the following judgment: Richard Parsons (the father of the child, who was the principal agent in the pretended communication), to stand thrice in the pillory, and be imprisoned two years; Eliz. Parsons, the mother, to be imprisoned one year; Mary Fraser, a servant, who was aiding and assisting, was sent to the house of correction to hard labour

for six months; Moore, the curate of the parish, and one James, were discharged on paying the prosecutor £300 and his costs, which were nearly as much more. Brown, who had published a narrative, and one Day, the printer of a newspaper, had previously made their peace with the prosecutor.

(*f*) See the clause in the Appendix.

(*g*) *Ante*, vol. 1, p. 967.

(*h*) *Rex v. Spragg*, 2 Burr. 929. 1 Black. R. 209.

(*i*) *Rex v. Teal*, 11 East, 307. *Rex v. Askew*, 3 M. & S. 9. *Rex v. Lord Cochrane*, 3 M. & S. 10.

(*j*) *Rex v. Hollingberry*, 4 B. & C. 329. 6 D. & R. 345.

(*k*) *Rex v. Nichols*, 2 Str. 1227.

(*l*) *Reg. v. Gompertz*, 9 Q. B. 824.

(*m*) *Ibid.*

## CHAPTER THE THIRD.

## OF THREATS AND THREATENING LETTERS.

IT is said, that the dispersing of *bills of menace* threatening destruction to the lives or properties of those to whom they were addressed, for the purpose of extorting money, is, at common law, a high misdemeanor, punishable by fine and imprisonment. (*a*) Threats directed against persons immediately under the protection of a court are offences punishable by fine and imprisonment, as if a man threaten his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in his custody, and properly executing his duty. (*b*) And a precedent is given of an indictment at common law against the attorney of a plaintiff in a cause for writing a letter to the attorney of the defendant, who had obtained a verdict on the evidence of his son, threatening to indict the son for perjury unless the defendant gave up the benefit of the verdict. (*c*)

[706]  
Threats at  
common-law.

But it was holden that threatening by letter or otherwise to put in motion a prosecution by a public officer to recover penalties for selling *Fryar's Balsam*, without a stamp (which by the 42 Geo. 3, c. 56, is prohibited to be vended without a stamped label), for the purpose of obtaining money to stay the prosecution, was not such a threat as a firm and prudent man might not be expected to resist, and, therefore, was not in itself an indictable offence *at common law*, although it was alleged that the money was obtained, no reference being made to any *statute* which prohibits such attempt. A count alleged that the defendant, intending to abuse the laws for the protection of the revenue, sent the following letter:—

‘SIRS,

‘I am applied to to prosecute an information against you for selling certain medicines without stamps. I have told the parties that all such informations must now be prosecuted by the public officer, and have advised them to let me write to you on the subject, and hear what you have to say. If I can be of any service to you in stopping them, you will write me accordingly, and I will get the best terms I can.’ Another count charged the defendant with corruptly attempting to extort £10 by threatening that a prosecution should be commenced for having sold *Fryar's Balsam* without a stamp. After argument in arrest of judgment Lord Ellenborough, C. J., said, ‘To obtain money under a threat of any kind, or to attempt to do it, is, no doubt, an immoral action; but to make it indictable, the threat must be of such a

Rex v. Southerton.  
Threatening to charge a party with penalties for selling medicines without a stamp, holden not to be indictable.

But where the threat is calculated to overcome a firm and prudent man, it is indictable.

(*a*) 1 Hawk. P. C. c. 53, s. 1. Reference is made to 1 Hale, 567, but *qu.* the reference.

(*b*) 4 Black. Com. 126.

(*c*) 2 Chit. Crim. L. 149.



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nature as is calculated to overcome a firm and prudent man. Now, the threat used by the defendant at its utmost extent was no more than that he would charge the party with certain penalties for selling medicines without a stamp. That is not such a threat as a firm and prudent man might not, and ought not, to have resisted. Then what authority is there for considering these as offences at common law? The principal case relied on is that of *Rex v. Woodward*, (d) which was where the defendants, having another man in their actual custody at the time, threatened to carry him to gaol, upon a charge of perjury; and obtained money from him under that threat, in order to permit his release. Was not that an actual duress, such as would have avoided a bond given under the same circumstances? But that is very unlike the present case, which is that of a mere threat to put process in a penal action in force against the party. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases, under the influence of such threats, may amount to robbery; but not so in cases of threats of other kinds. But this is a case of threatening, and not of deceit; and it must be a threat of such a kind as will sustain an indictment at common law, either according to one case, attended with duress, or, according to others, such as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. The present case is nothing like any of those; it is a mere threat to bring an action, which a man of ordinary firmness might have resisted.' (e)

It appears that, according to the principles laid down in this case, an indictment will lie, at common law, for extorting money by actual duress, or by such threats as common firmness is not capable of resisting. Therefore, where money is extorted from a party by the threat of accusing him of an unnatural crime, and from the circumstances of the case the offence does not amount to robbery, (f) there seems no reason to doubt but that it is indictable as a misdemeanor at common law. (g)

Offences by  
statutes.

Demanding property with menaces, with intent to steal; accusing, or threatening to accuse of an infamous crime with an intent to extort property, and by such accusation or threat actually extorting; the sending or delivering of a threatening letter, or writing to any person, thereby threatening to kill or murder, or to burn or destroy, or thereby with menaces demanding property; accusing, or threatening to accuse, or sending or delivering a letter, &c., accusing or threatening to accuse of certain crimes with intent to extort money, &c., are offences of the degree of felony by the provisions of recent statutes.

Sending  
letters  
threatening to  
murder.

By the Offences against the Person Act, 24 & 25 Vict. c. 100, s. 16, 'whosoever shall *maliciously* send, deliver, or utter, or *directly or indirectly cause to be received, knowing the contents thereof*, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall

(d) 11 Mod. 137, more fully stated in 6 East. R. 133.

(e) *Rex v. Southerton*, 6 East. R. 126. And see vol. 1, p. 198.

(f) *Ante*, vol. 2, p. 118, *et seq.*

(g) See a precedent in 3 Chit. Crim.

L. 841.

be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than five (*gg*) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.’ (*h*)

By the Malicious Injuries Act, 24 & 25 Vict. c. 97, s. 50, ‘whosoever shall send, deliver, or utter, *or directly or indirectly cause to be received, knowing the contents thereof*, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick, or stack of grain, hay, or straw, or other agricultural produce, *or any grain, hay, or straw or other agricultural produce in or under any building*, or any ship or vessel, *or to kill, maim, or wound any cattle*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than five (*gg*) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.’ (*i*)

(*gg*) 27 & 28 Vict. c. 47.

(*h*) This clause is framed from the 4 Geo. 4, c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1.

The words ‘directly or indirectly cause to be received’ are taken from the 9 Geo. 4, c. 55, s. 8 (I), and introduced here in order to prevent any difficulty which might arise as to a case falling within the words ‘send, deliver, or utter.’

The words of the 10 & 11 Vict. c. 66, s. 1, were ‘if any person shall knowingly send or deliver or utter to any other person,’ and the words ‘to any other person’ were advisedly omitted, in order that every sending, delivering, uttering, or causing to be received may be included. If, therefore, a person were to send a letter or writing without any address by a person, with directions to drop it in the garden of a house in which several persons lived, or if a person were to drop such a letter or writing anywhere, these cases would be within this clause. In truth, the new clauses make the offence to consist in sending, delivering, uttering, or directly or indirectly causing to be received any letter or writing, which contains a threat to kill or murder any person whatsoever, or to burn or destroy any house, &c., whatsoever, or to accuse any other person whatsoever of any crime, and it is wholly immaterial whether it be sent, &c., to any person or not, or whether it be sent, &c., to the person threatened, or to any other person. The cases, therefore, of *Rex v. Paddle*, R & R. 484; *Reg. v. Burridge*, 2 M. & Rob. 296; *Reg. v. Jones*, 2 C. & K. 398; 1 Den. C. C. R. 218; and *Reg. v. Grimwade*, 1 C. & K. 592; 1 Den. C. C. R. 30, are not to be considered as authorities on these clauses so far as they decide that the letter must be sent, &c., to the party threatened.

Sending letters threatening to burn or destroy houses, buildings, ships, &c.

In every indictment on this and the similar clauses in the other Acts, a count should be inserted alleging that the defendant uttered the writing without stating any person to whom it was uttered. Counts for uttering forged instruments never state the person to whom they were uttered, and they show that such a count on this clause would clearly be good. See *Elsworth’s case*, 2 East, P. C. c. 19, s. 59, p. 939, *ante*, vol. 2, p. 808.

The words of the 4 Geo. 4, c. 54, s. 3, were ‘any letter or writing with or without any name or signature subscribed thereto, or with a fictitious name or signature,’ but the words of the 10 & 11 Vict. c. 66, s. 1, were ‘any letter or writing’ only, and the latter words are used in this clause, and it is clear that they are large enough to include any writing whatsoever.

The word ‘maliciously’ was unnecessarily introduced in the committee of the whole House of Commons, and renders this clause inconsistent with sec. 46 of the Larceny Act, and sec. 50 of the Malicious Injuries Act.

The 4 Geo. 4, c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1, used the terms, ‘knowingly send,’ &c. This was a clear inaccuracy; for it would include every person who sent or delivered a letter, though he were ignorant of its contents; ‘knowingly,’ therefore, has been omitted, and ‘knowing the contents thereof’ substituted, which really expresses the intention of the clause. See *Girdwood’s case*, 1 Leach, 142, *post*, p. 195.

As to hard labour, &c., see *post*, p. 182.

(*i*) This clause is taken from the 4 Geo. 4, c. 54, s. 3, and 10 & 11 Vict. c. 66, s. 1.

See the preceding note as to the first two lines of this clause.

Letter  
demanding  
money, &c.,  
with menaces.

By the Larceny Act, 24 & 25 Vict. c. 96, s. 44, 'whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, *knowing the contents thereof*, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any *property*, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than five (i) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.' (j)

Demanding  
money, &c.,  
with menaces,  
or by force,  
with intent to  
steal.

Sec. 45. 'Whosoever shall with menaces or by force demand any property, *chattel, money, valuable security, or other valuable thing* of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five (ii) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.' (k)

Letter threat-  
ening to ac-  
cuse of crime,  
with intent to  
extort.

Sec. 46. 'Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, *knowing the contents thereof*, any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death, or *penal servitude for not less than seven years*, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, *chattel*, money, valuable security, or other valuable thing, from any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five (ii) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to

'Infamous  
crime' de-  
fined.

The clause is extended to letters threatening to burn any grain, hay, &c., in or under any building, or to kill, maim, or wound any cattle. In any indictment under this section a count should be inserted, alleging that the prisoners uttered the letter or writing without stating to whom the same was uttered. See the last note.

As to hard labour, &c., see *post*, p. 182.

(ii) 27 & 28 Vict. c. 47.

(j) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 8, and 9 Geo. 4, c. 55, s. 8 (I).

The beginning of this clause is made to correspond with the beginning of sec.

46, *infra*, of sec. 50 of the Malicious Injuries Act, *ante*, p. 179, and of sec. 16 of the Offences against the Person Act, *ante*, p. 179, as all these sections contain similar enactments. See the note, *ante*, p. 179, for the observations on the beginning of these clauses.

The alteration as to 'property, &c.', is made in order that this clause and ss. 45, 46, and 47 may correspond.

As to hard labour, &c., see *post*, p. 182.

(k) This clause is taken from the 7

Will. 4 & 1 Vict. c. 87, s. 7.

See the last note as to the words in italics.

As to hard labour, &c., see *post*, p. 182.



commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act.' (l)

Sec. 47. 'Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, *chattel*, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five (ll) years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.' (m)

Accusing or threatening to accuse with intent to extort.

Sec. 49. 'It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person.' (n)

It shall be immaterial from whom the menaces proceed.

Sec. 98. 'In case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except only a receiver of stolen property) shall, on conviction, be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be indicted and punished as a principal offender.' (o)

Principals in the second degree and accessories.

Abettors in misdemeanors.

Sec. 115. 'All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in which the offender shall be apprehended or be in custody; and in any indictment for any such offence, or for being an accessory to any such offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the

Offences committed within the jurisdiction of the admiralty.

(l) This clause is taken from the 7 & 8 Geo. 4, c. 29, ss. 8, 9; 9 Geo. 4, c. 55, ss. 8, 9, (l); and 10 & 11 Vict. c. 66, s. 1.

The beginning of this clause is made to correspond with the beginning of sec. 44, *ante*, p. 180, of sec. 50 of the Malicious Injuries Act, *ante*, p. 179, and of sec. 16 of the Offences against the Person Act, *ante*, p. 179, as all these sections contain similar enactments. See the note, *ante*, p. 179, for the observations on the beginning of these clauses.

As to hard labour, &c., see *post*, p. 182.

(m) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 8; 9 Geo. 4, c. 55, s.

8 (I); 7 Will. 4 & 1 Vict. c. 87, s. 4; and 10 & 11 Vict. c. 66, s. 2.

As to hard labour, &c., see *post*, p. 182.

(n) This clause is new. It is intended to meet cases where a letter may be sent by one person and may contain menaces of injury by another, and to remove the doubts occasioned by *Rex v. Pickford*, 4 C. & P. 227, and see *Reg. v. Smith*, 1 Den. C. C. 510, *post*, p. 190.

(o) This clause is taken from the 7 & 8 Geo. 4, c. 29, s. 61, and 9 Geo. 4, c. 55, s. 54 (I), and is like the 24 & 25 Vict. c. 100, s. 67, *ante*, vol. 1, p. 881, and the 24 & 25 Vict. c. 97, s. 56, *ante*, vol. 2, p. 1021.

offence itself shall be averred to have been committed "on the high seas:" provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.' (*p*)

Sureties for keeping the peace; in what cases.

Sec. 117. 'In case of any felony punishable under this Act the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized: provided that no person shall be imprisoned under this clause, for not finding sureties, for any period exceeding one year.' (*q*)

Hard labour.

Sec. 118. 'Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.' (*r*)

Solitary confinement and whipping.

Sec. 119. 'Whenever solitary confinement may be awarded for any indictable offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any indictable offence under this Act, the court may sentence the offender to be once privately whipped, *and the number of strokes, and the instrument with which they shall be inflicted, shall be specified by the court in the sentence.*' (*s*)

None of these Acts extend to Scotland.

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Some of the cases decided upon the repealed Acts may assist in the construction of the present statutes.

Robinson's case. As to the demand within the repealed clause of the 9 Geo. 1, c. 22.

The construction of the 9 Geo. 1, c. 22, was much considered, in a case where the prisoner, Michael Robinson, was indicted for sending the following letter, dated, &c., without any name subscribed thereto, to one J. O. Oldham, demanding of him a certain valuable thing, namely, a bank note, against the form of the statute:—

'SIR,

'I am well pleased to find that I am not likely to be mistaken in the idea I have entertained of you amongst men of a proper and liberal way of thinking: an understanding on such a matter as this is the easiest thing imaginable, and in repeating that you will find me a gentleman, I wish you to be satisfied that I am as incapable of taking any unmanly advantage as of wantonly sporting with the feelings of any one; I have ever despised and execrated the cowardly assassin, who, skulking in obscurity, sends forth his malignant shafts to wound the peace and the character of individuals; and I have, therefore, uniformly resisted every overture that has been made me for such a purpose. My situation as a literary character has teemed with temptations, but a sacred

(*p*) This clause corresponds with the 24 & 25 Vict. c. 100, s. 68, *ante*, vol. 1, p. 762, and the 24 & 25 Vict. c. 97, s. 72, *ante*, vol. 2, p. 1022.

(*q*) This clause corresponds with the 24 & 25 Vict. c. 100, s. 70, *ante*, vol. 1, p. 900, and with the 24 & 25 Vict. c. 97, s. 73, *ante*, vol. 2, p. 1022.

(*r*) This clause corresponds with the 24 & 25 Vict. c. 100, s. 69, *ante*, vol. 1, p. 900, and with the 24 & 25 Vict. c. 97, s. 74, *ante*, vol. 2, p. 1022.

(*s*) This clause corresponds with the 24 & 25 Vict. c. 100, s. 70, *ante*, vol. 1, p. 900, and with the 24 & 25 Vict. c. 97, s. 75, *ante*, vol. 2, p. 1022.

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principle of honour has superseded them all. The subject on which I have addressed you has long lain dormant, and it was because I thought the attack of a most serious complexion that I hesitated for such a length of time in giving any countenance to it; not that I ever sought for any circumstance to influence my judgment or qualify my opinion, and, for all that has ever come to my knowledge, it may be all *the moonshine of the moment*: I am, therefore, so far candid, and I trust, not indelicate; and it will at least be a satisfaction to you to be told, with a solemnity becoming the character I have professed myself, that not a soul but myself is in possession of a line of the MS., nor has it ever been out of my hands, or perused or heard by any person living since first I had it; so that when it is committed to the flames *all* will necessarily die with it. Of this you shall have a testimony so clear and unequivocal that it will not be possible for you afterwards to doubt. Thus much I have suggested for your satisfaction; you will now give me leave to say something on behalf of *the cause* I have engaged in. I have not the least objection to an interview, and I readily close with your proposition; but there are a few preliminaries which I must first beg leave to adjust. Perhaps I may be more anxious to urge them, in order to have some proof of your sincerity, after which I am at your service. In order to relieve a destitute and unhappy family, struggling with sickness and sorrow, you will permit me to be your almoner. Will you enable me to dispose of a little of your money, as I shall see occasion? It is a duty I owe to the cause of humanity to urge it. Remember, sir, I am now only making my appeal to your *benevolence*. I am holding out no delusions to exact the involuntary tribute. I am asking you as a gentleman, as a man, to give me some earnest of your intention to prove what I am so strongly inclined to give you credit for. Inclose a bank-note in a letter addressed to R. R., and let it be left at the Cambridge coffee-house, the top of Newman-street, in Goodge-street, on the side of the bar. At the entrance of the coffee-room is a bracket for letters; let it be placed there between the hours of eleven and one, on Thursday next; and at five o'clock on the same day a line shall be sent by a porter to your house to acknowledge the receipt; after which, if you will name any day (Friday excepted) in the following week on which it will suit you, in the evening, to take a bottle of wine at the King's-head tavern, in Middle-row, Holborn, or elsewhere, I will with pleasure attend you. Our meeting, however, is to be private and *tête-à-tête*. Thus, possibly, over the ashes of the MS. a phoenix may arise that may prove the forerunner to friendship. I shall send to the coffee-house between the hours of one and four, and I will venture to say that you will have no reason to be dissatisfied with the event of this correspondence. To obtain confidence it is necessary, or at least reasonable, to expect that one should be reposed.

‘I have the honour to remain, Sir,

‘Your obedient humble servant,

‘R. R.’

‘Tuesday, 12th January, 1796.’

‘J. O. OLDHAM, Esq.,

‘Brook-street,

‘(Private.) Holborn.’



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Other letters received in evidence to explain the letter on which the indictment was founded.

Direction to the jury.

Objections.

Judgment.

The prosecutor had served an apprenticeship with a person named Dolly, by whom he was afterwards taken into partnership; upon Dolly's death a report was spread that the prosecutor had been the author of his death, upon which he brought an action against two persons, and had judgment against them. Before the letter in question was sent, several other letters had been written by the prisoner to the prosecutor, to which he returned answers, for the purpose of obtaining information of the prisoner's place of abode, in order to bring him to justice. And all these letters were read in evidence, as serving to explain the letter upon which the prisoner was indicted. It was intimated in them that another person, who was a friend of the prisoner's, and who was in distress, had put certain MSS. into his hands, containing a charge of the prosecutor's having murdered his former master, Dolly, and afterwards married the widow, his accomplice; but that the prisoner was unwilling to publish the MSS. containing so serious a charge without giving a previous intimation to the prosecutor, and hearing what he had to propose upon the subject. A subsequent correspondence between the prosecutor and the prisoner was also given in evidence; in the course of which the prisoner communicated a few pages of the supposed MSS. in verse, from which the charge alluded to was to be plainly inferred. Upon this evidence the learned judge before whom the prisoner was tried left the case to the jury to say whether the prisoner sent the letter above set forth, and whether it contained a threat to publish a libel on the prosecutor, imputing to him the death of Dolly, unless he would send the prisoner a bank note; and in case they were of that opinion they were directed to find the prisoner guilty. The jury found him guilty, and also found specially that the prisoner sent the letter in the indictment, and that it contained a threat to publish a libel, imputing to the prosecutor the murder of his master, in order to extort money from him. Several objections were taken to this conviction, and amongst others it was objected that the letter did not contain a *threat or demand*, so as to bring the case within the 9 Geo. 1, c. 22. But the judges, after hearing the point argued, all agreed in overruling the objection. Buller, J., in delivering their opinion, after adverting to the preamble of the statute (upon which the counsel for the prisoner had founded his argument, by contending that it necessarily so far restrained the enacting clause that the demand contained in a letter must be subscribed and peremptorily accompanied with a threat of bodily harm), said:—‘Where the enacting clause of a statute refers to such offences only as are contained in the preamble, it may be restrained by the preamble; but in this case it would be doing violence to very plain words, and repealing some of the obvious provisions of the statute, if it were so restrained. It is no uncommon thing for the preamble of a statute to recite a particular mischief, as the cause of making it, and yet for the enacting part to embrace more general objects, and to extend to other cases which the legislature thought within the mischief. If the enacting clause in this case were to be restrained by the preamble the statute would apply only to cases where several persons had joined together in confederacy; where the letter was signed with a fictitious name only, and where venison or money was demanded;

and not to a letter without a name, nor to a demand of any other valuable thing than money or venison, nor to any demands by such letters, whether accompanied with a threat of bodily harm or not. But the enacting clause expressly applies to a single offender; to a letter sent without a name, as well as to one signed with a fictitious name; and to a demand of any valuable thing as well as of money or venison; and also to all demands by such letters, whether accompanied with a threat of bodily harm or not. I agree that a mere request, such as asking charity without imposing any conditions, would not come within the sense or meaning of the word "*demand*;" but here the demand was made under a threat that if it was not complied with the prisoner would publish a libel against the prosecutor, imputing to him the death of his master: for this is the construction which the jury by their verdict have expressly put upon the letter. Now, whether the letter does amount to such a demand or not is a question for the judges to determine, upon reading it as it is stated in the record; and they are all clearly of opinion that this is a *demand* within the true intent and meaning of this statute. It is a demand of money or money's worth (which a bank note is), by holding out a threat to impute murder to the prosecutor, and to injure his fame and his character; and not a request of voluntary charity.' (t)

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Demand.

In the following case, upon the 27 Geo. 2, c. 15, it was holden that the construction of the letter, namely, the question whether it contained, in the terms of it, an actual threatening to kill or murder, was properly left to the jury. The first count charged the prisoner generally with feloniously sending to the prosecutor a certain letter in writing, with the fictitious letters J. W. thereunto subscribed, threatening to kill and murder the prosecutor. (u) In the second count the letter was set out in the following form:—

Girdwood's case. Question left to the jury, whether a letter contained an actual threatening to kill or murder, within the repealed clause of 27 Geo. 2, c. 15.

‘SIR,

‘February 9, 1776.

‘I am sorry to find a gentleman like you would be guilty of taking *MacAllester's* life away for the sake of two or three guineas; but it will not be forgot by one who is just come home to revenge his cause. This you may depend upon, whenever I meet you, I will lay my life for him in this cause. I follow the road, though I have been out of London; but on receiving a letter from *MacAllester* before he died, for to seek revenge, I am come to town. I remain a true friend to *MacAllester*.

‘J. W.’

Hotham, B., left it to the jury to consider whether this letter contained in the terms of it an actual threatening to kill or murder, directing them to acquit the prisoner if they thought that the words might import anything less than to kill or murder. The jury found the prisoner guilty, and upon a case reserved on the point (amongst others), viz. whether the letter purported to be a letter threatening to kill or murder, ten judges, who were present, were all clearly of opinion that the conviction was right, and that the construction of the letter was properly left to the jury. (v)

(t) Robinson's case, 2 Leach, 749. 2 East, P. C. c. 23, s. 2, p. 1110.

ment.

(u) See *post*, p. 198, as to the necessity of setting out the letter in the indict-

(v) Girdwood's case, 1 Leach, 142. 2 East, P. C. c. 23, s. 4, p. 1120. The prisoner was executed.

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Jepson's case. Holden that as the letter did not by necessary construction import a threat to burn, &c., a conviction upon that statute was wrong.

It was holden, however, in a subsequent case, that as the letter in question did not, by *necessary construction*, import a threat to burn the prosecutor's farm-house and buildings, a conviction upon the 27 Geo. 2, c. 15, was wrong. The letter was as follows :—

‘ Mr. WOODGATE,—Sir,

‘ March 3rd, 1798.

‘ I am very sorry to acquaint you that we are determined to set your mill on fire, and likewise to do all the public injury that we are able to do you, in all your *farms and seteres*, (w) which you are in possession of, without you on next (x) day release that Ann Wood which you put in confinement. Sir, we mention in a few lines that we hope if you have any regard for your wife and family you will take our meaning without anything further; and if you do not we will persist as far as we possibly can, so you may lay your hand at your heart, and strive your uttermost ruin. I shall not mention nothing more to you until such time as you find the few lines a fact, with our respect. So no more at this time from me,

‘ R. R.’

Upon the trial, Mr. Woodgate, the prosecutor, swore that he had had a share in a mill three years before this letter was written, but had no mill at that time; but that he held a farm when the letter was written and came to his hands, and still held it, with several buildings upon it. It was objected that this was not such a letter as comprehended the offence in the Act of Parliament; and the prisoner having been convicted, the point was submitted to the consideration of the judges, who agreed (except Eyre, C. J., who was absent) that as the prosecutor had no such property at the time as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. As to the rest of the letter, Lord Kenyon, C. J., and Buller, J., were of opinion that it must be understood as also importing a threat to burn the prosecutor's farm-house and buildings; but the other judges not thinking that a necessary construction, the conviction was holden wrong. (y)

On an indictment under the 4 Geo. 4, c. 54, s. 3, for sending a letter threatening to burn, &c., which is set out, it may be left to the jury to say whether the letter sent amounted to such threat.

It has since been held that upon the trial of an indictment for sending a letter to the prosecutor, threatening to burn his house, &c., it may be left to the jury to say whether the letter amounted to such a threat. The indictment charged that the prisoners feloniously did send to J. Belcher a writing, without name or signature, directed to the said J. Belcher, by the name and description of ‘Starve-gut Belcher,’ threatening to kill and murder him, which said writing is as follows, viz. :—‘Starve-gut Belcher, if you dont go on better great will be the consequence; what do you think you must alter an (or) must be set fire; this came from London: i say your nose is as long rod gffig sharp as a flint, 1835. You ought to pay your men.’ A second count set out the letter as threatening to burn and destroy his houses, outhouses,

(w) It is said that by this was understood ‘settings or lettings,’ and that the whole letter was evidently the production of an illiterate person, being falsely spelt nearly throughout. 2 East, P. C. c. 23, s. 2, p. 1115, note (v).

(x) In 2 East, *ibid.*, the learned writer says, that the word at this part was unintelligible in his copy.

(y) *Rex v. Jepson*, 2 East, P. C. c. 23 s. 2, p. 1115.



barns, stacks of corn and grain, hay and straw. Lord Denman, C. J., asked the jury in the terms of the statute, whether this was a letter threatening to put J. Belcher to death, or to burn and destroy his houses, outhouses, barns, stacks of corn and grain, hay and straw? The jury negatived the threat to put him to death, but found that the letter threatened to fire his houses, outhouses, barns, stacks of corn and grain, hay and straw. Lord Denman, C. J., had some doubts whether this question ought to have been left to the jury, and whether the letter could be in point of law a threatening letter, to the effect found; but, upon a case reserved, the judges held the conviction good after verdict. (z)

A letter threatening to accuse the prosecutor of having made overtures to the prisoner to commit sodomy with him, did not threaten to charge such an infamous crime as to be within the 4 Geo. 4, c. 54, s. 3. One count of an indictment charged that the prisoner feloniously did send to J. Fabling a certain letter threatening to accuse the said J. Fabling of the offence of making overtures to him, the prisoner, to commit sodomy with the said J. Fabling, being an infamous offence and crime, with a view to extort money from the said J. Fabling. The letter set out in this count contained the following passage:—‘You well know you have several times made overtures to me, of which I can indite you of sodomy.’ The jury having found the prisoner guilty, Littledale, J., reserved for the consideration of the judges the question, whether the count should not have averred that an overture by the prosecutor to commit sodomy with the prisoner was an infamous crime; and, secondly, if it were necessary so to aver, whether the words, ‘being an infamous offence and crime,’ must not be considered as relating to the words describing the complete offence which immediately preceded them, and not to the overtures to commit that crime. The judges were of opinion that a charge of making overtures to commit sodomy was not an infamous crime within this Act, and they held that they were bound to take the word ‘infamous’ in its legal sense, and that such overtures, however they would disgrace and lead to detestation, would not subject the person making them to an infamous punishment, or prevent his being a witness, and therefore the conviction was wrong. (a)

A letter intimating that some persons had conspired to burn or otherwise destroy the property of the prosecutor, and offering to make a disclosure if a certain sum of money, was placed in a certain spot for the writer, is not within the 7 & 8 Geo. 4, c. 29, s. 8; though it may create apprehension in the owner’s mind, it does not contain a menace. (b) The prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 8, for sending the following letter to Mr. Young, demanding money with menaces:—

‘SIR,

‘As you are a gentleman and highly respected by all who know

(z) *Rex v. Tyler*, R. & M. C. C. R. 428.

(a) *Rex v. Hickman*, R. & M. C. C. R. 34. The word ‘solicitation’ was introduced in the 6 Geo. 4, c. 19, the 7 & 8 Geo. 4, c. 29, s. 9, and the 1 Vict. c. 87, s. 4, to meet this case. Another point,

on which the judges were equally divided, was whether the letter supported a count for sending a letter demanding money from the prosecutor.

(b) *MSS. Bayley*, J. 3 Burn, J. 10. & Wms. 506.

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Under the 4 Geo. 4, c. 54, s. 3, such crimes only were to be deemed infamous as subjected a man to infamous punishment or incapacitated him from being a witness.

A letter stating that the writer had overheard persons agree to injure the property of the prosecutor, and if he would lay thirty sovereigns at a certain place the writer

would give  
information  
to frustrate  
the attempt.  
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you, I think it my duty to inform you of a conspiracy. There is a few young men who have agreed among themselves to take from you personally a sum of money, or injure your property. I have overheard all the affair. I mean to say, your building property, in the manner they have planned this dreadful undertaking, would be a most serious loss. They have agreed to commence this upon an appointed time in the course of this winter, which would be a most dreadful sight. Sir, I could give you every particular information how you may preserve your property and your person, and how to detect and secure the offenders. Sir, if you will lay me a purse of thirty sovereigns upon the garden edge, close to Mr. Tatler's garden gate, I will leave a letter in the place, to inform you of the night this is to take place. I can also inform you how you could be sure to secure the offenders; but you must keep this all quite secret, and not make a talk of it, as it would come to their ears, and then they would put it off to another time. Sir, I hope you will not attempt to seize upon me, when I come to take up the money and lay down the note of information. Sir, you will find I am doing you a most serious favour. You will please excuse me in not describing my name, but I will make myself known the day after you have taken them, and be a witness against them. I shall come to lay down my letter on the 1st of December if I find the money. Sir, I am your unknown friend.'

It appeared that the prisoner had written the letter, and had done so with an intention of getting the thirty sovereigns to leave the country. For the prosecution it was contended that the letter contained a sufficient demand of money, as the request was accompanied by a condition, namely, to discover persons going to do a certain act; and *Robinson's case* (c) was cited. And, with respect to the menaces, to hold that the letter contained none, would be equivalent to holding that, whenever the menaces came from one person, and the letter from another, neither could be indicted; and, at all events, it was a question for the jury whether the letter did contain menaces. *Girdwood's case*. (d) Bolland, B., thought that he ought to decide whether the letter contained menaces or not; but he consulted Littledale, J., who thought the question should be left to the jury; and Bolland, B., then left it to the jury to say, whether the letter contained menaces: and they convicted the prisoner; but, upon a case reserved, the judges were of opinion that the conviction was wrong. (e)

The prisoner was convicted of having feloniously sent a letter to Sir W. R. Farquhar, Baronet, and others, demanding money with menaces, and without any reasonable or probable cause, of which letter the following is a copy:—

‘Gentlemen,

‘You say B. O. N. will accede to the terms proposed, and send part of the means to any place which may be named. You would have had an answer yesterday, but was prevented. If you act honourably by me, and not by any means deceive me, or

(c) *Ante*, p. 185.

(d) *Ante*, p. 185.

(e) *Rex v. Pickford*, MSS. C. S. G. and 4 C. & P. 227. S. C. 3 Burn, J. D. & Wms. 506. *Tindal, C. J., Garrow,*

*B., Park, J. A. J., and Bosanquet, J.,* thought this a letter demanding money with menaces. The other eight judges inclined to a contrary opinion. *MS. Bayley, J.*

If a letter contain an application for money accompanied by a threat of ill consequences if the money is not given, it is within the statute, though the

allow any spy to watch me, *I will save you or perish in the attempt, though I hazard my life in so doing*, and must have sufficient means at my disposal without delay, or all will be lost. I am fully assured that £20,000 *would not cover the horrid catastrophe, which would not only stop your bank for a time, but perhaps for ever, as the books would be all destroyed.* The match, the most dreadful and last resource, has been contemplated by the cracksman or captain of this most horrid gang, which I fervently pray to be relieved from. (I have never yet, so help me, God, done a deed I am afraid or ashamed of) and the only way I can privately obtain means will be the following:—At the London end of Kensington gardens (on the Knightsbridge side) there is a dike sloped, which divides the gardens from the park and a carriage road, where the roads meet as you turn to ride or drive across the bridge. It is a short distance from the first lodge, where the keeper remains in the gardens. By looking up that dike you will see large iron pipes, which convey water, &c., to the pond. A large elm tree stands in the middle of this road, betwixt the park and the gardens. There is sufficient room under the first pipe to conceal a small bag. If you will, therefore, send a man you can confide in, and lodge beneath the pipe 250 sovereigns, unseen by any mortal eye, I swear most solemnly by Almighty God to prevent the evil, if, when I have completed my task, and inform you all is safe, or denounce the villains, you will let me have £250 more, which, if God prospers me, I will repay with gratitude, as I could not get into business for less than £500, to obtain a respectable living. Let the money be lodged to-morrow (Saturday) morning, by half-past eleven, but not a moment sooner, and all shall be well with you; but if I am at all deceived in any possible way all must fall on yourselves.’ (f) It was objected that this was not a threatening letter within the statute; but the objection was overruled: and, on a case reserved upon that question, it was contended that the letter contained no menace from the party writing it, and that the case was not distinguishable from *Pickford’s case*. (g) Wilde, C. J., “Let the money be lodged to-morrow morning, by half-past eleven, but not a moment sooner, and all shall be well with you; but if I am at all deceived in any possible way, all must fall on yourselves.” Is that not a threat? That is not found in terms at all events in *Pickford’s case*: so we need not overrule that decision to support this conviction.’ ‘We are all agreed that this letter contained such a demand as is contemplated by the statute. There is an application made for money to be given to the applicant, accompanied by a threat of ill consequences if that money is not so given. The writer professes to be cognizant of all the circumstances connected with the evil foretold, and capable of averting them; and seeks to make the prosecutor part with his money against his will in order to induce the writer to avert the evil. It is said that this is not such a threat as the law will take notice of; and that it does not come within the rule adverted to by Lord Ellenborough in *Rex v.*

evil foretold may not proceed from the writer of the letter.

Whether a threat be within the statute or not depends on the general nature of the evil threatened, and not on the nerves of the individual threatened.

(f) The question whether this was a threatening letter within the 7 & 8 Geo. 4, c. 29, s. 8, was treated as a question of law by the judge at the trial, and this

was objected to on the case reserved; but the court thought the point ought to have been raised on the trial.

(g) *Supra*, note (c).



*Southerton*, (*h*) viz., that it must be a threat attended with duress, or such a threat as may overcome the ordinary free will of a firm man, and induce him from fear to part with his money. That rule must be understood to refer rather to the nature of the threat than to the probable consequences in any particular case. Whether a threat be criminal or no cannot be taken to depend on the nerves of the individual threatened, but [must depend] on the general nature of the evil with which he is threatened. Threats attended with duress, or threats of duress, or of other personal violence, or of great injury, such as is imported by this letter, will come within the rule.' (*i*)

It is a question for the jury to whom the letter is intended to be sent.

So also whether it contain threats.

A count alleged that the prisoner sent to A. G. B. Coutts and others, her partners, a certain letter directed to the said A. G. B. Coutts, and others, by the name and description of 'J. Coutts, Esq., Banker, Strand,' demanding money from them with menaces; another count stated the letter to be sent to A. G. B. Coutts. The letter contained the following passages:—

'Sir,

'The most desperate gang in the metropolis have resolved to obtain possession, by whatever means, of a certain portion of your property: it is composed of starving men, and no efforts will be spared in effecting their firm resolves.' \* \* \* 'Learning their design upon you, and having further a strong consideration for you, I made every effort to dissuade them, at the risk of personal suspicion and consequent danger, to abolish their intentions as respects yourself: further than this I dared not go; but intense suffering closes the ear of mercy. To remove that suffering is the only way to give access into its natural dictates; they, however, mutually agree that if I will give them a hundred pounds in solid gold, they will relinquish their design upon you; nothing less will satisfy. I communicate to you their demand; and personal safety will, I hope, induce compliance.' \* \* \* 'If they receive the sum in question, I am firmly convinced you will never have any cause of fear from them; but if not, non-compliance will hereafter be repented of too late.' \* \* \* 'That on Friday night next, at half-past nine o'clock, you will cause a little boy to be stationed at the base of the monument, who shall have in his possession the sum of one hundred pounds in solid gold, encased in boards, so that he shall not be aware of the contents, and deliver the same to the individual who asks for a parcel.' It was objected that as the letter was directed to J. Coutts there was no proof of its being intended for any of the partners mentioned in the indictment; and that the letter was not a threatening letter within the statute. Maule, J. (to the jury), 'In the first place, the prosecutor must make out to your satisfaction that this is a letter addressed to A. G. B. Coutts and others, individually or collectively, by the name of J. Coutts, Esq., Banker, Strand. The question is, is it in substance directed to them? I do not think it necessary that the direction should contain the actual name of the partners in the firm; because nothing could then be

(*h*) 6 East, 126, *ante*, p. 178.

(*i*) *Reg. v. Smith*, 1 Den. C. C. 510. Wilde, C. J., added, 'This decision does

not interfere with that of *Rex v. Pickford*.'

more easy than to send a threatening letter with perfect impunity. Such a direction might be used as would ensure the paper reaching the parties for whom it was intended, whilst at the same time such a variation might be adopted as would ensure to the writer an acquittal, on the ground of such a variance as is here urged. Evidence has been given that the firm was once T. Coutts & Co., and that none but themselves carry on such a business in the Strand, or in London, by such a style now. It is for you then to say whether the parties stated in the indictment are not those for whom the letter was intended. Secondly, is this a letter demanding money with menaces without any reasonable and probable cause? To ascertain this you must, of course, look to the letter itself, and to the situation of the parties. It may be that, under certain circumstances, an apparently innocent letter may convey a threat. It may be that no letter could be written which it might not be possible to prove by extraneous matter did not contain a threat. Now I can conceive a case where such a letter as this might be written:—"Sir, I trust you are well, and I shall be happy to meet you to-morrow." There I should consider myself called upon to withdraw such a letter from the jury, because it would be absurd to say such a letter contained a threat. But as it is impossible I can tell you that this letter may not contain a threat, I cannot decide that it is not a question for the jury.' 'In *Rex v. Pickford* (j) the jury were told that the letter was not a threatening one. They found, therefore, nothing more than that it had been sent by the prisoner, and the court held that they ought to have decided the whole question. This principle is further illustrated by *Rex v. Tyler*, (k) where a different course was, in the first instance, pursued. The jury were not there told that the letter did or did not contain threats, but its interpretation was left to them. They came to a certain conclusion, and it was upheld by the court. These two cases, then, show what is the proper course in trials of this kind. Evidence is to be given of the letter sent, and it is for the jury to say whether or not it contains a sufficient threat. At any rate, if that is not the proper mode of proceeding, and the court are competent to decide that this letter cannot, on any construction, be held to contain menaces, the objection will be on the face of the record, and will be open to the prisoner in arrest of judgment, or by a writ of error.' (l)

An indictment on the 4 Geo. 4, c. 54, 'for sending a letter threatening to kill and murder R. Collier, set out the letter as follows:—

'Sir,

'You are a rogue, thief, and vagabond, and if you had your deserts, you should not live the week out; I shall be with you shortly, and then you shall nap it, my banker. I have a care, old chap, or you shall disgorge some of your ill-gotten gains, watches and cash, that you have robbed the widows and fatherless of. Don't make light of this, or I'll make light of you and yours. I am your

'CUT-THROAT.'

'March 15th, 1831.'

It was objected that there was nothing in the letter which

(j) *Ante*, p. 188. This decision is erroneously stated in this report.

(k) *Ante*, p. 187.

(l) *Reg. v. Carruthers*, 1 Cox, C. C. 133.

Letter containing a threat to murder.

[718]

imported a threat to kill and murder Mr. C.; it was all hypothetical, and the signature 'Cut-throat' could not be called in aid, for by the statute the threat must be in the letter and not in the signature. And as the words were of ambiguous meaning there ought to have been an innuendo to explain them. But Patteson, J., held that the letter very plainly conveyed a threat to kill and murder, as no one who received it could have any doubt as to what the writer meant to threaten. (*m*)

Threatening to procure witnesses to support a charge already made was not a threatening to accuse within the 4 Geo. 4, c. 54, s. 5.

The prisoner was indicted under the 4 Geo. 4, c. 54, s. 5, for having feloniously and maliciously, with intent to extort money, charged and accused A. B. with having committed the horrible and detestable crime, &c., and that he feloniously and maliciously did menace and threaten to prosecute the said A. B. The evidence was, that he had threatened to procure witnesses to support a charge already made. It was objected for the prisoner that the statute applied only to the threatening to accuse prospectively, and that this was at most a threat to support such a charge by evidence. Bayley, J., 'Threatening to procure witnesses to support a charge already made is not within the Act of Parliament, which makes it felony to extort money by threatening to accuse of an indictable offence. It is one thing to accuse, but another to procure witnesses in support of an accusation already made.' (*n*)

Sending a letter to A., threatening to burn a house of which he is the owner, but let by him to and occupied by a tenant, was not an offence within the 4 Geo. 4, c. 54, s. 3.

The two first counts of the indictment charged the prisoner with feloniously sending a letter to one G. Ley, threatening to burn and destroy a certain house belonging to and the property of the said G. Ley. The third and fourth counts described the house as a certain house in the possession of one T. Elliott, and then belonging to and being the property of the said G. Ley. It appeared that the house was the property of G. Ley, and inhabited by T. Elliott as his tenant, and that the letter was received by G. Ley. It was objected that the two first counts were not proved, as the term 'his' in the 4 Geo. 4, c. 54, s. 3, must have a possessory meaning, and according to the analogy of the rule of law in arson and burglary, the house must be laid as that of the party actually dwelling therein. And as to the two last counts, the offence charged was the sending the letter to G. Ley, threatening to burn the house of T. Elliott, which was held not to be an offence within the repealed clause of the 27 Geo. 2, c. 15, *Rex v. Puddle*; (*o*) and Maule, J., was of opinion that the offence was not within the meaning of the statute. It must otherwise be admitted that if a party should have any interest whatever in a house, such as a reversion expectant on the determination of a particular estate, however remote or contingent, the house would be sufficiently described as 'his.' As to the other counts, the offence charged was that of sending a letter to A. threatening to burn the house of B., which, according to the case cited, was not within the Act. (*p*)

[719]

Threatening a landlord to

But where the question was reserved, whether threatening a landlord to burn his house, which was let to a tenant and in his

(*m*) *Rex v. Boucher*, 4 C. & P. 562.

(*n*) *Gill's case*, 1 Lew. 305. The learned judge seemed to think that a threat to prosecute would amount to a threat to accuse within the meaning of

the Act. See *Rex v. Abgood*, 2 C. & P. 436, *post*, p. 199.

(*o*) *Post*, p. 197.

(*p*) *Reg. v. Burrigidge*, 2 M. & Rob. 296.



occupation, the court avoided deciding the question; but Alderson, B., said, 'But for the cases, I should have thought the construction of the statute was "any of the houses of any of Her Majesty's subjects."' (g) And it is conceived that such a case would clearly be within the large words of the new enactment, and it is very reasonable that it should; for the injury to the landlord might, and generally would, be very much greater if the house were actually burnt than to the tenant.

burn his house  
is within the  
new Act.

An indictment alleged that J. Rowlands had 'finished and completed a house at T.,' and that the prisoner sent a letter to T. Lewis, directed to him by the name of 'Mr. T. Lewis,' &c., threatening to burn 'the house so built by the said J. Rowlands.' The letter was in the prisoner's writing, and was found in a cleft stick stuck in the ground close to Lewis's house, and was shown by him to Rowlands. Lewis had been tenant of the premises, and after him Rowlands became tenant, and had built a house on the premises. It was objected that the letter was intended for Lewis and not for Rowlands, and that the indictment should have stated that the letter was sent to Rowlands, or that he received it. The jury found that the prisoner sent the letter, intending that it should reach Rowlands as well as Lewis; and, upon a case reserved upon the question, 'whether the prisoner, upon this indictment and these facts, was properly convicted,' the judges were unanimously of opinion that the indictment was bad. (r)

Insufficient  
count alleging  
sending a  
letter to A.  
threatening to  
burn a house  
finished by  
B.

The word 'accuse' in the 7 & 8 Geo. 4, c. 29, s. 7, meant to charge the prosecutor before any third person, and 'threatening to accuse' meant threatening to accuse before any third person. The first count of the indictment was for extorting money by *threatening to accuse* the prosecutor of an unnatural offence; the second count for extorting it by *accusing*, &c. The prisoner accosted the prosecutor, and after intimating to him that he and another person had seen him in the act of committing the offence alluded to, added, 'Well, sir, we don't want to say anything about it; give us our allowance-money, and we will say nothing about it.' The prosecutor gave him five shillings. It was objected that the words proved did not amount to a threat to accuse, or an accusation within the 7 & 8 Geo. 4, c. 29, s. 7. That the word 'accuse' imported a charge made before a magistrate, or some judicial tribunal. But Patteson, J., was clearly of opinion that the words spoken by the prisoner did bring the case within the Act. By the former law it was a felony to extort money by threatening to accuse the prosecutor to any third party; and it was not necessary that the threat should be that of accusing by course of law; and the 7 & 8 Geo. 4, c. 29, s. 7, being declaratory of the former law, could hardly be construed as less extensive in

Meaning of  
the terms  
'accuse,' and  
'threaten to  
accuse,' in the  
7 & 8 Geo. 4,  
c. 29, s. 7.

(g) Reg. v. Grimwade, 1 Den. C. C. 30, 1 C. & K. 592.

(r) Reg. v. Jones, 1 Den. C. C. 218, 2 C. & K. 398, E.T. 1847. In the latter report it is stated that the judges held that the indictment was bad, and that the threat must be to the owner of the property; and that if the letter was sent to Lewis with intent that it should reach Rowlands, and did reach him, it should have been charged in the indictment as

sent to Rowlands. It is to be observed that the indictment was clearly bad on the ground that it neither stated that the house was the property of or belonged to Rowlands, but only that he had 'finished and completed a house,' 'for the future dwelling of himself,' &c.; and the decision that the count was bad may have been on this ground. The new clause would plainly include such a case if the count were properly framed.

its operation; neither was it necessary to construe the term 'accuse' in two different senses; the term 'accuse' throughout the Act meant to charge the prosecutor before any third person, and 'threatening to accuse' meant to charge before any third person. (s)

The words 'without reasonable and probable cause' apply to the money demanded and not to the threats.

The prisoner was indicted for sending to J. H. a letter demanding money from her with menaces. The letter sent by the prisoner to the prosecutrix alluded in threatening and mysterious language to facts injurious to her reputation, and added that if she did not write by twelve o'clock on a certain day, he would explain all to her father, brothers, and friends. The prisoner afterwards sent a letter to the father, in which the prisoner stated that he had received instructions to subpoena his daughter, J. H., as a witness against a brothel, which brothel his daughter had frequently visited, during the last two months, in company with an officer. J. H. was too ill to attend as a witness on the trial, and on the part of the prisoner it was suggested that, as the fact of her having gone to the brothel was not negatived, it could not be concluded that the prisoner had not reasonable and probable cause for the accusation he threatened to make; but Rolfe, B. (Williams, J., being present), told the jury that in his opinion the words 'reasonable and probable cause,' as used in the Act of Parliament, applied to the money demanded, and not to the accusation constituting the threat; and that if the lady had in fact gone to the brothel, it would not have made any difference in the case. (t)

A letter threatening to burn standing corn is not within the statute.

An indictment alleged that the prisoner sent the following letter to S. Hill, threatening to burn his houses, barns, ricks, and stacks of grain:—

'It is the provence of the Allmighty that is gest com to my knolege aboute your treatment of yourself and whife to the old man yet made him do jest as you like so I warne you shant do jest as you plase with me. If william is so quiet you shant find it the case with me; let you go wear you like you shore to be found out, you meae think that goine to be safe becose you goine to leve the Lizard; the a speciment of it in Mallion for you to go by. Prapes you mat read of Sampson Ridle and the fox Philistines. If no foxes to bit got thee may somfing in steed. If the not somfing don very shortly you not go onponished. I warne you I not prise you of any more. I think you injoyment will be very short in this world. Silfeshness will not indoer long.

'I jest let you know wot I meane you; you ben a very great enemy to me; bot by god I not forgit you if my life is spared. Vingens is mine, and I will repair so shore is a god in heving. So no more.

'JOSEPH MITCHELL.'

There had been incendiary fires in Mallion to houses, barns, and stacks of corn, and a quantity of standing barley had also been burnt. The father of the prosecutor and prisoner had died, and left all his property to the prosecutor, and this had much enraged the prisoner, and they were on bad terms. The prisoner had said that he had not been served fair about his

(s) *Rex v. Robinson*, 2 M. & Rob. 14, 2 Lew. 273.

(t) *Reg. v. Hamilton*, 1 C. & K. 212.

father's property, and that he had written a letter to his brother to frighten him, and get some of the property, and that he had said in it that he would serve him as Sampson did the Philistines, and that Sampson had tied two foxes' tails together, with a fire-brand between them, and sent them into the standing corn. Pollock, C. B., held that there was no evidence of any threat to burn, except to burn standing corn. The statement of the prisoner of what he meant by what he had written in the letter, must be taken into consideration in attaching a meaning to that letter, and the allusion to Mallion might well be explained to mean the same thing, as it was shown that standing corn was burnt there as well as houses. The fair construction to be put on the letter was that it contained a threat to burn the standing corn of the prosecutor, and, if so, that was not an offence within the statute. (*u*)

It was decided that the sending a letter signed with *initials* only, was sending a letter *without a name*, within the 9 Geo. 1, c. 22. Buller, J., in delivering the opinion of the judges on this point, said, 'Whether the letter be with or without a name is a simple fact appearing on the face of the letter itself. It is signed with two letters, R. R., which are so far from being a name, that no man on looking at the letter only can tell whether it meant to refer to any name, or what that name was.' (*v*)

A letter signed with *initials* only, was considered as a letter without a name within the 9 Geo. 1, c. 22.

In a case where the indictment, which was framed upon the 30 Geo. 2, c. 24, charged the prisoner with sending a threatening letter, intending 'to extort and gain *money*,' it was holden not to be supported by evidence of a letter threatening to accuse the prosecutor of an unnatural crime if he did not give up a certain *bill* drawn by the prisoner, and of which the prosecutor was the holder. (*w*)

A charge of an intent to extort *money*, not supported by proof of an intent to extort a bill of exchange.

In a case where the question arose whether there was sufficient evidence of the prisoner's having sent the letter in question, knowing its contents: the facts were that the prosecutor proved the receipt of the letter by the penny post, at his house, in a street near Berkeley-square, in the county of Middlesex, and his tracing it up to one Elizabeth Robinson, who swore that she was employed in going errands for the prisoners in Newgate, and that having received this letter from the prisoner's hands at the grate at Newgate, she immediately carried it to the post-office in Newgate-street. And the servant of the office-keeper confirmed her account, and both swore to the identity of the letter, the direction being in a remarkable hand. The case was left to the jury, with a direction to consider whether from the prisoner's delivering the letter he knew the contents of it; and the jury, having found the prisoner guilty, the question was submitted to the consideration of the judges, whether there were sufficient evidence to be left to the jury of the prisoner's sending the letter, knowing the contents. The judges held that the conviction was right. (*x*)

Sending a letter, knowing the contents.

[720]

The prisoners, who were husband and wife, were indicted on the Where the

(*u*) Reg. v. Hill, 5 Cox, C. C. 233.

East, P. C. c. 23, s. 3, p. 1118.

(*v*) Robinson's case, 2 Leach, 749. 2 East, P. C. c. 23, s. 2, p. 1110. *Ante*, p. 182.

(*x*) Girdwood's case, 1 Leach, 142. 2 East, P. C. c. 23, s. 4, p. 1120. *Ante*, p. 185.

(*w*) Major's case, 2 Leach, 772. 2



wife wrote a threatening letter, and the husband carried it to the party threatened, held that the husband, though privy to the writing, was not within the 9 Geo. 1, c. 22, or 27 Geo. 2, c. 15, nor could the wife alone be convicted unless she wrote and sent it without the husband being privy to the contents.

Sending the letter by the post, or by indirect means.

9 Geo. 1, c. 22, and the 27 Geo. 2, c. 15, for feloniously sending a threatening letter to their master, demanding £10. The wife wrote the letter, and it was delivered to the prosecutor by the husband, who said he found it in the prosecutor's garden; but there was no evidence that he had any knowledge of its contents. It was objected on behalf of the prisoners that the offence described by the statutes on which the indictment was founded was 'knowingly sending a threatening letter,' whereas the evidence only showed that the wife had written the letter, and that the husband had delivered it, and that there was no proof of its having been sent to the prosecutor. The court (Ashhurst, J., and Perryn, B.) agreed that merely writing a threatening letter would not constitute the offence within these Acts of Parliament; that carrying a letter could not be comprehended under the word 'send' in the statutes; that the legislature had it not in contemplation that any person would be the carrier of a threatening letter which he himself had written or contrived; and that the act of delivering a threatening letter was not the offence described in those statutes. That if any doubt could be entertained upon that point the legislature itself had removed it, for by the subsequent Act, 30 Geo. 2, c. 24, the offence of delivering as well as sending a threatening letter was made a misdemeanor, punishable at the discretion of the court, according to the circumstances of the case. But the court further observed, that there was still a question for the consideration of the jury; for though M. H. were the wife of the other prisoner, yet if the jury were of opinion that she wrote the letter itself without any intervention of her husband, and sent it by him, without his knowing anything of the contents, to the prosecutor, she alone might be found guilty; but that otherwise both the prisoners must be acquitted. (*y*)

In a case where the prisoners were indicted for sending a letter, the proof was that the letter was of the handwriting of one of the prisoners, and that it was thrown by the other prisoner into the yard of the prosecutor, from whence it was taken by a servant of the prosecutor, and delivered to him. (*z*) And in another case the proof was that the letter in question was in the handwriting of the prisoner, who sent it to the post-office, from whence it was sent in the usual manner to the prosecutor. (*a*) In another case, where it was proved that the prisoner dropped the letter into a vestry-room, which the prosecutor frequented every Sunday morning before service began, from whence the sexton had picked it up, and delivered it to him, Yates, J., said that it seemed to be very immaterial whether the letter were sent directly to the prosecutor, or were put into a more oblique course of conveyance, by which it might finally come to his hands. (*b*) And in a sub-

(*y*) *Rex v. Hammond*, 1 Leach, 444.

(*z*) *Rex v. Jepson*, 2 East, P. C. c. 23, s. 2, p. 1115. *Ante*, p. 186.

(*a*) *Heming's case*, 2 East, P. C. c. 23, s. 2, p. 1116. *Claumbre*, J.

(*b*) *Lloyd's case*, 2 East, P. C. c. 23, s. 5, p. 1122. The case was submitted to the judges on another point, on which the indictment was holden to be defective (see *post*, p. 198), so that it became un-

necessary for them to give any opinion on the point above stated. In 2 East, P. C. *ubi supra*, the learned writer in note (*a*) says, 'Qu. whether, if one intentionally put a letter in a place where it is likely to be seen and read by the party for whom it is intended, or to be found by some other person, who it is expected will forward it to such party, and the letter do accordingly reach its intended

sequent case it was holden that dropping a letter in a person's way, in order that such person might pick it up, was a *sending* of the letter to such person. (*c*) In a case upon the 27 Geo. 2, c. 15, it was decided, that in order to bring the offence within that clause, it was necessary to prove that the letter was sent to the person threatened; and also that sending it to A., in order that he might deliver it to B., was a *sending* to B., if it were so delivered. A letter threatening to burn the house of Rodwell, and the stacks of Brook, was sent to Kirby, and the indictment charged the sending it to Kirby. Upon a case reserved, the judges held that a sending to Kirby, as Kirby was not threatened, was not within the statute; and upon that account the judgment was arrested; but they intimated, that if Kirby had delivered it to Rodwell or Brook, and a jury should think that the prisoner intended he should so deliver it, this would be a *sending* by the prisoner to Rodwell or Brook, and would support a charge to that effect. (*d*)

A count charged the prisoner with sending a letter to one W. Brown, threatening to burn his house. The letter was left by the prisoner at a gate in a public road near Sir J. Rowley's house, directed to 'Sir Joshua Rowley, Baronet, Stoke, Suffolk.' Having been found there by one of the witnesses, it was forwarded by him to Sir J. Rowley's house, and there deposited in the steward's room, and there opened by the steward, who read it, but instead of delivering it to Sir J. Rowley, he handed it to a constable, who afterwards showed the letter both to Sir J. Rowley and Brown, who occupied a house under Sir J. Rowley, under an agreement, two years of which remained unexpired. Alderson, B., directed the jury to consider whether, in leaving the letter as before described, the prisoner intended that it should not only reach Sir J. Rowley, to whom it was directed, but that it should also reach Brown, and then, if they thought so, the learned Baron was of opinion that would be a *sending* to Brown; and the jury having convicted, upon a case reserved, the judges were of opinion that the conviction was right. (*e*)

The prisoner was indicted for sending a threatening letter to the prosecutor. The letter was proved to have been affixed to a gate in a public highway, near which the prosecutor would be likely to pass from his house; and Cresswell, J., held 'that if it were proved that the prisoner wrote the letter and affixed it on the gate, it was a question for the jury whether he did so with an intent that it should come into the prosecutor's hands; for, if so, it would be a *sending*.' (*f*)

The letter must formerly have been sent to the person threatened.

If a threatening letter be directed to A., but the evidence satisfies the jury it was intended to reach the hands of B., whose house it threatens to burn, this supports a count charging a *sending* to B.

Affixing a letter to a gate.

destination, this may not be said to be a *sending* to *such party*, supposing such an allegation to be necessary upon the true construction of the Acts? The same sort of evidence was given in Jepson's case (*ante*, p. 196) in support of the allegation of sending a threatening letter to the prosecutor, and no objection was made on that ground. And the general current of precedents is in the same form.<sup>9</sup>

(c) *Rex v. Wagstaff*, R. & R. 398.

(d) *Rex v. Paddle*, R. & R. 484. See

*Reg. v. Burrigge*, *ante*, p. 192.

(e) *Reg. v. Grimwade*, 1 Den. C. C. 30, 1 C. & K. 592. In the later report Alderson, B., said, 'The whole act of the prisoner ceased when he left the letter; and if he left the letter with intent that it should go on, that is a *sending* it; and what the constable did with it afterwards, I think, is immaterial.'

(f) *Reg. v. Williams*, 1 Cox, C. C. 16. This would clearly be an uttering within the new Act.

Evidence of sending a letter.

Where a prisoner was indicted under the 4 Geo. 4, c. 54, for sending a threatening letter to the prosecutor, and the only evidence against him was his own statement that he should never have written the letter but for W. Goodes; Lord Abinger, C. B., held that there was no evidence of the prisoner having sent the letter; as upon this evidence Goodes might have taken the letter or might have sent it himself, having made the prisoner write it; and there was no evidence of the prisoner having directed Goodes to take it. (*g*)

What is an uttering.

One count charged the prisoner with sending a letter to the prosecutrix threatening to kill her; another with uttering the same letter. The prisoner was seen by a witness to put a small brown paper parcel containing the letter under the table-cloth in the kitchen of the house where both the prisoner and prosecutrix were in service. The witness afterwards lifted up the cloth, and found the parcel, and the letter in it. The witness gave the parcel to the prosecutrix, to whom the letter was directed. It was contended that there was neither a sending of the letter, nor an uttering of it to the prosecutrix. It was answered that there was a sending, or, at all events, an uttering, as there could be no doubt the prisoner placed the letter on the table for the purpose of its reaching the prosecutrix by some means; and Patteson, J., held that there was evidence of an uttering. (*h*)

The indictment must set forth the letter.

It was decided, upon reference to the judges, that it was necessary to set forth the threatening letter in the indictment, in order that the court might see whether it fell within the purview of the respective statutes. It was contended, in support of the indictment, upon which the point was raised, that it pursued the words of the 9 Geo. 1, c. 22 (now repealed); that the defendant was charged with sending the letter 'feloniously and contrary to the form of the statute;' and that those words imported that the letter was of such a nature as the statute had in view. But the judges were of opinion that the indictment was bad in not setting forth the letter itself: and that if the words, 'feloniously and contrary to the form of the statute,' were allowed to supply the place of the letter, it would be leaving it to the prosecutor to put his own interpretation upon it, and to the jury the construction of the matter of law. (*i*)

[722]

The indictment need not state the ownership of the property attempted to be extorted.

Where some counts charged the prisoner with threatening to accuse the prosecutor of an infamous crime with intent to extort from him a valuable security for the payment of fifty pounds, and others laid the intent to be to extort money from him; Platt, B., held that the indictment was good, though it did not allege whose property the security or money was. The term 'extort' has a technical meaning, and the very import of the word shows that the prisoner is not acquiring possession of his own property: and in this case, whether anything is obtained or not, the crime is

(*g*) *Rex v. Howe*, 7 C. & P. 268.

(*h*) *Reg. v. Jones*, 5 Cox, C. C. 226. Patteson, J., took time to consider whether he would reserve the question, but did not do so, as he was satisfied he was right in his opinion. It must not be assumed that Patteson, J., held that there was not a sending. In passing sentence

he said, 'Your learned counsel has stated some difficulties in point of law. I do not think there are any.'

(*i*) *Lloyd's case*, *ante*, note (*h*). And the law of this case was recognized by *Grose, J.*, in delivering the opinion of the twelve judges in *Hunter's case*, 2 Leach, 631.



complete, and therefore, whether the property belongs to the person threatened or not, is quite immaterial. (*j*)

But the indictment must aver *from whom* the money, &c., was demanded; and if the indictment be for threatening to accuse, &c., it must allege *who* was the person threatened. One count stated that the prisoners by menaces did demand the monies of J. Axx with intent the said monies of the said J. Axx feloniously to steal. Another count stated that the prisoners feloniously did threaten to accuse the said J. Axx of the crime of buggery, with a felonious intent to extort money from the said J. Axx, and the said money feloniously to steal. It was objected that the first count did not state that any demand was made upon J. Axx; and that it was not inconsistent with this count that the menace was offered to the wife, child, or servant of J. Axx, and that a demand made on another person was not within the Act. To the second count it was objected that it did not state that the prisoners threatened J. Axx; and, on a case reserved, both objections were held valid. (*k*)

The indictment must aver from whom the money was demanded, and who was threatened to be accused.

An indictment on the 4 Geo. 4, c. 54, s. 5, charged that the prisoners did feloniously, with intent to extort money, charge and accuse J. N. with having committed the horrible and detestable crime, &c., and did feloniously, with intent to extort, &c., menace and threaten to prosecute the said J. N. for the said pretended offence; it was objected that the charge contained in the indictment was not within the terms of the 4 Geo. 4, c. 54, s. 5, which applied only to threatening to accuse prospectively, and not to a threat to prosecute a charge antecedently made; and Garrow, B., after consulting Burrough, J., held that the objection must prevail. If the indictment had followed the terms of the statute, and it had been proved that the prisoners had threatened to prosecute J. N., the case would have been left to the jury to say whether that was not a threatening to accuse him. But the offence laid in the indictment was not sufficiently charged under the statute. (*l*)

Indictment for threatening to prosecute a charge already made, insufficient.

It was also held to be necessary that the indictment should allege an intent of the writer in sending the letter consistent with and deducible from the letter itself. In a case already mentioned, where the indictment charged that the letter was sent to extort money, and it appeared upon the face of the letter that it was sent with the view of inducing the prosecutor to give up a bill of exchange, the judges held the allegation not to be sustained. (*m*)

The intent of the writer should be alleged correctly.

If the indictment state the offence of which the prisoner threatened to accuse the prosecutor, it must state it correctly. There were several counts in an indictment, charging the prisoner with threatening to accuse the prosecutor of the crime of sodomy, and it appeared to Littledale, J., that the letter written by the prisoner only imputed to the prosecutor that he had solicited the prisoner to permit him to commit that crime; he therefore directed the jury to acquit the prisoner on those counts. (*n*)

Variance in the crime alleged to have been threatened.

In prosecutions under the new Act where the prisoner is

Where a de-

(*j*) Reg. v. Tiddeman, 4 Cox, C. C. See Gill's case, 1 Lew. 305, ante, p. 192.

387. (*m*) Major's case, ante, p. 195.

(*k*) Rex v. Dunkley, R. & M. C. C. (*n*) Rex v. Hickman, R. & M. C. C. R.

90. 34.

(*l*) Rex v. Abgood, 2 C. & P. 436.

mand is necessary an actual or express demand by words is not necessary.

charged with *demanding* money, &c., by menaces, &c., with intent to steal, it should seem that an actual or express demand by words is not necessary. On indictments on the 7 Geo. 2, c. 21, for assaulting, and by menaces, &c., demanding money, &c., with intent to rob, it was the better opinion that an express demand of money by words was not necessary; and that the fact of stopping another on the highway, by presenting a pistol at his breast, was, if unexplained by other circumstances, sufficient evidence of a demand of money to be left to the jury. It was observed that the unfortunate sufferer understood the language but too well; and the question was put, 'Why must courts of justice be supposed ignorant of that which common experience makes notorious to all men?' (o) And in one case upon that Act the court appears to have considered that an *actual demand* was not necessary; and that whether there was a demand or not, was a fact for the consideration of the jury under all the circumstances. (p)

Menaces by pretending to set fire to a rick.

The prisoner applied to the prosecutor for work, and being refused he asked for a shilling, and being again refused, he became very abusive, and threatened 'to burn up' the prosecutor. He then went to a neighbouring stack, and knelt down close to it, to strike a lucifer-match; but, discovering that he was watched, he blew out the match and went away. No part of the stack was burnt: and on an indictment for attempting to set fire to the stack, the jury were not satisfied that he intended to set fire to the stack, but they thought that he intended to extort money from the prosecutor by his conduct, and an acquittal was directed; but the prisoner was ordered to be detained on the charge of demanding property with menaces, on the ground that, assuming the finding of the jury to be correct, the prisoner was liable upon such a charge under the 1 Vict. c. 87, s. 7. (q)

A threat to make known to his parishioners and others that a clergyman had committed fornication is a menace. It is for the jury to determine whether a menace has been made without reasonable and probable cause.

The prisoner was indicted for delivering to C. H. Marsh letters demanding of him 10,000 francs, being of the value of £400, with menaces and without reasonable and probable cause. The originals in French were thus translated:—

'The bearer of this note is ignorant of all. I am in Stamford, and as you have neither answered my prayers nor my threats, I have considered that it was better to come as far as here, for you would not answer me without doubt at London. I have eight letters to restore to you, which are very compromising; for there are some of them old ones. (I see the bottom of your heart.) Well! in spite of that, if I had not really need of money to continue that which I have commenced, which is really above my means, I would not ask you anything to-day; but it is for me a question of life or death; I must have 10,000 francs. See that which you have to do! When I have told you that I loved you, it was true and sincere. Well, in spite of the hatred which I experience, it causes me pain to demand them of you. I return entirely the promises you have made about your uncle, and wish not for the future to hear speak more of you; for with all the sacrifices that you have made for me, the heart neither being for

(o) 1 East, P. C. c. 8, s. 11, p. 417.

(p) Rex v. Jackson, 1 Leach, 267.

(q) Reg. v. Taylor, 1 F. & F. 511.

Pollock, C. B., after consulting Cockburn, C. J.

nothing, that cannot make me forget that which you have made me suffer. There is my address:—

‘Hotel of the Port, Stamford.

‘N. MIARD.’

‘Thursday, April 16, 1843.’

‘P.S. Recal to yourself these words, “With me peace is better than war.”’

‘The person who carries this note to you was ignorant of all yesterday; and as I have not had an answer, the person knows all to-day. You may therefore answer him verbally, without fear of compromising yourself further. As I am not false, I ought not to let you be ignorant of that which I have the intention of doing, in case you should not satisfy my demand. This is the plan which I have conceived, and I swear to you I will put it in execution. Firstly, I will go into your church on Easter Sunday, and, reckoning from that evening, I will go into your village, from cottage to cottage, to inform them all of that which has passed. Afterwards I will go to the magistrate at Stamford, from clergyman to clergyman at Peterborough, to all the chapter, and the bishop. I will take afterwards the names of all the bishops of England, and I will write to them all. From there I will go to London, and cause you to be inserted in all the newspapers; afterwards I will go to find the Archbishop of Canterbury, who, being equally instructed, and I will go again to London to the magistrates, and I shall know how to find Clarisse, that she may do so as well as me. I may not be more rich for it; but at least I shall be revenged for all that you have made me suffer.’

‘Friday Morning, Standwell’s Hotel, Stamford.’

‘N. MIARD.’

‘Yesterday I gave you my address incorrectly, but now you cannot make a mistake.’

It appeared that a criminal intercourse between the prosecutor, who was rector of B. and a prebend of P., and the prisoner had commenced at a house of ill-fame in London, and been renewed in Paris, and subsequently in London again, and the prisoner had received at different times £1,200 from the prosecutor. Tindal, C. J., after referring to the words of the 7 & 8 Geo. 4, c. 29, s. 8, applicable to the case, told the jury ‘that parts of this offence have been made out, is perfectly clear; that a letter was sent by the prisoner to the prosecutor making a demand of money with menaces, there is no doubt; what you will have to say therefore is whether that was done without reasonable and probable cause; for it is admitted that the menaces contained in these letters are such as are contemplated by the Act; and indeed the threat of exposing a clergyman, who has been guilty of great vices, in his own church on the most solemn day of the year, of publishing his conduct afterwards to every rank of society in his own neighbourhood, and also of spreading his disgrace more publicly still, can scarcely be said to be such a threat as not to require more than ordinary firmness to resist it; and therefore, according to the proper test laid down by Lord Ellenborough, (*r*) to be such as not to fall within the meaning of this Act. But the main defence



is that there was some just and reasonable ground for the demand made in this case, or that the prisoner at least truly and honestly believed that she had just and reasonable cause for making it; and that is the view which I recommend you to take in applying this evidence. Ask yourselves the question whether this demand was made at a time when the party making it really and honestly believed that she had good and probable cause for making it.' (s)

What are  
sufficient  
menaces.

The prisoner was indicted for demanding money with menaces from J. Bradshaw, and a second count charged a larceny of money. J. Bradshaw owed Stainforth upwards of two pounds for rent, and his agent signed an authority to Oldfield, a bailiff, to make a distress for that rent. The agent's clerk went with the warrant to Oldfield's deputy, and they and the prisoner, a self-appointed bailiff, went to Bradshaw's house, which was locked up. The authority was returned to Oldfield, who gave no instructions or authority to the prisoner to proceed in the matter of the distress; afterwards the prisoners went to Bradshaw's house, and demanded the rent due to Stainforth, stating that if it was not paid they had a warrant from a magistrate, and would break open the door and make the distress; but that if Bradshaw would pay them five shillings and sixpence for expenses, and sign an I O U for the debt, payable by instalments, they would be satisfied. One of the prisoners shook the door of the house. Bradshaw hesitated, and one of the prisoners left and returned with a policeman. Nothing was said as to what the policeman was to do. The policeman did not speak to Bradshaw. The policeman had only been told that the prisoners had a distress to make. After the appearance of the policeman Bradshaw agreed to pay the five shillings and sixpence, and paid them that sum. He believed that they had authority to distrain. It was objected that no such menace as was contemplated by the 24 & 25 Vict. c. 96, s. 45, was proved, and as to the second count that, if any offence was proved, it was obtaining money by false pretences. The objections were overruled, and the jury were told that the words and conduct of the prisoners, if they believed the facts, constituted a menace within the meaning of the statute. The jury said that they considered the statement made by the prisoners that they had a warrant signed by a magistrate (which was untrue), supported by their procuring a policeman to give them a supposed authority to break into the house, and showing the intent by violently shaking the door, was a menace within the meaning of the Act, and found both prisoners guilty generally; and, on a case reserved, Wilde, B., after argument, delivered judgment. 'The question turns upon the proper construction of the 24 & 25 Vict. c. 96, s. 45. There are many demands for money or property accompanied by menaces or threats, which are obviously not criminal, nor intended to be made so. Thus in a case of disputed title to personal property, a man may threaten his opponents with personal violence if he does not relinquish the subject of the dispute, and he would not be within the intention of the statute. (t)

(s) *Reg. v. Miard*, 1 Cox, C. C. 22. The evidence on which the question was left to the jury is not stated.

(t) This is a faulty illustration. The case would not be within the statute because there would be no intention to

Other instances would offer themselves to a little consideration. Where, then, is the proper limit to the operation of this section? It is to be found in the words "with intent to steal." There is no other restriction expressed. Nothing is said about "violence" in conjunction with menaces, still less of violence to the person as distinct from violence to property. There is no express limit, except in the words "with intent to steal." Now a demand of money with intent to steal, if successful, must amount to stealing. It is impossible to imagine a demand for money with intent to steal, and the money obtained upon that demand, and yet no stealing. (*u*) The question then arises, what are the incidents attending the procurement of money or property by menace or threats necessary to constitute stealing? It is said in East, (*v*) "the taking must in all cases be against or without the consent of the owner to constitute larceny or robbery." On the other hand, it is said at the same place, "a colourable gift, which in truth was extorted by fear, amounts to a taking and trespass." These two passages, when taken together, appear to define the offence of stealing in the case of menaces. For if a man is induced to part with property through fear or alarm, he is no longer acting as a free agent, and is no longer capable of the consent above referred to. Accordingly, in the cases cited in the argument, (*w*) the threatened violence, whether to person or property, was of a character to produce in a reasonable man some degree of alarm or bodily fear. The degree of such alarm may vary in different cases. The essential matter is that it be of a nature and extent to unsettle the mind of the person on whom it operates, and take away from his acts that element of free voluntary action which alone constitutes consent. Now to apply this principle to the present case, a threat or menace to execute a distress warrant is not necessarily of a character to excite either fear or alarm. On the other hand, the menace may be made with such gesture and demeanor, or with such unnecessarily violent acts, or under such circumstances of intimidation as to have that effect; and this should be decided by the jury. Now in this case there was evidence very proper to be left to the jury to raise the above question. But the chairman left no such question to them, and directed them as a matter of law that the conduct of the prisoners (if believed) constituted a menace within the statute. Our judgment that this conviction cannot be sustained, is founded entirely on this ground.' (*x*)

steal, however violent the menaces might be.

(*u*) This is a manifest error. If a man makes a frivolous demand of money without any pretence for the demand, and thereby obtains the money, this is clearly no larceny.

(*v*) 2 East, P. C. c. 16, s. 3, p. 555.

(*w*) *Rex v. Parfait*, 1 East, P. C. c. 8, s. 11, p. 416. *Simons' case*, 2 East, P. C. c. 16, s. 131, p. 731. *Taplin's case*, 2 East, P. C. c. 16, s. 128, p. 712.

(*x*) *Reg. v. Walton*, L. & C. 288. No notice was taken of the question raised on the second count. This decision requires reconsideration, as it obviously proceeds upon the fallacy of supposing it

necessary that the menaces should be such that if property were obtained by them the offence would be larceny. Now the words of the clause warrant no such construction. The words are 'whosoever shall by menaces, or by force, demand any property, &c., with intent to steal the same.' Any menaces or any force, therefore, clearly satisfy the terms of the clause, provided there be an intent to steal. It might just as well be said that on an indictment for an assault with intent to rob, or for wounding with intent to murder, it was necessary to prove such an assault in the one case, or such a wounding in the other, as would be sufficient to effectuate the intent, and yet it has never

If money be demanded with menaces, that is sufficient, though the party menaced have! no money with him.

If a person with menaces demanded a sum of money from another, and that other did not give it him, because he had it not with him, it was within the 7 & 8 Geo. 4, c. 29; but if the person demanding the money knew that the money was not then in possession of the party, and only intended to obtain an order for the payment of it, it was otherwise. The prosecutor was forced by the prisoners into a retired place in a house and fastened down on a bench with a chain, and then told that he should not stir from the spot till he had paid £1,200; the prosecutor said the money was in a bank, and if he were permitted to write to his family he would send for the required sum. This was refused, and paper, pens, and ink were brought, and the prosecutor wrote a cheque for £800; the prosecutor had money about his person, but it was not taken or demanded by the prisoners. It was held that these facts did not support an indictment containing a count for demanding with menaces and by force the money of the prosecutor, and a count for an assault with intent to rob the prosecutor of his money. *Patteson, J.*, 'If a man with menaces demands a sum of money of another, and the person does not give it him, because he has it not with him, the offence is the same; but if it turns out, as in this case, that a sum of money, known to be not then in his possession, was demanded, the case is different. The prisoners do not take anything from Mr. Gee: they got an order for the delivery of the deeds, and that was all they wanted.' (y)

Middleditch's case. As to the sufficiency of evidence to prove an accusation of an infamous crime.

The first count charged the prisoner with accusing the prosecutor of having made a solicitation to him, whereby to induce him to commit with the prosecutor the crime of b——, with a view to extort money from the prosecutor. The second count charged the prisoner with having accused the prosecutor of having made a solicitation to him, whereby to induce him to permit the crime of b—— to be committed by the prosecutor. About half-past ten at night the prisoner, dressed in a soldier's uniform, accosted the prosecutor as he was passing down Hemming's Row, endeavoured to whisper to him, and stooped and asked what hour it was, and, receiving for answer, 'I don't know exactly, but it is past ten,' attempted to whisper several times again, but, the prosecutor drawing back, what the prisoner said in such whispers was inaudible. The prisoner followed the prosecutor for a considerable time, through Green Street, Leicester Square, Panton Street, into Jermyn Street, and into the Haymarket, Piccadilly, and the Regent Circus, and when asked by a person, who interfered for the protection of the prosecutor in Piccadilly, 'What do you mean by annoying this gentleman?' the prisoner replied, 'I know what I mean.' The prosecutor on getting into Regent Circus applied to a policeman to take the prisoner in charge for following and annoying him, and at the same moment the prisoner ran up, and said, 'I charge this person with making an indecent

been doubted that any assault, however slight, or any wound, however trivial, was sufficient, provided the intent were proved. In truth the criminality in these cases depends on the intent. The effect of this decision is to render the clause almost inoperative; for where the menaces have not obtained the money, it is plain a jury will be very reluctant to find that

they were sufficient to obtain it. The whole offence consists in the acts and intent of the prisoner; and it is quite beside that to consider what the effect on the prosecutor might be. See *Reg. v. Robertson* in the addenda.

(y) *Rex v. Edwards*, 6 C. & P. 515. *Bosanquet and Patteson, Js.*



assault on my person.' He afterwards explained this by stating, 'This man came up to me in Orange Street, where I was standing at a watering-place making water, and, putting his hand round a stone, which stood between me and an adjoining urinal, took hold of my private parts.' The same charge was preferred at the station-house, and also before the magistrate, with the addition given in italics below. The prisoner's charge before the magistrate was as follows:—'Between ten and eleven o'clock last night I was proceeding towards my barracks down Orange Street. I had occasion to stop at a watering-place: while so doing the defendant (prosecutor) came into an adjoining watering-place; there is a partition; he looked round at me; then he put his hand round, and caught hold of my private parts. *I said, "What do you mean by that, you d——d old scoundrel?" He made answer, "Don't make a noise for God's sake," and left the place immediately.* I followed him. He went into a tobacconist's shop; he came out in two or three minutes, caught hold of a young man's arm, and they walked on. He said to me, "Which way are you going?" I made him no answer. He stopped, and said, "I am going the reverse way to you." He turned round to the right; I still followed him; he stopped, and asked me what I was following him for. I told him I wanted to get a constable; he turned back again; I followed him to Regent Circus, when I gave him in charge.' On cross-examination he said, 'I made a charge on the 12th of July last against a gentleman named Williams of a similar nature. I never made any other charge of this sort against any person; I have never been summoned to appear against Williams.' According to the evidence the prosecutor had not been in an accommodation-place that evening with the prisoner or any other person, but being followed by the prisoner, and observing a cigar shop, he inquired where he could find a policeman; the prisoner was at that time looking in at the window of the cigar shop, and afterwards continued his annoyance to the prosecutor by following him when he came out of the shop. A young man upon this volunteered his protection to the prosecutor, and put the question before mentioned to the prisoner. The jury convicted, and, upon a case reserved upon the question whether there was sufficient evidence to go to the jury, and to sustain the verdict on the said two counts, which alleged a solicitation to commit a capital offence in the express terms of the statute, the prisoner's counsel contending that the evidence only proved a charge of an indecent assault, the judges were unanimously of opinion that, if the charge were confined to the charge before the magistrate, it could not be with intent to obtain money. But five of the judges (z) thought that the previous conduct of the prisoner, coupled with the charge (before the magistrate) was sufficient evidence for the jury to convict the prisoner on this indictment. Seven of the judges (a) thought otherwise. (b)

(z) Lord Denman, C. J., Tindal, C. J., Erle, J., Wightman, J., and Williams, J.

(a) Pollock, C. B., Alderson, B., Rolfe, B., Coltman, J., Patteson, J., Coleridge, J., and Cresswell, J.

(b) Reg. v. Middleditch, 1 Den. C. C. 92. There was a third count, which

merely charged the prisoner with accusing the prosecutor of a certain infamous crime with intent to extort money; as to which the prisoner's counsel contended—whether in arrest of judgment or not does not appear—that it was insufficient; for that, although the legislature had de-

Evidence of a solicitation to commit a crime.

On a count charging the prisoner with having accused H. C. S. of having solicited him to commit an infamous crime, it appeared that the prosecutor had taken shelter from the rain under a portico of Buckingham Palace, and that the prisoner, who was a sentry on duty there, after some conversation, had seized the prosecutor and charged him with having indecently touched or assaulted him, and then took him to the guard-house, and said, 'I charge this man with indecently assaulting me.' When the case was heard before the magistrate the prisoner stated that the prosecutor caught hold of his private parts. It was contended that this was a charge of assault and not of solicitation; and as the Act had both 'assault' and 'solicitation,' they were intended to be different things: the one an act done; the other a solicitation, in its strict sense. Cresswell, J., 'Suppose the case of an assault with intent to commit a rape; that means an assault made with an intention to use force and to commit a rape if possible: but it often happens that a very indecent assault is committed with no intention of resorting to further violence, if resistance is offered, but merely in the hope that the woman's scruples may be overcome. Now, supposing that a man's soliciting a woman to yield her person to him was an offence, might not such an indecent assault, committed for such a purpose, be treated as a solicitation, in case the evidence fell short of proving an attempt to commit a rape? In short, may there not be a solicitation by deeds as well as by words?' And after holding that neither the charge made at the guard-house nor before the magistrate could be taken into consideration, because neither could have been made to extort money; Cresswell, J., said, 'I think that, although the prisoner charged the prosecutor in terms with an assault, throughout the transaction and afterwards, yet it was with an assault of such a character and made under such circumstances that it might be taken to mean a solicitation. It is a question which the jury must determine.' (c)

It is for the jury to decide what the accusation was which the prisoner intended to make.

Examinations before the justice are admissible, but not cross-examinations.

One count charged Braynell and Wren with threatening to accuse the prosecutor of an assault with intent to commit an abominable crime; another of an attempt to commit such a crime; two others of a solicitation to commit and permit, &c. Four other counts alleged that the prisoner did accuse the prosecutor as in the first four counts, and the last charged the prisoner with a demand of money, with menaces, &c. The prosecutor was looking into a shop-window, and felt some one press against him, and, on looking round, saw Braynell, who a moment afterwards pressed his private parts against the prosecutor's hand. He immediately walked away, and Braynell followed him, and asked what he meant by taking indecent liberties with him. Wren was then present. The prosecutor denied,

fining what it includes under the terms 'infamous crimes,' yet this did not excuse the prosecutor from particularizing the specific charge. The report does not expressly state the decision of the recorder upon this point, but it seems that he must have held the objection good; as he reserved for the opinion of the judges the further question, 'whether a general judgment upon the finding of

the jury on the whole indictment is rendered void or voidable by the insufficient statement of the offence charged in the third count;' but the decision of the other question rendered it unnecessary to consider this question.

(c) *Reg. v. Cooper*, 3 Cox, C. C. 547. See this case, *ante*, vol. 2, p. 132, as to the admissibility of a previous charge made by the prisoner against another person.

that he had done what was alleged. Braynell said, 'Do you think that I would allow you to do that for nothing?' He then asked what the prosecutor would stand, and suggested that they should go into a public-house to settle it. The prosecutor refused. Braynell said he must take the consequences. The prisoner shortly afterwards gave the prosecutor into the custody of a policeman who came up, and he was taken to the station, where Braynell signed the following charge: 'Indecently assaulting J. Braynell at Hemming's Row,' &c. Wren signed it as a witness. The next day the prisoners were examined as witnesses before a magistrate, when the charge was gone into, and were cross-examined in the absence of each other, and the charge dismissed. Williams, J., held that the examination in chief of the prisoners were admissible in evidence against them, as they were then under no charge, and were not bound to say anything to criminate themselves. The cross-examination of Braynell was principally directed to ascertain how he had employed himself, and whether he and Wren had been together on the day in question; and his answers were not only contradictory in themselves, but quite inconsistent with those of Wren, when he was afterwards cross-examined. (d) Williams, J., held that the cross-examinations were not admissible. It was no doubt most material that these questions should have been asked before the magistrate, because it was most important to ascertain the amount of credit to be attached to the evidence of the prisoners, but no such connection between these answers and the particular charge in this indictment could be perceived as would justify their being held to be relevant. (e) It was then objected that the evidence did not support the first eight counts, as the evidence only showed a charge of an attempt to commit an indecent assault. But Williams, J., held that it was for the jury to say, judging from the prisoners' whole conduct, what was the accusation that they intended to make. (f)

Where the prisoner was indicted for sending a letter to the prosecutor threatening to accuse him of an infamous crime with intent to extort money, and it appeared that the prosecutor had paid the prisoner and his accomplice, from time to time, between £1,000 and £2,000, under threats of accusing him of the offence, and the letter contained the following:—

'I am going to propose to you that you shall drow up an agreement that will serve yourself, or you can have that Colverton to do it for you, and whatever the agreement is I will sind my name to, so that I shall never have eney more caus to com & se you; for I wish this to be the last of our meting, & I also state that I do not wish to be eney annoyance to you or your sisters, as long as I stay hear, but that depends intierly on yourself of corse.

(d) Williams, J., looked at the depositions to ascertain the nature of the cross-examinations.

(e) With all deference this ruling seems to be erroneous. The material question on the trial of this indictment was whether the prisoners had made a false charge, and it was most material to ascertain all that they had said, which showed their evidence before the magistrate to be false. If they had made the

same statements elsewhere, it cannot be questioned that they would have been evidence, and their being made before the magistrate could make no difference, unless there had been any such undue influence used as would exclude them. The truth of the evidence of the prisoners in chief was just as much in issue before the jury as before the magistrate.

(f) *Reg. v. Braynell*, 4 Cox, C. C. 402.

It is for the jury whether there was an intent to extort.

The guilt or innocence of the prosecutor is immaterial.





Mr. Dixon, I do not wish to ask you for enney money for what I have propoosed to you, but as a gentleman, I will leve to yourself to do as you think proper.'

The prisoner, in defence, read a statement charging the prosecutor with the offence, and declaring that he wanted to see him, as having been a party to it, but denying the intent to extort money. Martin, B., told the jury that the question for them to determine was whether the prisoner intended to extort money, and that it was nothing that he denied it, if his own acts and conduct, and his meaning, as indicated by his letters, plainly proved that such was the real object. That was the sole question: the truth of the charge did not matter. (g)

Evidence as to what the prosecutor understood the letter to mean.

The prisoner was indicted for sending to the prosecutor the following letter, threatening to burn and destroy his houses, &c.:—

'SIR,

'This is to inform you that you are better not let your farm to any of your family; if you do, you will suffer as before. You know how felt the other day.

'A CAUTION FRIEND.'

The prosecutor may be asked what he understood the meaning of the letter to be.

It was proposed to ask the prosecutor what he considered was the meaning of the letter, and on this being objected to, Erle, J., said, it appeared to him that the answer to the question was admissible. The offence intended by the statute was a threat to burn the premises, and that threat must be in writing, and the thing intended to be prevented was the misery occasioned to the party who had received the intimation that his premises would have the calamity of fire brought upon them. Unless the law went so far as to make it punishable to create that fear by any language the author knew would create that fear, the law would be powerless. The very fact of saying ironically, 'I don't say you are a thief,' could be expressed in such way as to make anybody understand that the party meant to make that charge; and, although there might be no single word in the letter which by itself would appear to mean so to a stranger, yet the party receiving it would perfectly well understand it. The jury must be satisfied that when he wrote those words—'You will suffer as before'—the writer intended to create in the mind of the party receiving the letter, the fear that his house would be burnt down. Evidence might be offered that, under the particular circumstances, the words had not their ordinary meaning, but the meaning imputed to them upon the record, and therefore the witness might be asked whether he understood the meaning to be that which the record imputed. (h)

A letter cannot be put in the hands of the jury with

On an indictment for sending a letter threatening to burn a house—in order to prove it was written by the prisoner, a book, in which the prisoner had made entries for a club, was produced.

(g) *Reg. v. Menage*, 3 F. & F. 310.

(h) *Reg. v. Hendy*, 4 Cox, C. C. 243. Mr. Moody gave me this note of this case: an indictment averred that a fire of certain premises of the prosecutor had taken place, and that the prisoner sent a letter threatening to burn the house,

&c., of the prosecutor, which was set out, and to the words, 'you shall suffer as before' added, 'meaning the said fire;' and Erle, J., allowed the prosecutor to be asked 'what meaning he, at the time he received the letter, put on these words?'

and a witness was allowed to refresh his memory of the handwriting by inspecting these entries, he having frequently seen the prisoner write; and after examining the letter he said that, judging from the character of the writing, he should be of opinion that it was not the prisoner's. It was then proposed to put the letter and the book into the hands of the jury, that they might compare the writing. Erle, J., 'I cannot allow that. The judge and the jury are at liberty to look at any papers in the cause: they may inspect them and compare them, and form such a conclusion as the comparison is calculated to lead to, without saying anything to any person on the subject. But I cannot permit an inspection, for this purpose, of papers or writings which are not material for the proof of the case, and which, therefore, are not properly papers or writings in the cause. If this were allowed, particular entries may be selected for the purpose, differing materially from the prisoner's general handwriting, and a wrong impression be thereby produced.' It was then proposed to put the letter and another writing, proved to be the prisoner's, and which had been given in evidence, in the hand of a witness from Doctors' Commons, whose duty it was to inspect wills in order to detect any forgery in them, and to ask him whether he was of opinion that they were both written by the same person. Erle, J., 'The rules of evidence, as applicable to this case, will not allow you to do this. You may call a scientific witness to disprove by comparison the writing at issue from being the writing it is said to be, but not to affirm it. All that you are authorised to ask this witness, as a scientific witness, is as to his belief of the writing being in a natural or feigned hand; but if he says it is in a feigned hand, you cannot go further, and ask him as to his belief of its being written by the same party who wrote another piece of writing shown to him.' (i)

The 9 Geo. 1, c. 22, provided that offences against that Act might be tried in any county of England; but no such provision being made with respect to offences within the other repealed statutes, the trial of such offences was governed by the general rule. Upon this rule the trial might be in the county in which the prosecutor received the letter by the post, though delivered by the prisoner and put into the post in another county. (j) And it seems that the offender might be tried in the county in which he sent the letter, though the prosecutor received it in another county. The offence of *sending* a threatening letter, would seem to be complete, as far as depends on the offender, by his putting the letter into the post-office to go into another county; though the party to whom it is sent afterwards receives it in the latter county. (k) The post-office marks in town or country, proved to

a writing not in evidence in the case in order that they may compare them. An expert may prove that a letter is in a feigned hand, but nothing more.

Place where the offence may be tried.

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Post-office marks.

(i) Reg. v. Shepherd, 1 Cox, C. C. 237. See the cases, vol. 2, p. 819, *et seq.*

(j) Girdwood's case, 1 Leach, 142. 2 East, P. C. c. 23, s. 4, p. 1120, *ante*, p. 185, where the letter was *received* by the prosecutor in Middlesex, and the trial had in that county, though the letter was delivered by the prisoner to a woman in London, and by her put into the office, which was also in London. *Essex's case*, 2 East, P. C. c. 23, s. 7, p. 1125, where the offence was laid in Middlesex, though

the letter was dated from Maidstone, in Kent, and sent by the post from Maidstone; and Lord Mansfield held that as the letter was directed to the prosecutor in Middlesex, where it was delivered, that was a sending in Middlesex, and that the whole was to be considered as the act of the defendant to the time of the delivery in that county.

(k) 2 East, P. C. c. 23, s. 7, p. 1125. Burn. Just. tit. *Letter*. And see now the 7 Geo. 4, c. 64, s. 12, *ante*, vol. 2, p. 392.

be such, are evidence that the letters on which they appear were in the office to which those marks belong at the dates which the marks specify; (*l*) but a mark of double postage paid on any such letter is not of itself evidence that the letter contained an inclosure. (*m*)

On an indictment for sending a threatening letter, the prisoner's declarations of the meaning of the letter are admissible in evidence. An indictment on the 4 Geo. 4, c. 54, for sending a letter threatening to accuse of an infamous crime, need not have specified such crime, for the specific crime the prisoner threatened to charge might intentionally be left in doubt. (*n*)

The prisoner was tried for feloniously sending to J. S. Tucker the following letter, with intent to extort money from the said J. S. Tucker:—

‘ Sir,

‘ You perhaps did not expect to hear from me so suddenly; but when you turned me away from Laytonstone for a mere trifle (that too at a time when by the late failures many scores of clerks were out of employ), you forgot that I had you in my power through your transactions with me five nights following (I have the dates and circumstances on paper written at the time), and that from your conduct to me before I went to live with you, you could expect no mercy from me. Did you not, however, let it pass? In a few words, I have taken advice upon the subject, and know that, if you are obstinate, it is in my power to bring down *ruin* on your head, and infamy on your name. However, I will be merciful. Allow me to return to L. in the same manner as before. I will never mention it again, as if I did I should lose everything, and gain nothing; but it is impossible for me to get any situation in town at present. It is not true that Mrs. T. advertised, as you said; she is in great distress, and she is my mother, therefore I would wish to afford her a little relief, if possible; so send me five pounds to my address, which, with the other you lent me, I will I O U for, and pay when I get a place. If I do not hear from you by Saturday morning, you will hear of it (enclosing five pounds). Now, consider ruin and beggary on one side, and wealth and comfort on the other; remember that, if you are obstinate, it will cost you *all*; do as I say, it will cost you nothing. I wait your answer before I proceed. As yet, I have given Mr. Norris no names. On Saturday night (if you are silent) I will go too far to retract.’

‘ Your’s obediently,

(Signed) ‘ JAMES TUCKER, Junr.’

The second count charged the prisoner with threatening to accuse the said J. S. Tucker of a certain infamous crime, viz. with attempting and endeavouring to commit the abominable crime of sodomy with the said J. S. Tucker, with the same intent. The third count charged him with threatening to accuse the said J. S. Tucker of an infamous crime, with the same intent. The fourth, fifth, and sixth counts were the same as the former, except that the letter was called a paper-writing, and the direction omitted. The third and sixth counts did not describe the specific crime, but alleged, generally, an infamous crime. All the counts concluded against the statute, &c. The prosecutor, after proving the letter

(*l*) Perkins's case, 1 Lew. 99, Park, J. A. J. Rex v. Bardett, 4 B. & A. 95.

(*m*) Rex v. Plumer, R. & R. 264.

(*n*) This is the marginal note to the case in R. & M. C. C. R., but it does

not appear that any such point was reserved or decided, although such a point might have arisen on the third and sixth counts. C. S. G.



in question, said, that on the Saturday following the Thursday on which he received the letter, he saw the prisoner at a public-house in the Strand, and that he, the prosecutor, asked him what he meant by sending him that letter, and what he meant by 'trans-actions five nights following.' The prisoner said that the prosecutor knew what he meant. The prosecutor denied it; and the prisoner afterwards said, 'I mean by taking indecent liberties with my person.' The prisoner, in cross-examination, asked the prosecutor whether on his oath he could deny that he did take indecent liberties 'with his (prisoner's) person. The prosecutor said he never did. Alexander, C. B., submitted the following question to the judges, whether parol evidence to explain the letter was properly received? Adding, that without it the prisoner could not have been convicted, and that by his cross-examination he in effect repeated the charge. And all the judges (except Littledale, J., who was absent) were unanimously of opinion that such evidence was properly received, and that the conviction was proper. (o)

From a case which was cited in a former part of this chapter, it appears that prior and subsequent letters from the prisoner to the party threatened may be given in evidence as explanatory of the meaning and intent of the particular letter on which the indictment is framed. (p)

Prior and 'subsequent letters may be given in evidence.

The cases in the chapter on Robbery may occasionally be referred to with advantage in cases falling within this chapter. (q)

The court will, after the bill is found, upon the application of the prisoner, order the letter to be deposited with an officer, in order that the prisoner's witnesses may inspect it. (r)

(o) *Rex v. Tucker, R. & M. C. C. R.* 134. We have seen that it has been held, on the trial of an indictment for threatening to accuse a person of an abominable crime, that the jury need not confine themselves to the consideration of the expressions used before the money was given, but may, if those expressions

are equivocal, connect with them what was afterwards said by the prisoner when taken into custody. *Reg. v. Kain*, 8 C. & P. 187, *ante*, vol. 2, p. 132.

(p) *Robinson's case, ante*, p. 185.

(q) See vol. 2, p. 133, *et seq.*

(r) *Rex v. Harris*, 6 C. & P. 105, *Littledale, J., and Bolland, B.*

## BOOK THE SIXTH.

## OF EVIDENCE.

## CHAPTER THE FIRST.

OF WHAT NATURE EVIDENCE MUST BE.—OF PRESUMPTIVE EVIDENCE.—ON THE RULE THAT THE BEST POSSIBLE EVIDENCE MUST BE PRODUCED—AND OF HEARSAY EVIDENCE.

[725] BEFORE entering upon the subject of Presumptive Evidence, to which the following section will be appropriated, it may be proper to pay attention to a few points applicable to the law of evidence in criminal prosecutions generally.

Rules of evidence the same in criminal as civil cases.

There is no difference as to the rules of evidence between criminal and civil cases. What may be received in the one case may be received in the other, and what is rejected in the one ought to be rejected in the other. (*a*) A fact must be established by the same evidence, whether it is to be followed by a criminal or civil consequence. (*b*)

Bill of exceptions to evidence.

It has been doubted whether a bill of exceptions lies in any criminal case. (*c*) In one case Lord Hardwicke mentioned it as a point not settled; and said that a bill of exceptions had never been determined to lie in mere criminal proceedings, though he had known it allowed in informations in the Court of Exchequer. (*d*) And it seems now to be settled that a bill of exceptions does not lie in any criminal case. (*e*) If the judge who presided at the trial was of opinion that there was a doubt whether he might not have admitted some evidence or witness improperly, or whether the facts proved constituted the crime charged, he might formerly, in his discretion, forbear to pass sentence, or respite the judgment, until the opinion of the fifteen judges were obtained upon a case reserved. (*f*) And now by the 11 & 12 Viet. c. 78 (*g*), when

Case reserved.

(*a*) By Abbott, J., in *Rex v. Watson*, 2 Stark. R. 155.

(*b*) *Lord Melville's case*, 29 How. St. Tr. 763.

(*c*) *Sir H. Vane's case*, 1 Lev. 68. S. C. Kel. 15. 1 Sid. 85. Hawk. P. C. b. 2, c. 46, s. 210. *Rex v. Lord Paget and others*, 1 Leon. 5. *Rex v. Nutt*, 1 Barnardist. 307. 2 Phil. Ev. 463.

(*d*) *Rex v. Inhabitants of Preston*, Cas. temp. Hardw. 249.

(*e*) *Reg. v. Rice*, 2 Cox, C. C. 118, where Sugden, Lord Chancellor of Ireland, refused to grant an order commanding Ball, J., to sign a bill of excep-

tions which had been tendered to him on the trial of a capital felony. *Reg. v. Esdaile*, 1 F. & F. 213. Lord Campbell, C. J. *Reg. v. Alleyne*, Dears. C. C. 505. Arch. C. P. 149. *Reg. v. Brown*, Arch. C. P. 149.

(*f*) The proper course to raise objections to the insufficiency of the indictment is by demurrer, motion in arrest of judgment, or writ of error; and in recent cases the judges seem strongly disposed not to allow cases to be reserved on such objections. *Reg. v. Purchase*, C. & M. 617. *Reg. v. Overton*, *ibid.* 655.

(*g*) See the Appendix of Statutes, viii.

any person is convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or gaol delivery or court of quarter sessions, the judge or commissioner or justices of the peace before whom the case is tried, may, in his or their discretion, reserve any question of law, which has arisen on the trial for the consideration of the court constituted by that Act, and forbear to pass sentence, or respite the judgment until such question is decided. (*h*) If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, such a conviction ought not to be set aside because some other evidence was given which ought not to have been received; (*i*) but if the case without such improper evidence were not so clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise. (*j*) But as it seems now to be settled that where evidence, objected to on the trial of a cause, is received by the judge, and is afterwards thought by the court to be inadmissible, the losing party has a right to a new trial, on the ground that it is impossible for the court to say what effect such evidence may have produced on the jury, (*k*) it may well be doubted whether, if the judges were of opinion that any evidence had been improperly admitted or rejected in a criminal case, the conviction would be supported.

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Where the defendant has been convicted on an indictment either for felony, (*l*) or for a misdemeanor, a new trial may be granted, at the instance of the defendant, where the justice of the case requires it; (*m*) though inferior jurisdictions cannot grant a new trial upon the merits, but only for an irregularity. (*n*) Where several defendants are tried at the same time for a misdemeanor, and some are acquitted and others convicted, the court may grant a new trial as to those convicted, if they think the conviction improper. (*o*) And it is a rule that where there is only one defendant, he must be present in court when a motion is made for a new trial, although he has been sentenced to transportation under the 11 Geo. 4 and 1 Will. 4, c. 70, s. 9, by the judge who tried him at the assizes. (*p*) And where several defendants are convicted upon an indictment for a misdemeanor, all must be present in court when a motion is made for a new trial on behalf of any of them, unless a special ground be laid for dispensing with their attendance. (*q*) But where a defendant has been found

New trial.

(*h*) See the rules issued by the judges as to such cases reserved in 1 Den. C. C. ix.

(*i*) But see the more correct account of *Rex v. Tinkler*, on which *Rex v. Ball*, *infra*, is reported to have been rested, in 1 Den. C. C. iv., and Lord Denman's notes, *ibi* l.

(*j*) *Rex v. Ball*, R. & R. 132. *Rex v. Oldroyd*, *ibid.* 88; but see *Rex v. Harling*, R. & M. C. C. R. 39.

(*k*) *Crease v. Barrett*, 5 Tyrw. 458. *Wright v. Doe d. Tatham*, 7 A. & E. 313. *De Rutzen v. Farr*, 4 A. & E. 53, and *Bessey v. Windham*, 6 Q. B. 173.

(*l*) *Reg. v. Scaife*, 17 Q. B. 238. 2 Den. C. C. 281.

(*m*) *Rex v. Mawbey*, 6 T. R. 638. Tidd, 942, 943. As to the grounds on which the application may be made, see 1 Chit. Cr. L. 654. *Reg. v. Whitehouse*, Dears. C. C. 1.

(*n*) See the cases collected on this point in note (*b*) to *Rex v. Inhabitants of Oxford*, 13 East, 416.

(*o*) *Rex v. Mawbey*, 6 T. R. 619. *Reg. v. Gompertz*, 9 Q. B. 824. But in conspiracy, if several are convicted, the new trial must be as to all, though only one shows himself to be entitled to it.

(*p*) *Reg. v. Caudwell*, 17 Q. B. 503. *Howard v. Reg.* 11 Law T. 629.

(*q*) *Rex v. Teal*, 11 East, 307. *Rex v. Askew*, 3 M. & S. 9.



guilty of an offence, e. g. a nuisance, for which he is not liable to *personal punishment*, but only to a fine, it is not necessary that he should be present in court when a motion is made for a new trial. (*r*) Whenever it is necessary for a defendant to be present, if he be already in custody he must obtain a *habeas corpus* to bring him into court. (*s*) The presence of the defendant is not necessary on the argument of a special verdict, as the presumption of innocence may be supposed to continue. (*t*) As a general rule, no new trial can be had where the defendant is acquitted, although the acquittal was founded on the misdirection of the judge; (*u*) or where a verdict is found for a defendant on a plea of *autrefois acquit*, although that raises a collateral issue, which may have been found in favour of the defendant on insufficient evidence. (*v*) But where the proceeding is in substance merely to try a civil right, a new trial may be granted after an acquittal; (*w*) and therefore a new trial may be granted where the question is as to the liability to repair a highway, (*x*) but not where the charge is a wrongful obstruction of a highway. (*y*) When it is intended to move for a new trial in any criminal case, either the motion should be made within the first four days of term, or during those days an intimation must be given to the court that counsel is prepared to make that motion. (*z*)

After an  
acquittal.

## SEC. I.

### Of Presumptive Evidence.

Presumptive  
or circumstan-  
tial evidence.

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WHEN a fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily or usually attend such facts, and are called presumptions, not proofs, for they stand instead of the proofs till the contrary be proved. (*a*) In criminal cases, from the secret manner in which

(*r*) Reg. v. Parkinson, 2 Den. C. C. 459.

(*s*) Rex v. Spragg, 2 Burr. R. 930.

(*t*) Note to Rex v. Spragg.

(*u*) Rex v. Cohen, 1 Stark. N. P. C.

516. Rex v. Sutton, 5 B. & Ad. 52.

(*v*) Rex v. Lea, 2 M. C. C. R. 9, S. C. 7 C. & P. 836.

(*w*) Reg. v. Chorley, 12 Q. B. 515.

Reg. v. Russell, 3 E. & B. 942. Reg. v. Leigh, 10 A. & E. 398.

(*x*) Reg. v. Chorley, *supra*.

(*y*) Reg. v. Russell, *supra*. Reg. v. Johnson, 2 E. & E. 613.

(*z*) Reg. v. Newman, 1 E. & B. 268.

(*a*) Gilb. Ev. 142. As if a man be found suddenly dead in a room, and another be found running out in haste with a bloody sword; this is a violent presumption that he is the murderer: for the blood, the weapon, and the hasty flight, are all the necessary concomitants to such horrid facts; and the next proof to the sight of the fact itself, is the proof of those circumstances that do necessarily attend such fact. *Ibid.* Unless the wound

was in such a part of the body that the deceased could not have inflicted it himself, and it was shown that no other person had been in the room, it is conceived that such a presumption ought not to be considered as conclusive. In *Ashford v. Thornton*, 1 B. & Ald. 428, where the subject of presumption in cases of murder was much discussed, Abbott, J., said, 'A case might be put where a person should come up and find another lying wounded with a dagger in his body, and should draw it out, or should, in assisting the wounded man, wrench the knife out of the murderer's hand; then if the murderer escaped, leaving him with the body, according to this law [Bracton] he would be considered guilty of the murder, and be immediately hanged without trial.' And, 'in the history of the law, several presumptions which were at one time deemed conclusive by the courts, have, by the opinions of later judges, acting upon more enlarged principles, become conclusive only in the absence of proof to the contrary, or have been treated as

guilty actions are generally perpetrated, it is seldom possible to give direct evidence of the commission of the offence charged, i. e. to produce a witness who saw the act committed; and, therefore, recourse must necessarily be had to presumptive (or, as it is often called, circumstantial) evidence, i. e. the direct evidence of circumstances, from which the commission of the act may be presumed by the jury. (*b*)

Where an indictment for murder was supported entirely by circumstantial evidence, and there was no fact which, taken alone, amounted to a presumption of guilt; Alderson, B., told the jury that before they could find the prisoner guilty, they must be satisfied 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person;' and he then pointed out to them the proneness of the human mind to look for, and often slightly to distort the facts, in order to establish such a proposition, forgetting that a single circumstance, which is inconsistent with such a conclusion, is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt. (*c*)

There is no difference between civil and criminal cases, with reference to the modes of proof by direct or circumstantial evidence, except that in the former, where civil rights are ascertained, a less degree of probability may be safely adopted as a ground of judgment, than in the latter, which affect life and liberty. (*d*)

One of the most usual presumptions in criminal prosecutions occurs in cases of larceny, where upon proof of the felony having been committed, and of the property stolen having been shortly afterwards found in the possession of the prisoner, it is presumed that he actually stole it, unless he prove how he came by it. (*e*)

What circumstantial evidence is sufficient to warrant a conviction.

Instances of presumptions.

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wholly within the discretion of juries.' 1 Phil. Ev. 441. C. S. G.

(*b*) Presumptions are often divided into three sorts,—violent, probable, and light. Co. Lit. 6 *b*. 3 Black. Com. 371. But such a classification seems altogether useless, and the distinction to amount to nothing more than that in one case the presumptive evidence may be very strong, in another less so, and in another very weak. See 1 Stark. Ev. 838, *et seq.*

(*c*) Hodge's case, 2 Lew. 227. See the very able observations on this subject. 1 Stark. Ev. 841, *et seq.*, 859, *et seq.*

(*d*) 1 Phil. Ev. 166, 7th edit. Perhaps strong circumstantial evidence in cases of crimes, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt: for men may be seduced to perjury by many base motives, to which the secret nature of the offence may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming altogether the links of a transaction, should all unfortunately concur to fix the

presumption of guilt on an individual, and yet such a conclusion be erroneous. 1 East, P. C. c. 5, s. 9, p. 223.

(*e*) Where two prisoners were indicted for stealing two horses, and the case against them consisted entirely of evidence to show that both the horses were found soon after the robbery, in the joint possession of the prisoners, and it appeared that the horses had been stolen on different days, and at different places, Littledale, J., compelled the prosecutor to elect on which of the two stealings he would proceed; and his lordship observed that the possession of stolen property soon after a robbery is not in itself a felony, though it raises a presumption that the possessor is the thief; it refers to the original taking, with all its circumstances. Rex v. Smith, Ry. & Mood. N. P. C. 295. Where the only evidence against the prisoner was that three sheets were found upon his bed in his house three calendar months after they had been stolen, and it was urged that this was too long a time after the larceny to call on the prisoner to give any account how he had become possessed of them; and Rex

So also on an indictment for the crime of arson, proof that property, which was taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner, raises a presumption that the prisoner was present, and concerned in the arson. (*f*) So also proof that clothes, weapons, or implements, which are shown to have been previously in the possession of the prisoner, were found at or near to the spot where a felony was committed, is frequently adduced in order to raise a presumption that the prisoner was present at the time when the felony was committed. (*g*) The buying goods at an under value is said to be presumptive evidence that the buyer knew they were stolen. (*h*) Upon an indictment for perjury, in falsely taking the freeholder's oath at the election of a knight of the shire, in the name of J. W., it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election, by the name of J. W., and who swore to his freehold and place of abode; and that there was no such person, and that the defendant voted on the second day, and was no freeholder, and some time afterwards boasted that he had done the trick, and was not paid enough for the job, and was afraid he should be pulled for his bad vote; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of J. W., it was held that there was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge as alleged in the indictment. (*i*)

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*v. Adams, ante*, vol. 2, p. 338, was relied upon; Wightman, J., held that the case must go to the jury, as it seemed to him that it was impossible to lay down any definite rule as to the precise time, which was too great to call upon the prisoner to give an account of the possession, and that in this case there was *some* evidence, although *very slight*, for the jury to consider. The prisoner was acquitted. *Reg. v. Hewlett*, Salop Spr. Ass. 1843, MS. C. S. G. See vol. 2, p. 337, *et seq.*, and *Reg. v. Knight*, L. & C. 378, and *Reg. v. Langmead*, L. & C. 427, in the Addenda to vol. 2. Mr. Starkie observes that 'the recent possession of stolen goods is recognised by the law as affording a presumption of guilt, and therefore, in one sense, is a presumption of law, but it is still in effect a mere natural presumption; for although the circumstance may weigh greatly with the jury, it is to operate solely by its natural force, for a jury are not to convict unless they be actually convinced in their consciences of the truth of the fact. Such a presumption is, therefore, essentially different from the legal presumptions in fact where a jury are to infer that a bond has or has not been satisfied, as a few days or even hours, more or less, have elapsed, when the twenty years are expiring.' 2 Stark. Evid. 684.

(*f*) *Rex v. Rickman*, 2 East, P. C. 1035.

(*g*) In *Reg. v. Stonyer* and others,

Stafford Spr. Ass. 1843, *cor.* Wightman, J., on an indictment for burglary in the house of Keeling, evidence was given of the finding of a crowbar in the house of one Bladon, which was near Keeling's, and was broken into the same night, it being proved that the crowbar had been previously seen in the possession of the prisoners, and a chest of drawers in Keeling's house having been broken open by such an instrument. Such is the inference of guilt drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which by means of such an instrument had been burglariously entered. 1 Stark. Ev. 844. Greenl. Ev. 49.

(*h*) *Ante*, vol. 2, p. 567.

(*i*) *Rex v. Price*, 6 East, 323. The following is an example of a case of circumstantial evidence too weak for conviction. Two women were indicted for colouring a shilling and sixpence, and a man (Isaacs) as counselling them, &c. The evidence against him was, that he visited them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room just after the apprehension, he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him



Ordinarily all instruments are written at the time they bear date, and therefore the date of any instrument is presumptive evidence that it was made at the time of that date. (*j*) The date, therefore, of a bill of exchange is *prima facie* evidence that it was drawn at that date. (*k*)

Date of instruments.

Ordinarily also a bill of exchange is accepted shortly, within a few days, after it is drawn. The date of the bill, therefore, though not evidence of the very date of the acceptance, is reasonable evidence of the acceptance having taken place within a short time after that day, regard being had to the distance the bill would have to travel from the one party to the other. (*l*)

Acceptance of a bill.

A very common presumption is made by a jury in favour of a defendant from the goodness of his character; which subject, together with the presumption as to the intent of a prisoner, or his guilty knowledge respecting the act which is the subject of the indictment, raised upon the proof of prior acts unconnected with it, will be considered in a subsequent chapter, where the rule as to evidence being confined to the points in issue is discussed. (*m*)

From good character.

Most important presumptions are derivable from the conduct of the parties, as well in civil as in criminal proceedings. If circumstances induce a strong suspicion of guilt, and where the accused might, if he were innocent, explain those circumstances consistently with his own innocence, and yet does not offer such explanation, a strong natural presumption arises that he is guilty. And in general, where a party has the means of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a forcible inference against him. (*n*)

Conduct.

Presumptions from a man's conduct operate in the nature of admissions; for, as against himself, it is to be presumed that a man's actions and representations correspond with the truth. (*o*) And admissions may be presumed, not only from the declarations or acts of a party accused, but even from his acquiescence or silence. (*p*)

Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance. (*q*)

Suppression of evidence.

a bad three-shilling piece, five bad shillings, and five bad sixpences. Upon a case reserved, the judges thought the evidence too slight to convict him. *Rex v. Isaacs*, MS. Bayley, J., *ante*, vol. 1, p. 102. See also *ante*, vol. 1, p. 303, as to presuming consent of parents to a minor's marriage, on a prosecution for bigamy.

(*j*) *Roberts v. Bethell*, 12 C. B. 778.

(*k*) *Ibid.*; except in case of a bill, which constitutes a petitioning creditor's debt in bankruptcy. As to the date of letters, see vol. 1, p. 320, note (*p*).

(*l*) Per Maule, J., *ibid*.

(*m*) See also as to the presumption that a ship never heard of has foundered. *Green v. Brown*, 2 Str. 1199. *Twemlow v. Oswin*, 2 Campb. 85. *Houstman v.*

*Thornton*, Holt, 242. *Koster v. Reed*, 6 B. & C. 19. So where a letter, fully and particularly directed to a person at his usual place of residence, is proved to have been put into the post-office, this is equivalent to proof of delivery to the hands of that person; because it is a safe and reasonable presumption that it reaches its destination. Per Lord Tenterden, *Walter v. Haynes*, 1 R. & M. N. P. C. 149.

(*n*) 2 Stark. Evid. 688. 1 Stark. Evid. 862.

(*o*) *Ibid*.

(*p*) 2 Stark. Evid. 17, 21.

(*q*) 1 Phil. Evid. 447, citing *Harwood v. Goodright*, Cowp. 87. 1 Stark. Evid. 847.

Falsification  
of evidence.

So the fabrication of evidence is calculated to raise a presumption against the party who has recourse to such a practice, not less than when evidence has been suppressed or withheld. (*r*) Legal experience, however, has shown that false evidence has sometimes been resorted to for proving facts that are true. (*s*)

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Presumption  
of continu-  
ance.

Other presumptions are founded on the experienced continuance or permanency, of longer or shorter duration, in human affairs. When, therefore, the existence of a person, a personal relation, or state of things, is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, till the contrary is shown, or till a different presumption is raised from the nature of the subject in question. Thus, where the issue is upon the life or death of a person, once shown to have been living, the burden of proof lies upon the party who asserts the death. (*t*) But after the lapse of seven years, without intelligence concerning the person, the presumption of life ceases; and the burden of proof is devolved on the other party. (*u*) But there is no legal presumption as to the time of the death within the seven years, and the fact of the party having been alive or dead at any particular period during the seven years must be proved by the party relying on it. (*v*) In one case, where the presumption of life conflicted with that of innocence, the court seem to have considered that the presumption of law was, that the party was not alive, when the consequence of his being so was that another person had committed a criminal act. (*w*) But in a subsequent case, the court held that there was no rigid presumption of law on such questions of fact without reference to the accompanying circumstances; such, for instance, as the age or health of the party; and that the proper question in such cases was what inference might fairly be drawn from the evidence. (*x*)

Of life and  
death.

Partnership.

On the same ground, a partnership or other similar relation,

(*r*) 1 Stark. Ev. 847.

(*s*) 1 Phil. Ev. 448. Referring to 3 Institute, 232, where a case is mentioned of an uncle, who was hanged for the murder of his niece, and who produced on the trial a child as like unto her, both in person and years, as he could find, but which upon examination was found not to be the true child; and it afterwards appeared that the niece had run away, and was alive. And also the Douglas Peerage case, Appendix to Evans' Pothier. 'The fabrication of evidence does not, however, furnish of itself any presumption of law against the innocence of the party, but is a matter to be dealt with by the jury. Innocent persons, under the influence of terror from the danger of their situation, have been sometimes led to the simulation of exculpatory facts.' Greenl. Ev. 43.

(*t*) Greenl. Ev. 46, 47, citing Throgmorton v. Watton, 2 Roll. R. 461. Wilson v. Hodges, 2 East R. 312. Battin v. Bigelow, 1 Pet. C. C. R. 452. See 3 Stark. Ev. 937.

(*u*) Greenl. Ev. 47, citing Hopewell v. De Pinna, 2 Campb. 113. See 1 Phil. Ev. 449. Doe d. George v. Jenson, 6 East R. 80. Doe d. Lloyd v. Deakin, 4 B. &

Ald. 435. Watson v. King, 1 Stark. R. 121. It has been held in America not to be necessary that the party be proved to be absent from the United States; it is sufficient if it appears that he has been absent for seven years from the particular State of his residence, without having been heard from. Greenl. Ev. 47, note 5, citing Newman v. Jenkins, 10 Pick. 515. Innis v. Campbell, 1 Rawle, 373. Spurr v. Trimble, 1 A. K. Marsh, 278. Wambough v. Skenk, 1 Penningt. 167. Woods v. Woods, 2 Bay. 476. 1 New York Rev. Stat. 749, s. 6.

(*v*) Doe d. Knight v. Nepean, 5 B. & Ald. 86. 2 M. & W. 894.

(*w*) Rex v. Twynning, 2 B. & Ald. 386, post, p. 221, note (*q*).

(*x*) Rex v. Harborne, 2 A. & E. 540, ante, vol. 1, p. 320. Upon an issue of the life or death of a party, the jury may find the fact of death from the lapse of a shorter period than seven years, if other circumstances concur: as if the party sailed on a voyage, which should long since have been accomplished, and the vessel has not been heard of. Greenl. Ev. 47, referring to In re Hutton, 1 Curt. 595.

once shown to exist, is presumed to continue till it is proved to have been dissolved. (*y*) So where an indictment alleged that the defendant made his warrant of attorney directed to A. and B., 'then and still being attorneys of the King's Bench,' it was held that as the defendant, by executing the warrant, admitted them to be attorneys at that time, it must be presumed that they continued to be so at the time when the indictment was found. (*z*)

So a party once elected to an office must be presumed to continue in it until the contrary be shown. Thus a return made to the stamp-office by a banking copartnership in March 1841, stating a person to be a public officer of the company, being proof that he was an officer at that time, the presumption is that he continued such officer until November 1842. (*a*) But if the office had been an annual office, it would have been otherwise. (*b*)

So where a building is shown to have been properly registered for the celebration of marriages, the presumption is that it continued to be registered. (*c*)

So where a thing is proved to have been in a particular state at one time, it is presumed to have been in that state at a former time, unless there be evidence that at some previous time it was in a different state. (*d*) Where, therefore, in order to prove certain assessments of land-tax, the signatures of certain persons to them were proved, and it was shown that those persons had acted as commissioners after the date of the signatures, but there was no evidence of their having so acted before, it was held that the acting as commissioners within a reasonable time after the date of the signatures was evidence that they were commissioners at that time; for the inference might be carried upwards as well as downwards. (*e*)

The *opinions* also of individuals once entertained and expressed, and the *state of mind*, once proved to exist, are presumed to remain unchanged till the contrary appears. Thus all the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God till it is shown from his own declarations. In like manner, every man is presumed to be of sane mind till the contrary is shown; but if derangement or imbecility be proved or admitted at any particular period, it is presumed to continue till disproved. (*f*)

Besides the presumptions which a jury may make from circumstantial evidence, there are also presumptions of law. Thus, on every charge of murder, the fact of killing being first proved, the law presumes it to have been founded on malice till the contrary

(*y*) Greenl. Ev. 48. 2 Stark. Ev. 688. Alderson v. Clay, 1 Stark. R. 405.

(*z*) Rex v. Cooke, 7 C. & P. 559, Paterson, J.

(*a*) Steward v. Dunn, 12 M. & W. 655.

(*b*) Per Parke, B., *ibid*.

(*c*) Reg. v. Manwaring, D. & B. 132.

(*d*) Rex v. Burdett, 4 B. & Ald. 124, per Best, J. In this case a letter was delivered to a person, unsealed, in Middlesex, and it was held that it must be presumed that it was sent in that state from Leicestershire, there being no evi-

dence to the contrary.

(*e*) Doe dem Hopley v. Young, 8 Q. B. 63. Where a demise in ejectment was laid on the 2nd of May, it was held that the jury might presume from the evidence of there being no sufficient distress on the premises *some time* in May, that there was none in May before the 2nd, nor on the 6th of June, when the declaration was served. Doe, lessee of Smelt v. Fuchau, 15 East R. 286.

(*f*) Greenl. Ev. 48. Attorney-general v. Parnter, 3 Bro. Ch. C. 443.



appear; and therefore all circumstances alleged by way of justification, excuse, or alleviation, must be proved by the prisoner, unless they arise out of the evidence produced against him. (*g*)

Of the probable consequence of an act.

Indeed, it is a universal principle, as Lord Ellenborough observed in the case of *Rex v. Dixon*, (*h*) that when a man is charged with doing an act, of which the probable consequences may be highly injurious, the intention is an inference of law resulting from the doing the act. In the case of *Rex v. Sheppard*, (*i*) uttering a forged stock receipt to a person who employed the prisoner to buy stock to that amount, and advanced the money, was held sufficient evidence of an intent to defraud that person; and it was further held, that the oath of the person to whom the receipt was uttered, that he believed the prisoner had no such intent, would not repel the presumption of an intention to defraud. So where the prisoner was indicted (under the repealed statute, 43 Geo. 3, c. 58) for setting fire to a mill, with intent to injure the occupiers thereof, it was held, that an injury to the mill being the necessary consequence of setting fire to it, the intent to injure might be inferred; for a man must be supposed to intend the necessary consequence of his own act. (*j*) So in prosecutions for forgery, a jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although, from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. (*k*)

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In the case of *Rex v. Fuller* and another, (*l*) the twelve judges were of opinion, that the having in possession a large quantity of counterfeit coin unaccounted for, and that without any circumstance to induce a belief that the defendants were the makers, was evidence of having procured it with intent to utter it. (*m*)

Presumptions with respect to age.

It seems to be a presumption not admitting of proof to the contrary, that a person under the age of fourteen is unable to commit the crime of rape; (*n*) and also that an infant under the age of seven cannot be guilty of felony; (*o*) and it is a *prima facie* presumption of law that a person under the age of fourteen is not guilty of a felonious intention, until evidence be produced to show that he is *doli capax*; for then it is said, *malitia supplet aetatem*. (*p*)

Presumption of innocence.

In general, however, a presumption of law arises in favour of

(*g*) *Fost.* 255. 1 *East*, P. C. c. 5, s. 106, p. 340.

(*h*) 3 *M. & S.* 15. See also *ante*, vol. 2, p. 774, 1019.

(*i*) *R. & R.* 169. *Ante*, vol. 2, p. 775.

(*j*) *Rex v. Farrington*, *R. & R.* 207. *Ante*, vol. 2, p. 1045.

(*k*) *Rex v. Mazagora*, *R. & R.* 291. *Ante*, vol. 2, p. 787. See also *Reg. v. Hill*, 2 *M. C. C. R.* 30, *ante*, vol. 2, p. 779.

(*l*) *R. & R.* 308. *Ante*, vol. 1, p. 86.

(*m*) See further as to the primary intention, including the collateral one imputed in the indictment, and the necessary proof of the particular intent laid. *Ante*, vol. 1, p. 990, *et seq.* 2 *Stark. Ev.* 573.

(*n*) 1 *Hale*, P. C. 630. *Rex v. Groombridge*, 7 *C. & P.* 582. *Rex v. Eldershaw*, 3 *C. & P.* 396, *ante*, vol. 1, p. 8.

(*o*) 1 *Hale*, P. C. 27, *ante*, vol. 1, p. 7.

(*p*) 1 *Phil. Evid.* 443, citing *Rex v. Owen*, 4 *C. & P.* 236.

innocence until the contrary is proved; (*q*) and it arises not only in matters essentially criminal, but in every instance the rule is, that illegality is never to be presumed, but that the presumption always is, that a party complies with the law. (*r*) So it is a legal maxim, that '*omnia præsumuntur esse rite et solemniter acta donec probetur in contrarium*;' (*s*) and, therefore, it is a general presumption of law, that a person acting in a public capacity, as a peace officer, justice of the peace, constable, &c., is duly authorised to do so; (*t*) and that even in a case of murder. (*u*) And this rule of evidence runs through all offices from that of a judge to that of a vestry clerk. (*v*)

*Omnia esse rite acta.*

Evidence that a party has acted as an officer at a particular time raises a presumption not only that he continued to be such officer after that time, but that he was such officer at a reasonable time previously. (*w*)

Office presumed to continue.

The general rule applicable to the doctrine of presumption is, that we are to presume that which reasonably accounts for the existing state of things. (*x*) Thus the relations of landlord and tenant, of partnership, and of marriage, are frequently presumed from the conduct of the parties being consistent with that state of things, and more consistent with that state than any other. (*y*)

What reasonably accounts for a state of things is to be presumed.

It may be proper here to mention the two well-known cautions of Lord Hale respecting presumptive evidence, viz. 1. That a person should never be convicted for stealing the goods *ejusdem*

Caution of Lord Hale as to presumptions.

(*q*) *Rex v. Twyning*, 2 B. & A. 386, in which case, a woman having married again within the space of twelve months after her husband had left the country, the presumption that she was innocent of bigamy was held to preponderate over the usual presumption of the continuance of life. But see *Rex v. Harborne*, *ante*, p. 218, note (*x*).

(*r*) *Sissons v. Dixon*, 5 B. & C. 758. See also *Bennett v. Clough*, 1 B. & A. 461, which was an action against a carrier for losing a parcel, containing some bank notes, stamps, and a letter. For the defendant it was said, that the 42 Geo. 3, c. 81, s. 5, made it illegal to send a letter in a parcel, and that the plaintiff therefore could not recover. But there is a proviso in that section, that it shall not extend to any letter concerning goods, sent by a common carrier of goods, to be delivered with the goods to which it relates; and the court held, that as illegality is never presumed, the defendant should have given *prima facie* evidence that the letter did not concern the stamps with which it was sent. See also *Rodwell v. Redge*, 1 C. & P. 220.

(*s*) As that a marriage was lawfully celebrated. See *Reg. v. Manwaring*, D. & B. 132, *ante*, vol. 1, p. 307.

(*t*) *Rex v. Verelst*, 3 Campb. 432. *Gordon's case*, 1 Leach, 515. S. C. 1 East, P. C. pp. 312, 315.

(*u*) By *Buller, J.*, in *Berryman v. Wise*, 4 T. R. 366. See also *Rex v. Rees*, 6 C. & P. 606. *Rex v. Borrett*, 6 C. & P. 124. *Butler v. Ford*, 3 Tyrw. 677; 1 C. M. & R. 662. *Reg. v. Murphy*, 8 C. P.

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(*v*) Per *Patteson, J.*, in *Marshall v. Lamb*, 5 Q. B. 115. See *Doe dem Bowley v. Barnes*, 8 Q. B. 1037, where, acting as churchwardens and overseers at the time of a demise in an ejectment, was held sufficient. *Wolton v. Gavin*, 16 Q. B. 48; where a soldier had been enlisted more than three weeks, and had been employed to enlist recruits, and had done so, and it was held that it might be presumed that he had been attested. In this case *Erle, J.*, mentioned an anonymous case where, in support of a marriage, the only proof that the party who performed the ceremony was a priest, was the fact that he performed it; and this was held enough. See also *Plumer v. Brisco*, 11 Q. B. 46. *Bunbury v. Matthews*, 1 C. & K. 380.

(*w*) *Doe dem Hopley v. Young*, *ante*, p. 219. *Steward v. Dunn*, 12 M. & W. 655, *ante*, p. 219.

(*x*) Per *Bayley, J.*, *Rex v. St. Mary-lebone*, 4 D. & R. 475.

(*y*) Per *Erle, J.*, *Reg. v. Fordingbridge*, E. B. & E. 678, where a witness proved that more than sixty years before he lived with the same master as the pauper, and believed him to be an apprentice, and that he was instructed by a journeyman, and lodged and boarded in the house, with two others, who were instructed in the art of a tailor, and, after proof of due search for the indentures without success, it was held that this state of things could only be accounted for by the existence of an indenture of apprenticeship.

*ignoti*, because he cannot give an account of how he came by them, unless there be due proof made that a felony was committed of these goods. 2. That a person should never be convicted of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead. (z)

## SEC. II.

*The best possible Evidence must be produced.*

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General rule  
that best possible  
evidence  
must be produced.

It is a general rule that you must give the best evidence that the nature of the thing is capable of: (a) the true meaning of which rule is not that in every matter there must be all that force and attestation that by any possibility might have been gathered to prove it, and that nothing under the highest assurance possible shall be given in evidence, but that no such evidence shall be brought that *ex natura rei* supposes still greater evidence behind in the party's possession or power; for such evidence is altogether insufficient, and proves nothing, as it carries a presumption with it contrary to the intention for which it is produced. For if the other greater evidence did not make against the party, why did he not produce it to the court? As if a man offer a copy of a deed or will where he ought to produce the original, this carries a presumption with it, that there is something more in the deed or will that makes against the party, or else he would have produced it; and, therefore, the proof of a copy in this case is not evidence: (b) but if he prove the original deed or will in the hands of the adverse party, or to be destroyed without his default, a copy will be admitted, because then such copy is the best evidence: the presumption of greater evidence behind in the party's possession being overturned by positive proof. (c)

Hence it appears that evidence of an inferior quality, or, as it is called, secondary evidence, cannot be received until it be shown that no evidence of a superior quality, or, as it is termed, primary evidence, can be produced. It becomes necessary, therefore, to consider, 1st, What is primary evidence. 2ndly, What is a sufficient ground for the admission of secondary evidence. 3rdly, What is good secondary evidence.

1. What is primary evidence. It has already appeared that it is the quality and not the quantity which the rule requiring the best possible evidence regards. Thus, if a will of lands is to be proved, the primary proof of the contents is the will itself; and neither an exemplification under the great seal, nor the probate in the spiritual court, will be admissible: (d) but one of the three subscribing witnesses will be sufficient, without calling the others to prove the execution, if he can speak to all the requisites of attestation, and the jury believe him. (e) So if there are several

What is primary  
evidence.

Contents of  
will.

Execution of  
will proved by  
one of three  
witnesses.

(z) 2 Hale, P. C. 299.

(a) Bull. N. P. 293.

(b) Ibid. Gilb. Ev. 13.

(c) Bull. N. P. 293.

(d) Bull. N. P. 246. But the probate is the best evidence as to personality.

(e) Bull. N. P. 264. So the execution of a will has been held to be proved by evidence of the testimony of one of the subscribing witnesses, who was dead, given on a trial between the same parties, although another attesting witness was



subscribing witnesses to a deed, and all are proved to be dead, proof of the signature of one will be sufficient; for the proof is, as far as it goes, complete, and not inferior in its kind to any that can be produced. (*f*) So for the purpose of proving handwriting, where it happens to be a case where there would be no objection to the competency of the writer himself, it is not necessary to call him: it is sufficient to prove it by the evidence of some one acquainted with the general character of his writing, who, on inspection, can say he believes it to be the handwriting of the party. Thus, where the signature of a magistrate to a deposition is to be proved, it is usually done by a witness acquainted with the general character of his writing, without calling the magistrate himself. The evidence of such a witness is not in its nature inferior or secondary; and though it may generally be true that the writer is best acquainted with his own handwriting, and, therefore, his evidence will in general be thought the most satisfactory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons who have been in the habit of seeing him write. (*g*) And it seems, that on the same principle, the evidence of such persons is as much primary evidence to disprove his handwriting as to prove it. (*h*) On an indictment for unlawfully assembling, it was held, that a paper which had been delivered by Hunt to the witness at a meeting, as a copy of certain resolutions about to be proposed and read, and which corresponded with what the witness heard read from a written paper, was admissible as evidence of those resolutions, without giving the defendant notice to produce the original. (*i*) And in the same case, it was decided that parol evidence of inscriptions, or devices on banners and flags displayed at the meeting, was admissible without producing the originals, though it appeared that they had been seized by the police officers, and therefore might have been produced on the part of the prosecution. (*j*)

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Primary evidence of handwriting.

Of disproving handwriting.

Other instances of primary evidence.

The contents of a written instrument can only be proved by the instrument itself, unless it be lost, or in the hands of the other party: and the declarations of the party against whom it is to be proved were once held inadmissible for this purpose, unless the non-production of the instrument were accounted for. (*k*) And, generally speaking, parol evidence is secondary in its nature to written evidence: and where a written instrument is required by law, or made by a private compact to express the intention of the parties, it possesses a force and authority superior to any other evidence. (*l*) Thus when an agreement has been reduced into writing, the writing itself must be produced. (*m*) And although

Written instruments.

present and not called. *Wright v. Doe d. Tatham*, 1 A. & E. 3. See also *Doe d. Spilsbury v. Burdett*, 4 A. & E. 1.

(*f*) 1 Phil. Ev. 418.

(*g*) 1 Phil. Ev. 223, 7th edit. *Ante*, vol. 2, p. 819.

(*h*) *Ante*, vol. 2, p. 818.

(*i*) *Rex v. Hunt*, 3 B. & A. 566. *Ante*, vol. 1, p. 404.

(*j*) *Ibid.* Abbott, C. J., said, 'If we were to hold that what was inscribed on a banner could not be proved without the

production of the banner, I do not know upon what reason the witness should be allowed to mention the colour of the banner, or even to say he saw the banner displayed; for the banner itself may be said to be the best possible evidence of its existence and of its colour.'

(*k*) *Bloxam v. Elsie*, 1 R. & M. N. P. C. 187, Abbott, C. J. But see *post*, p. 244.

(*l*) 1 Stark. Ev. 504.

(*m*) *Brewer v. Palmer*, 3 Esp. 213, *cor.*

Parol evidence  
not always  
secondary to  
written.

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a day-book be the best evidence to prove any matter entered in it, yet it is not necessary to produce it to prove that no entry of a fact was made in it. (*u*) But, in many instances, the mere existence of written evidence will not exclude independent parol evidence to prove the same fact. Thus, where upon letting premises to a tenant, a memorandum of agreement was drawn up, the terms of which were read over and assented to by him, and it was then agreed that he should on a future day bring a surety, and sign the agreement, it was held that the existence of this memorandum did not preclude parol evidence of the terms of the letting. (*o*) So where a verbal contract is made for the sale of goods, and it is put into writing afterwards by the vendor's agent, for the purpose of assisting his recollection, but not signed by the vendor, the terms of the contract may be given in evidence on the part of the vendor, without producing the writing. (*p*) Where a party paying money has taken a receipt, the circumstance of a payment having been acknowledged in writing does not make such writing exclusively primary evidence of the fact; but he may show the payment by a person who saw the money paid, or by the admission of the other party to that effect. (*q*) If several persons be witnesses of the same fact, and one of them, to assist his memory, makes a memorandum of it, this circumstance would not exclude the testimony of the other witnesses. (*r*) So parol evidence of what a person said on the hearing of an information for a trespass in pursuit of game, under the 1 & 2 Will. 4, c. 32, is admissible, although there be a deposition which is not produced, as there is no Act of Parliament requiring the magistrates to take down the evidence in such a case; but it is otherwise in the case of felony, where the depositions must be produced, because, by statute, magistrates are bound to take down what the witnesses say. (*s*) So where the defendant made a charge against the plaintiff before a magistrate, and what he said was taken down by the clerk, but not signed either by the defendant or the magistrate, and the case was subsequently heard and depositions taken; Cresswell, J., held that parol evidence was admissible of what was said on the first examination. (*t*) So though an entry of a marriage may have been made in the parish register according to the Marriage Act, such entry does not become the only primary evidence of the marriage, but it may also be proved by any one who witnessed it; and, indeed, in all cases except actions for criminal conversation, and indictments for bigamy, by reputation. (*u*) Where, in order to prove a demand for the

Lord Eldon, C. J. *Sinclair v. Stevenson*, 1 C. & P. 582, *cor. Best*, C. J.

(*u*) In *Macdonnell v. Evans*, 11 C. B. 930, Maule, J., said, 'Suppose a man is asked whether he made an entry in his day-book, and he says No, it cannot be necessary to produce the book.'

(*o*) *Doe v. Cartwright*, 3 B. & A. 326. See also *Wilson v. Bowie*, 1 C. & P. 8.

(*p*) *Dalison v. Stark*, 4 Esp. 163.

(*q*) *Rambert v. Cohen*, 4 Esp. 213. *Jacob v. Lindsay*, 1 East, R. 460. And if the receipt were on unstamped paper, it may be used by a witness, who saw it

given, to refresh his memory, 4 Esp. 213.

(*r*) 1 Stark. Ev. 504. So in Laver's case for high treason, Mr. Stanley, an under-secretary of state, gave evidence of L's confessions, upon his examination before the council, which, though taken in writing, was not produced. 12 Vin. Abr. 96, tit. *Evidence*, A. b. 623, pl. 7.

(*s*) *Robinson v. Vaughton*, 8 C. & P. 252, Alderson, B.

(*t*) *Jeanes v. Wheedon*, 2 M. & Rob. 486.

(*u*) *Morris v. Miller*, 1 W. Bl. 632. It may also be observed that, in order to

purpose of bringing an action of trover for a lease, a witness stated that he had verbally required the defendant to deliver up the lease, and at the same time served a notice in writing on him to the same effect; Lord Ellenborough, C. J., held that the written notice need not be produced; for the notices being concurrent and independent, either might be proved as evidence of the conversion. (*v*)

The above are instances of modes of proof which, notwithstanding the existence of other evidence which might be more satisfactory, are yet in their nature primary, and consequently available. It may be useful to mention also some examples of what is not the best possible evidence, and therefore inadmissible. Upon an indictment for having set fire to a house, with intent to defraud an insurance company, the policy is the best evidence to prove that the house was insured, and an entry to that effect in the books of the insurance office is but secondary evidence. (*w*) To prove the oaths required by the Toleration Act, parol evidence was held secondary, and inadmissible; because they were matters of record in the court where they were sworn. (*x*) Courts of record speak by means of their records only; and, therefore, the acts of a court can be proved in no other manner. Thus, parol evidence is inadmissible to show the day on which a trial at nisi prius took place; for it should be proved by the production of the nisi prius record. (*y*) But this position may well be doubted, for the assizes and sittings at nisi prius often continue more than a day, and though the record might simply name the first day, yet a court for the purpose of doing substantial justice would allow it to be proved that a trial in fact took place on a different day.

Where, therefore, a commission day was on the 19th of March, and an assignment of goods was made by a prisoner on the 20th, and he was convicted of felony on the 22nd, it was held that it might be proved that in fact the conviction took place on the 22nd, although the record stated the assizes to have been holden on the 19th. (*z*) If it be necessary to prove that a trial took place, as in the case of a prosecution for perjury committed on the trial of a cause at nisi prius, that cannot be done by parol evidence, but the record should be produced, or at least the *postea*. (*a*) And even where the transactions of courts, which are not technically speaking of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognises. (*b*) On an indictment on the 8 & 9 Will. 3, c. 26 (for high treason by having a mint die in possession), it was incumbent on the prosecutor to

Instances of what is not the best possible evidence.

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Insurance.

Matters of record.

Acts of a court.

Commencement of prosecution.

make the production of the writing necessary, it must appear to relate to the matter in question. Thus where parol evidence is offered to prove a tenancy, it is not a valid objection, that there is some written agreement relative to the holding, unless it should also appear that it was made between the parties as landlord and tenant, and that it continues in force to the very time to which the parol evidence applies. *Doe v. Morris*, 12 East, 237. *Doe v. Pearson*, 12 East, 239 *n*.

(*v*) *Smith v. Young*, 1 Campb. 439.  
(*w*) *Rex v. Doran*, 1 Esp. 127, *ante*, vol. 2, p. 1053. And, therefore, where

formerly the policy could not be received in evidence for want of a proper stamp, the indictment could not be supported, *Rex v. Gilson*, R. & R. 138, *ante*, vol. 2, p. 1053.

(*x*) *Rex v. Hube, Peake*, N. P. C. 132. *Ante*, vol. 1, p. 419.

(*y*) *Thomas v. Ansley*, 6 Esp. 80, by Lord Ellenborough. *Rex v. Page*, 6 Esp. 83, by Lord Kenyon. Tidd. Prac. 869. But see *Rex v. Coppard*, *ante*, p. 41.

(*z*) *Whitaker v. Wisbey*, 12 C. B. 44.

(*a*) *Ante*, p. 95.

(*b*) 3 Stark. Ev. 786.



Examination  
before a ma-  
gistrate.

Negative  
proof of no-  
tice.

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Negative  
proof of con-  
sent.

show that the prosecution was commenced within three months, and parol evidence that the prisoner was apprehended for treason respecting the coin within three months (the offence appearing to have been committed above three months before the indictment preferred), was held by the twelve judges to be insufficient, the warrant to apprehend or to commit not being produced. (c) Parol evidence is not admissible of the declaration of a prisoner before a magistrate, where the examination has, conformably to the statute, been taken in writing. (d) In the case of *Williams v. The East India Company*, (e) the question was, whether the agent of the defendants, who were the freighters of the plaintiff's ship, had apprised the plaintiff or his officers of the inflammable and dangerous nature of a quantity of roghan which had been stored in the ship, and which ultimately occasioned its destruction. It was the duty of the conductor of military stores to convey goods on board the ship, and of the chief mate to receive them: the chief mate was dead, and no evidence was given of what had passed between him and the conductor of the stores; but the captain and second mate proved that no communication had been made to them. Upon this evidence, the plaintiff who, it was held, was bound to prove the negative, was nonsuited by Lord Ellenborough, C. J., on the ground that the best evidence possible of the want of notice had not been produced, viz. the evidence of the conductor of stores. The court afterwards affirmed the nonsuit; and Lord Ellenborough, in delivering their opinion, said, 'The best evidence should have been given of which the nature of the case was capable. The best evidence was to have been had by calling, in the first instance, upon the persons immediately and officially employed in the delivering, and in the receiving of the goods on board, who appear in this case to have been the first mate on the one side, and the military conductor, the defendant's officer, on the other; and though the one of these persons, the mate, was dead, that did not warrant the plaintiff in resorting to an inferior and secondary species of testimony (namely, the presumption and inference arising from a non-communication to the other persons on board), as long as the military conductor, the other living witness, immediately and primarily concerned in the transaction of shipping the goods on board could be resorted to; and no impossibility of resorting to this evidence, the proper and primary evidence on the subject, is suggested to exist in this case.' In a case on an indictment on the 42 Geo. 3, c. 107, s. 1, which made it felony to course a deer in an enclosed ground, without the consent of the owner of the deer: Lawrence, J., thought it necessary to call the owner of the deer, for the purpose of disproving his consent, and the owner not being called, the jury were directed to find a verdict of acquittal. (f) But this decision has been overruled by subsequent authorities of the greatest weight: and the rule may now be considered settled that, in cases where it is necessary to prove the non-consent of the owner of the property which is the subject of the charge in the indictment, the testimony of the owner himself is not exclusively primary evidence of the non-consent; but it may be inferred from

(c) *Rex v. Phillips*, R. & R. 369.

(d) See vol. 1, p. 645.

(e) *Jacobus' case*, 1 Leach, 509.

(f) 3 East, R. 192.

(g) *Rex v. Rogers*, 2 Campb. 634.

the conduct of the prisoner, and the circumstances under which the act was done. Where the prisoners were indicted on the 3 Geo. 3, c. 36, for lopping and topping an ash timber-tree, 'without the consent of the owner,' the owner, Sir J. Aubrey, had died before the trial. The offence was committed at eleven o'clock at night, on the 18th of February. Sir J. Aubrey died on the 1st of March following, having given orders for apprehending the prisoners on suspicion. The land steward was called to prove, that he himself never gave any consent, and from all he had heard his master say, he believed that he never did. Bayley, J., told the jury that they must be perfectly satisfied that the prisoners had not obtained the consent of the owner of the tree, namely, Sir J. Aubrey, that they might lop and top it; and left it to them to say, whether they thought there was reasonable evidence to show that in fact he had not given any such permission. His lordship adverted to the time of night when the offence was committed, and to the circumstance of the prisoners running away when detected, as evidence to show that the consent required had not in fact been given. (g) And in three cases, reserved at once for the opinion of the twelve judges, it was held that, though there must be some evidence to negative the owner's consent, his non-consent might be inferred from the circumstances, or proved by his agents. The first of the three cases was *Rex v. Allen*, an indictment for killing a fallow deer in the park of the forest of Waltham, without the consent of the owner, the King; the second, *Rex v. Argent*, for entering a yard adjoining and belonging to the dwelling-house of J. Greenwood, a Quaker, and taking fish out of a pond there without the consent of the owner; and the third, *Rex v. Chamberlain*, for taking fish in Claremont Park, belonging to Prince Leopold, without his consent. The offence in each case was committed under circumstances which the learned judge, who tried it, thought quite sufficient to warrant the jury in finding the non-consent of the owner, admitting the onus of proving such non-consent to lie on the prosecutor; but in consequence of the decision in *Rex v. Rogers*, above mentioned, further evidence was gone into, by calling the persons engaged in the management of the property, but not the owners. The judges held the conviction in each of the cases right. (h)

2ndly. What is a sufficient ground for the admission of secondary evidence. If the primary evidence be lost or destroyed, or it cannot be produced, or if it be in the hands of the adverse party, then upon proof of the loss or destruction, or that it cannot be produced in the former cases, or of the fact of its being in such possession, and of reasonable notice to produce it at the trial having been given to the other party, in the latter case, secondary evidence is admissible. (i) Where secondary evidence is offered,

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2. What is sufficient ground for the admission of secondary evidence.

(g) *Rex v. Hazy*, 2 C. & P. 458.

(h) R. & M. C. C. R. 154.

(i) Besides these two instances of the loss or destruction of the primary evidence, and its being in the hands of the adverse party, it should seem that secondary evidence is admissible in all cases where it is apparent that such secondary evidence is the best, which the

party, without any default, has it in his power to produce; for then the presumption of a fraudulent suppression of the better evidence, which is the foundation of the rule, must cease. Thus, if an attesting witness to a written instrument after his attestation became incompetent from interest, proof of his handwriting was admissible. *Godfrey v. Norris*,

Where the primary evidence is lost.

What is sufficient proof of loss.

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The search need not be recent nor for the purpose of the cause.

Useless documents.

in consequence of the loss of the primary evidence, in order to establish such loss, it must be proved that diligent search has been made in those quarters from which the primary evidence was likely to be procured. The evidence of a document being lost may vary much, according to the nature of the paper itself, the custody it is in, and all the surrounding circumstances. A paper of considerable importance, which is not likely to be permitted to perish, may call for a much more minute and accurate search than that which may be considered as waste paper, which nobody would take care of. (*j*) In the case of *Kensington v. Inglis* (*k*) it was incumbent on the plaintiff to prove the loss of a license to trade; and a witness, who had been secretary to the governor of a colony, said it was his practice to destroy or put aside such licenses among the waste papers of his office, as not being of further use, and he supposed he had disposed of the license in question (which, after having been granted by the governor, was returned to the witness), in the same manner as other licenses for ships whose voyages had been performed: but he was not sure it was destroyed. He further stated, that he had been applied to for the license, and had searched for it; but he did not recollect whether he found it or not; though he did not think that he had found it. Lord Ellenborough, C. J., in delivering the judgment of the court, (*l*) said, 'We are of opinion, that this evidence satisfies what the law requires in respect of search; and establishes with reasonable certainty the fact of the license being lost. It was not to be expected that the witness should be able to speak with more confident certainty to a fact, to which his attention would not be particularly drawn at the time, on account of any importance being supposed to belong to it.' In the preceding case the search was neither recent nor made for the purpose of the cause (*m*); and it has since been held that neither was necessary. Where, therefore, a search had been made nearly three years before the action was brought, but it did not appear for what purpose, it was held sufficient. (*n*)

Where it became necessary to account for the non-production of a policy, and it was proved that it had been effected about seven years before, and having become useless on account of a second

1 Str. 34. So if he became incompetent from infamy, *Jones v. Mason*. 2 Stra. 833. The defendant, in an action of trespass for breaking hatches, offered in evidence articles of agreement, dated in 1745, between persons standing in the respective situations of the plaintiff and defendant. To produce this deed the defendant's attorney was called, who said he had received it from the son of the owner of the defendant's land. This evidence was objected to as insufficient: then the son of the owner was called, who said he had received it from his father that morning; this being also objected to, the father was called; upon which the plaintiff examined him upon the *voire dire*, and objected that he could not be a witness, being interested; whereupon Holroyd, J., held, that as the father was objected to, the next best evidence

had been given, and admitted the deed. *Card v. Jeans*, Manning's Dig. 375. If a deed be in the possession of a third person, who is not by law compellable to produce it, and he refuses to do so, secondary evidence is admissible, for the original is then unattainable by the party offering such evidence. *Doe v. Ross*, 7 M. & W. 102, *Newton v. Chaplin*, 10 C. B. 356.

(*j*) Per Pollock, C. B. *Gathercole v. Miall*, 15 M. & W. 319.

(*k*) 8 East, 273.

(*l*) 8 East, 289.

(*m*) As the witness made the search in the Bahamas, but left them in April 1801, the search must have been before that time; the decision was in 1807.

(*n*) *Fitz v. Rabbits*, 2 M. & Rob. 60, *Patteson, J.*



policy being effected, it had probably been returned to the plaintiff; and the clerk of the plaintiff's attorney proved that, a few days before the trial of the action, he had searched for it in the plaintiff's house, not only in every place pointed out by the plaintiff, but in every place which he thought likely to contain a paper of this description; it was held that this was sufficient evidence to entitle the plaintiff to give secondary evidence of the contents of the policy. In this case, Abbott, C. J., observed, that where the loss or destruction of an instrument may almost be presumed, very slight evidence of its loss or destruction will be sufficient. (*o*) If a person proved that he had searched for an envelope among his papers, and could not find it, that would be sufficient. So with respect to an old newspaper, which had been at a public coffee-room; if the party who kept the coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and said he supposed some one had taken it away, that would be sufficient. (*p*)

Where a duplicate adjudication of bankruptcy was left at the counting-house, being the usual and last-known place of business of the bankrupts, on the 21st of June, and the place then locked up on behalf of the assignees, and the paper was seen there a fortnight or three weeks afterwards, and on the 26th of July the summons to appear was left in the same counting-house, which was unlocked for the purpose, and then locked up again, and before the trial the counting-house was searched, and neither of these papers could be found, and due notice to produce them had been given, it was held that the search was sufficient. The presumption was either that the bankrupts had got them, or that they had got into the hands of some person to whom they were of no importance, who had destroyed them. (*q*)

Gordon's case.  
Documents in  
bankruptcy.

Where a tithing-man went to a house to execute a warrant, and read the warrant under the window of the house, where the party who was to be apprehended under the warrant then was, and an affray then took place between the tithing-man and the inhabitants of the house, during which the tithing-man stated that he lost it; that he had it in his hand when he read it under the window; and that he never saw it afterwards; that he searched his pocket for it after he had gone about a mile and a half from the house, and could not find it; and that he directed a boy to look carefully for it, on the road between the house and the place where he first missed it; and the boy swore that he had made careful search, and could not find it; it was held, on a case reserved, that secondary evidence of the warrant was properly received, although notice had not been given to the prisoner to produce it. (*r*)

Loss of a war-  
rant to apprehend.

(*o*) *Brewster v. Sewell*, 3 B. & A. 296. See also *Freeman v. Arkell*, 2 B. & C. 494, where Bayley, J., expressed himself to the same effect. And for further examples of sufficient searches, see *Rex v. North Bedburn*, Cald. 452. *Rex v. Johnson*, 7 East, 65. *Rex v. Morton*, 4 M. & S. 48. *Bligh v. Wellesley*, 2 Carr. & P. 400. *Rex v. East Farleigh*, 6 D. & R. 147. *Rex v. Stourbridge*, 8 B. & C. 96. *Pardoe v. Price*, 13 M. & W. 267.

*Miall*, 15 M. & W. 319. In *Reg. v. Rastrick*, 2 Cox, C. C. 39, Platt, B., held that a label stating the amount of money in a parcel had not been sufficiently searched for, as the search had been only made at the owner's house, and not at his shop, and he could not say whether he saw the label last at his shop or at his house, though he had taken the parcel, as usual, to his house.

(*q*) *Reg. v. Gordon*, Dears. C. C. 586.

(*r*) *Rex v. Hood*, R. & M. C. C. R. 281.

(*p*) Per Alderson, B., *Gathercole v.*

What is not  
sufficient proof  
of loss.

But if it be proposed to give secondary evidence of a written instrument, and such instrument is traced into the possession of a particular person, the loss cannot be established without calling him as a witness; for it will not be enough to prove that he was applied to for the instrument, and upon such application said that he could not find the same, nor did he know where it was. Thus, where it was proved that an indenture of apprenticeship was of two parts, that one had been destroyed, and that the other had come to the hands of a Miss Taylor, who when asked for it said she could not find it: but she was not subpoenaed: this was held insufficient evidence of the loss.<sup>(s)</sup> So where an agreement for renting a tenement had remained with the landlord, and he, being asked by a witness whether there was any such agreement, said, 'I cannot say for a certainty; I will search;' and told his clerk to search, which he and the witness did amongst the papers of the office, and could find no agreement: but the landlord was not examined; it was held that enough did not appear to show that the sessions were wrong in holding that the search was insufficient. It might be that the landlord's house was the proper place of deposit, and it had not been searched. If there had been proof *alunde* that the office was the proper place of deposit, the search would have been sufficient, though the landlord was not examined. <sup>(t)</sup> The same principle applies with respect to the

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(s) *Rex v. Castleton*, 6 T. R. 236. See also *Williams v. Younghusband*, 1 Stark. R. 139, and *Parkins v. Cobbett*, 1 C. & P. 282. In *Rex v. Denio*, 7 B. & C. 620, the pauper, who had served as an apprentice, proved that the indenture was kept by his master, and when the apprenticeship expired, he asked his master for the indenture, who said he had not got it, but that it was with the overseer of the parish by which the pauper was bound apprentice, and proof was given of search among the papers of the parish for the indenture, and that it could not be found; and that all the books and papers about that date were missing; and it was held, that as the master was living, and might have been called as a witness, and his declarations were clearly not admissible in evidence, there was not sufficient evidence to show that a due search had been made so as to let in parol evidence of the indenture. In *Rex v. Rawden*, 2 A. & E. 156, the widow of an apprentice stated that, a short time before her husband died, she asked him what had become of his indentures, and he said that he had got them away from his master after the end of his apprenticeship, and had worn them in his pocket till they were all to pieces; and it was held that evidence of this conversation was inadmissible, there being no further proof either of the indenture having been in the possession of the apprentice, or of other inquiry after it. But where, in order to establish a settlement by apprenticeship, it was proved that the indenture was only of one part, and that upon application to the pauper, who was then ill, and died soon after-

wards, to know what had become of it, he declared that when the indenture expired it was given to him, and he had burnt it long since; and it was also proved, that inquiry was made of the executrix of the master, who said that she knew nothing about it; it was held that this proof was sufficient to let in parol evidence of the contents of the indenture. *Rex v. Morton*, 4 M. & S. 48. The court distinguished this case from *Rex v. Castleton*, inasmuch as there was no proof that the indenture ever existed in the possession of the pauper, unless his declaration were taken as evidence; and if it was, in the same breath he declared it no longer existed; whereas the evidence in *Rex v. Castleton* showed that a further search was necessary. An indenture of apprenticeship may be useful after the apprenticeship has expired, to entitle the party to the freedom of a corporation, or to exercise a trade, or it may be evidence of his settlement. Per *Abbott, C. J.*, *Brewster v. Sewell*, 3 B. & A. 296. And there is no reason why the master should keep it after the apprenticeship is over, per *Crompton, J.*, *Reg. v. Hinkley*, 3 B. & S. 885. The reasonable presumption, therefore, is that it would be in the custody of the apprentice; and it has been held that a search among his papers after his death was sufficient, without any search elsewhere. *Reg. v. Hinkley, supra*. But as an expired indenture sometimes remains with the master, per *Maule, J.*, *Hall v. Ball*, 3 M. & Gr. 242, it would always be safer to search the master's papers also.

(t) *Reg. v. Saffron Hill*, 1 E. & B. 93.

person who has the legal custody of an instrument: if it is proposed to establish its loss for the purpose of giving secondary evidence of its contents, the person who has the legal custody of it should be called as a witness, or steps should be taken to make evidence of his conduct admissible. (*u*) So where there are two trustees of a settlement, a search for it by one of them is insufficient. (*v*) And where the instrument in question is the appointment to an office, the legal custody is in the officer, who is the person most interested in the instrument, and who requires its production as a sanction for those acts which he may be called upon to do under its authority. (*w*) If the individual to whose possession the instrument is traced be dead, an inquiry should be made of his executors, or such persons as must be presumed to have it in their possession. (*x*) But if the papers of the deceased were searched during his lifetime, it is unnecessary to apply to the executors or other persons to whose possession such papers may have come. (*y*) If two or more parts of a deed have been executed, the loss or destruction of all the parts must be proved, in order to lay a ground for admitting secondary evidence of its contents. (*z*)

Search should be with the person who has the legal custody.

Where two parts have been executed.

What is due search.

The court must be satisfied that due diligence has been used to find the document in question; but it is not necessary to negative every possibility: it is enough to negative every reasonable probability of anything being kept back. Where an officer or an attorney is applied to for the inspection of documents, the court will assume, until the contrary appears, that the officer or attorney produces all the documents relating to the subject. (*a*) The search should be such as to induce the court to come to the conclusion that there is no reason to suppose that the omission to produce the document itself arose from any desire to keep it back, and that there has been no reasonable opportunity of producing it which has been omitted, and the proper limit of the search is where a reasonable person would be satisfied that the party had *bonâ fide* endeavoured to produce the document itself. (*b*)

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(*u*) *Rex v. Stoke Golding*, 1 B. & A. 173.

(*v*) *Doe dem. Richards v. Lewis*, 11 C. B. 1035.

(*w*) *Rex v. Stoke Golding*, *supra*. The law presumes the appointment of overseers to be in the custody of some of the overseers, per *Holroyd, J.*, *ibid*.

(*x*) 1 Phil. Ev. 456, 7th edit.

(*y*) *Rex v. Piddlehinton*, 3 B. & Ad. 460. The master of an apprentice took away the indenture after it was executed, and failed in business after the apprentice had served about a year. Upon the failure, an attorney had the custody of *all* the papers and books of the master, and looked over them after the failure, and did not find any indenture, and it was held that this was sufficient to allow the admission of secondary evidence, though the master's widow was living, and no inquiry had been made of her; for after the evidence of the attorney it was useless to inquire as to her possession of the indenture.

(*z*) *Bull. N. P.* 254. *Doxon v. Haigh*,

1 Esp. 409. *Alivon v. Furnival*, 4 Tyr. 751.

(*a*) *M'Gahey v. Alston*, 2 M. & W. 206. In this case a cheque, which had been drawn on the account of a parish, had been delivered to the paying clerk of the parish, and the bankers of the parish, on the same day, paid a cheque of the same amount, and their custom was to return the cheques when paid to the paying clerk. The cancelled cheques were kept in a room in the workhouse, used by the paying clerk as an office for that purpose, and application was made to the succeeding paying clerk for an inspection of the cheques he had in his office, and the paying clerk handed to the witness several bundles, which the witness looked through without finding the cheque in question, but looked at no other. The paying clerk was not called, and it was held that this was such reasonable search for the cheque as to render parol evidence of it admissible.

(*b*) Per *Alderson, B.* *Gathercole v. Miall*, 15 M. & W. 319. Where in an



Questions asked of persons likely to have a document and their answers are admissible.

Where the production of a document cannot be enforced, secondary evidence of its contents is admissible.

Documents abroad.

An agreement in America.

Letter in France.

Whether there has been due search is a question to be determined by the court; and any questions may be put for the purpose of showing that there has been a reasonable and *bonâ fide* search, though the answers to them may not be evidence in the ultimate question before the court. (c) Therefore witnesses may prove what inquiries they have made of persons, who are likely to have a document in their possession, and what answers they received from them, though they are not called as witnesses. (d)

If in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents as if its production were physically impossible. (e) Where, therefore, a witness proved that he had seen the signature of a person in a parish register, it was held that the witness might prove whose signature it was, although the register was not produced; for the person who had the custody of the register was not by law compellable to produce it, and, therefore, the identity of the party might be proved by showing that the signature was in his handwriting. (f)

And this rule will apply to documents in the possession of persons abroad, for their production cannot be enforced; still it seems that reasonable endeavours should be made to produce them.

Where a witness proved that, on his arrival at New York, the custom-house authorities took possession of all his papers, under a suspicion that he was the bearer of secessionist dispatches, but ultimately all the papers were returned to him, except an agreement which it was suggested had reference to the supply of goods for the confederates in America, and the witness had made repeated applications at New York for the agreement, but was told that it had been sent to Washington, and he had made no inquiry for it at that place; it was held that reasonable efforts had been made to procure the original, and that secondary evidence was properly received. (g)

Where a Roman Catholic priest, shortly before a trial, went to Paris, and there saw in the possession of the Abbé Cognat a letter, in the handwriting of the defendant, and he asked the Abbé to let him have the letter in order to bring it to England, but the Abbé refused; it was held that the evidence given for the purpose of letting in secondary evidence was insufficient. It was nothing

action against overseers of the poor their attorney's clerk had called twice on one of the defendants to ask him for his appointment, when he said that he had lost it, but no search had been made by any one for it, it was urged that search ought to have been made at the house; Alderson, B., 'I do not see in what way a search would have carried the matter further. It would be in substance the same as inquiry of the party. It is the necessity of the case. This is a declaration made by the party who cannot be examined to the fact.' *City of Bristol v. Wait*, 6 C. & P. 591. It is obvious that the defendant had a direct interest in producing the appointment, as his defence rested on his being an overseer.

(c) Per Lord Campbell, C. J. *Reg. v. Braintree*, 1 E. & E. 51.

(d) *Reg. v. Braintree*, *supra*. See *Reg. v. Kenilworth*, 7 Q. B. 642, where Coleridge, J., said, 'The preliminary proof is given to enable a judicial tribunal to determine whether secondary evidence can be submitted to them. In such a case a looser rule of evidence may prevail. The sessions were to make up their minds, not whether the document was destroyed or not, but whether there had been a *bonâ fide* search, and not mere carelessness and neglect, or fraud, in not producing it.'

(e) Per Pollock, C. B. *Sayer v. Glossop*, 2 Exch. R. 409.

(f) *Sayer v. Glossop*, *supra*.

(g) *Quilter v. Jorss*, 14 C. B. (N. S.), 747.

more than proof of a mere demand of the document apparently made by a stranger, who did not even disclose his purpose in making it. (*h*)

Where an overseer of a parish was duly subpoenaed to produce a rate-book, but neglected to attend the trial of an appeal between two other parishes, it was held that secondary evidence of the rate-book was inadmissible. (*i*)

Disobedience  
to a subpoena  
*duces tecum*.

We have seen that, on proof of the loss of a deposition in bankruptcy, secondary evidence may be given of its contents on a trial for perjury. (*j*)

In perjury.

There is no distinction between criminal and civil cases with respect to secondary evidence of documents in the possession of the defendant. It has been solemnly determined, that notice may be given to the defendant in a criminal prosecution to produce a paper in his possession, and in case he neglects to produce it, other evidence may be given of it. (*k*) Where secondary evidence is sought to be given, on the ground that the primary evidence is in the possession of the adverse party, in the first place, the fact of such possession must be proved. The degree of evidence, which may be necessary to prove that fact, will depend so much on the nature of the transaction, and the particular circumstances of each individual case, that it is scarcely possible to lay down a general rule on the subject. (*l*) Where an original instrument belongs exclusively to a party, or regularly ought to be in his possession according to the course of business, slight evidence is sufficient to raise a presumption that it is in his possession. Thus, where the solicitor to a commission of bankruptcy proved that he had been employed by the defendant to solicit his certificate under the commission, and that, on looking at his entry of charges, he had no doubt the certificate was allowed, this was held sufficient proof of the certificate having come to the defendant's possession. (*m*) Where an instrument has been delivered to a third party, between whom and the party to the suit there exists a privity, the possession of the privy is considered the possession of the party, for the purposes of letting in secondary evidence. Thus, in an action against the owner of a vessel, for goods supplied to the use of the vessel, a notice to the defendant to produce the order for the goods which he had given to the captain was held sufficient to let the plaintiff into secondary evidence of the contents of the order, though the order itself appeared to be in the possession of the captain; on account of the privity between the

2. Where the  
primary evi-  
dence is in the  
possession of  
the other  
party.

Possession of  
privy.

(*h*) *Boyle v. Wiseman*, 10 Exch. R. 647. But Parke, B., said during the argument, 'If it had been distinctly put to the Abbé Cognat, "It is proposed to read this letter in evidence on the trial of an action for libel; will you allow it to be placed in my hands for that purpose?" and he had refused, perhaps that might have been sufficient to admit secondary evidence.'

(*i*) *Reg. v. Llanfachthly*, 2 E. & B. 940. The grounds of this decision were, that the overseer might be punished for disobeying the subpoena, and that there would be great liability to abuse, if the production of the evidence was dispensed

with by the disobedience of the witness. The only judges in court were Lord Campbell, C. J., and Erle, J.; and with all deference to them, this decision deserves reconsideration. Is one man to be hanged because a witness disobeys a subpoena, or another to lose 10,000*l.* by a like disobedience?

(*j*) *Reg. v. Milnes*, 2 F. & F. 10, *ante*, p. 94.

(*k*) *Per Buller, J., Rex v. Watson*, 2 T. R. 201. *Attorney-General v. Le Merchant*, 2 T. R. 201, note (*a*). *Cates v. Winter*, 3 T. R. 306.

(*l*) 2 Phil. Ev. 216.

(*m*) *Henry v. Leigh*, 3 Campb. 502.

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Where a party has a right to a document.

Instrument once in the party's possession, but

owner and the captain. (*n*) So in an action of trover against the sheriff, a notice to the sheriff's attorney was, on account of the privity between him and his under-sheriff, held sufficient to let in secondary evidence of a writ, which was proved to have come to the possession of the under-sheriff by having been returned to him during the time the sheriff remained in office. (*o*) So notice to a defendant to produce a cheque drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, though the cheque remains in the banker's hands, for the possession of the banker is the possession of his customer. (*p*) So where a forged deed was produced by the prisoner's attorney on the trial of an ejectment, in which the prisoner was the lessor of the plaintiff, and after the trial it was returned to the prisoner's attorney, it was held that secondary evidence might be given of it, after notice to the prisoner to produce it, without calling the attorney to prove what he had done with the deed. (*q*)

In order to let in secondary evidence, the instrument need not be in the actual possession of the party; it is enough if it is in his power, which it would be if it were in the hands of a party, in whom it would be wrongful not to give up possession to him. But he must have such a right to it, as would entitle him not merely to inspect but to retain it. Where, therefore, a written contract had been deposited in the hands of the common agent of the defendant and the person with whom he had contracted, and notice to produce had been given to the defendant, it was held that secondary evidence was not admissible, because, even if the document were given to the defendant for the purpose of the cause, it must be returned. (*r*) And where a paper is in the hands of a person acting in an independent character, and who has a right to the possession of it, notice to the party is insufficient; and this is so, although the party justifies under the authority of that person. (*s*)

A letter which had been in the possession of the defendant was proved on the part of the defendant to be then filed in chancery, pursuant to an order of that court; Abbott, C. J., was of opinion,

(*n*) *Baldney v. Ritchie*, 1 Stark. N.P.C. 338. Reg. v. Barker, 1 F. & F. 326.

(*o*) *Taplin v. Atty*, 3 Bing. 164.

(*p*) *Partridge v. Coates, R. & M. N. P. C. 156*, per Abbott, C. J., S. P. Barton v. Payne, 2 C. & P. 520, per Bayley, J. See also *Sinclair v. Stevenson*, 1 C. & P. 582, where Best, C. J., held it was enough to trace the primary evidence to the possession of an agent. But there is no such privity between the defendant, and a third person under whom he justifies, so as to make proof of the possession of such third party equivalent to the possession of the defendant. *Evans v. Sweet, R. & M. N. P. C. 83*, per Best, C. J. And Lord Kenyon held, on the trial of an information for a libel, that proof of the delivery of a paper to the servant of the defendant was not proof of the fact of the paper being in the defendant's possession, so as to let in parol evidence of

its contents, upon notice to the defendant to produce it. *Rex v. Pearce, Peake, N. P. C. 76*; but see *contra*, *Pritchard v. Symonds*, Bull. N. P. 254. *Rosc. Ev. 7*, and *Colonel Gordon's case*, 1 Leach, 300, note (*a*) to Aickles's case.

(*q*) *Rex v. Hunter*, 4 C. & P. 128, Vaughan, B. Some counts of the indictment charged that certain persons made the deed, and that the prisoner fraudulently altered it, and it was objected that previously to the receiving secondary evidence the attesting witness ought to be called; but Vaughan, B., overruled the objection.

(*r*) *Parry v. May*, 1 M. & Rob. 279, Littledale, J.

(*s*) 2 Phil. Ev. 218, citing *Evans v. Sweet, R. & M. 83*. *Rex v. Pearce, Peake, 76*. *Pritchard v. Symonds*, B. N. P. 254. *Whitford v. Tutin*, 10 Bing. R. 395.



that the plaintiff, upon proof of notice to produce, was not entitled to give secondary evidence of the contents; for the letter was as much in the possession of the one party as the other. Either party might, on application to the court of chancery, have obtained permission to produce it. (t) But where a document was traced to the possession of the defendant, upon whom notice to produce it had been served, but he proved that it was then in the stamp-office (where it had been delivered to have some duties allowed). Best, C. J., held, that as he had not informed the plaintiff of that circumstance when serving the notice, secondary evidence was allowable. (u)

since parted with.

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After the possession of the primary evidence is proved to be in the adverse party, the party offering secondary evidence must prove that he has given notice to the other side to produce the primary evidence. Such notice may be by parol as well as in writing, and if both a parol and written notice have been given, proof of either is sufficient. (v) It should be properly entitled; (w) and must not be general, but should specify the document to be produced. Thus, a notice 'to produce all letters, papers, and documents touching a bill of exchange, mentioned in the declaration, and the debt sought to be recovered,' was held too vague. (x) So a notice 'to produce letters and copies of letters, also all books relating to the cause,' was held insufficient to let in secondary evidence of a letter alleged to have been written nine years before. (y) It should also be served in reasonable time. (z) In civil cases, the rule is, that notice to produce should be served before the commission day, when the party lives away from the assize town, in order that he may have an opportunity of bringing the paper required. (a) And, *à fortiori*, in a criminal case, where the party is in prison at a distance from his home, ought the notice to be served before the commission day. (b) And where

Notice to produce;

its form.

When and upon whom to be served.

(t) *Williams v. Munnings*, 1 R. & M. N. P. C. 18.

(u) *Sinclair v. Stevenson*, 1 C. & P. 582.

(v) *Smith v. Young*, 1 Campb. 440. Rose. Ev. 7.

(w) *Harvey v. Morgan*, 2 Stark. R. 17, where in an action by the plaintiffs as the assignees of C. v. E., a notice to produce was entitled A. and B., assignees of C. and D. v. E., and held insufficient by Lord Ellenborough, though A. & B. were in fact the assignees of C. and D.

(x) *France v. Lucy*, R. & M. N. P. C. 341. *Smith v. Sandeman*, 2 Cox, C. C. 239.

(y) *Jones v. Edwards*, McClel. & Y. 139. In *Morris v. Hauser*, 2 M. & Rob. 392, Lord Denman, C. J., held a notice to produce 'all letters, written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf,' sufficient to let in secondary evidence of a letter. And in *Jacob v. Lee*, 2 M. & Rob. 33, Patteson, J., held a notice to produce 'all and every letters written by the plaintiff to the defendant relating to the matters

in dispute in this action,' sufficient, and distinguished the case from *France v. Lucy*, and *Jones v. Edwards*, *supra*, on the ground that the notice mentioned the parties by whom and to whom the letters were addressed.

(z) As to what is considered a reasonable notice, see *Doe v. Grey*, 1 Stark. R. 283, *Bryan v. Wagstaff*, R. & M. N. P. C. 327. *Drabble v. Donner*, *ibid.* 47.

(a) *Trist v. Johnson*, 1 M. & Rob. 259, *Park, J. A. J. S. P. George v. Thompson*, 4 Dowl. P. R. 656, where it was served on the commission day, at 5 P. M., at the attorney's residence, after he had left home for the assize town. *Doe d. Curtis v. Spitty*, 3 B. & Ad. 182. *Hargest v. Fothergill*, 5 C. & P. 303, *Taunton, J.* In *Howard v. Williams*, 9 M. & W. 725, a notice was served on the defendant's attorney at his residence, twenty miles from the place of trial before the under-sheriff, at 8 P. M., on the night before the trial; the defendant resided in the same town with the attorney, but was not at home until 12 that night; and the notice was held insufficient.

(b) *Rex v. Ellicombe*, 1 M. & Rob. 260, *Littledale, J.* This was an indict-

on a trial at the assizes for arson, with intent to defraud an insurance company, a notice to produce the policy had been served on the prisoners about the middle of the day before the trial, and his residence, where the fire happened, was thirty miles from the assize town, the notice was held insufficient. (*e*) But no general rule can be laid down, as each case must depend on its particular circumstances. Where, therefore, a document was at the assize town, in the possession of an attorney, who had acted as attorney for the prisoner on a trial where the document was given in evidence, a notice served on the commission day was held sufficient. (*d*) In town causes, service of notice on the attorney in the evening before the trial is in general sufficient. (*e*) And on a trial for conspiracy, a notice to produce a cheque served at three o'clock in the afternoon of the day before the trial, at the office of the London agents for the country attorney of the defendants who lived in Herefordshire, has been held sufficient. (*f*) And where a party has been served with a notice to produce sufficiently early to enable him to produce the document, it makes no difference that at the time of the service the case has been partly heard. (*g*) But where in a town cause the service was at seven

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ment for setting fire to a house with intent to defraud an insurance company, and notice was served on the prisoner in gaol on Monday, the assizes having commenced on the Friday previous, and the trial being on the Wednesday following. The prisoner's residence was ten miles from the assize town. The notice was held insufficient.

(*c*) *Reg. v. Kitson*, Dears. C. C. 187.

(*d*) *Reg. v. Hankins*, 2 C. & K. 823, Coltman, J. In this case, on a trial for perjury, it appeared that about noon on the commission day at Hereford, the trial taking place the following morning, a notice to produce a paper (with reference to which the perjury was alleged to have been committed on a trial in the county court) was served in Hereford on Mr. Cadle, the present attorney of the prisoner. The prisoner lived at Ross, fourteen miles from Hereford, and Mr. Cadle lived at Newent, twenty-five miles from Hereford; but in the notice, further notice was given that the paper was then in Hereford in the possession of Mr. Minett, who was then at the Green Dragon Hotel, and who had been the attorney for the prisoner at the trial in the county court, and who had previously been called upon under a subpoena *duces tecum* to produce the paper on this trial for perjury, and had been held not bound to produce it, on the ground that he held it as attorney for the prisoner; and Coltman, J., held that this notice was sufficient to let in secondary evidence of the contents of the paper. So where notice to produce certain policies of insurance was served on the attorney of the prisoner, on Tuesday evening, the prisoner being then at Maidstone, but not in custody, and the policies were twenty miles off, and the trial was

on Thursday, and on the Wednesday the prisoner's attorney had sent a person to serve a subpoena at a place within four miles of where the policies were; Bramwell, B., held, that as there had been an opportunity of obtaining the policies, the notice was sufficient, and said that no general rule could be laid down, but every case must be governed by its particular circumstances, *Reg. v. Barker*, 1 F. & F. 326.

(*e*) *Per Gurney, B., Atkins v. Meredith*, 4 Dowl. P. R. 658. 2 Phil. Ev. 219. *Gibbons v. Powell*, 9 C. & P. 634. *Gurney, B., Leaf v. Butt, C. & M.* 451. *Meyrick v. Woods*, *ibid.* 452. But where notice to produce a receipt was served on the defendant on Saturday, the cause coming on for trial on the Monday, Gurney, B., held the service too late, and that the notice should have been served on the attorney. *Housman v. Roberts*, 5 C. & P. 394. Where the party and his attorney both lived in Worcester, Williams, J., held that service on the Saturday during the assizes for the Monday following was sufficient. *Firkin v. Edwards*, 9 C. & P. 478.

(*f*) *Reg. v. Hamp*, 6 Cox, C. C. 167. Lord Campbell, C. J. The sheriff had seized the cheque in question in levying for a forfeited recognizance of one of the defendants, but this was held to make no difference.

(*g*) *Sturm v. Jeffree*, 2 C. & K. 442. Pollock, C. B. This cause began on Thursday, and at four o'clock was adjourned; before nine that evening the notice was served: all the parties lived in London. On Friday the hearing was resumed, and the document called for; and it was held that the notice was sufficient.

o'clock the evening before the trial, upon the attorney, who resided in London, between two and three miles from the tradesman, whose books were required to be produced, the Court of Exchequer held the notice insufficient, as the books could not be presumed to be in the possession of the attorney. (*h*) All these cases depend on their particular circumstances, and the question in each is, whether the notice was given in a reasonable time to enable the party to be prepared to produce the document at the time of the trial. (*i*) The notice may be served either on the party himself or his attorney. There is no difference in this respect between criminal and civil cases. (*j*) Where the defendant, an attorney, was indicted for perjury on the trial of an ejectment, in which he had acted as the attorney of the lessor of the plaintiff, and had produced a document and taken it back again, it was held that a notice to produce that document served on the defendant was sufficient, although he was not the attorney on the record in the ejectment. (*k*) And a notice served on a prisoner in gaol is sufficient. (*l*) So a notice served on a prisoner for one session of the Central Criminal Court has been held to be sufficient for a subsequent session, to which the trial had been postponed. (*m*)

The reason why notice to produce is required is not to give the opponent notice that such a document will be used, so that he may be enabled to prepare evidence to explain or confirm it; (*n*) but it is merely to enable the party to have the document in court, to produce it, if he likes, and, if he does not, to enable the opponent to give secondary evidence of it. It is merely to exclude the argument that the opponent has not taken all reasonable means to procure the original. (*o*) If, therefore, the document be in court, it may be called for, and if it be not produced, secondary evidence of it may be given. (*p*)

So notice to produce is unnecessary, when, from the nature of the proceedings, the party in possession of the instrument has

Notice to produce when unnecessary.

(*h*) *Atkins v. Meredith*, 4 Dowl. P. R. 658. In *Rex v. Haworth*, 4 C. & P. 254, Parke, J., held a notice to produce a forged deed served on the prisoner after the commencement of the assizes too late, saying it should have been served a reasonable time before the assizes; but it does not appear whether the prisoner resided in the assize town or not. In *Royston's case*, 1 Lew. 267, Bolland, B., held a notice to produce a note served on Monday, the trial being on the Wednesday following, insufficient, but the report does not state on what ground.

(*i*) Per Alderson, B., *Lawrence v. Clark*, 14 M. & W. 250, where a notice dated the 12th of February was put into the letter-box of the plaintiff's attorney in London at half-past eight the evening before the trial, which was on the 19th, but it was not shown whether the document was in the possession of the attorney or the plaintiff, who lived in London; and the notice was held insufficient.

(*j*) *The Attorney-General v. Le Merchant*, 2 T. R. 201, in note (*a*) to *Rex v. Watson*. But it has been observed that

the preceding case could not have been a case of felony, and that in felony a prisoner cannot appear by attorney (Per Pollock, C. B., *Reg. v. Downham*, 1 F. & F. 386). As, however, an attorney may in fact be employed by a prisoner, it is clear that a notice served on an attorney so employed is good; but it is, of course, necessary to prove that the attorney is so employed. *Reg. v. Downham*, *supra*. *Reg. v. Boucher*, 1 F. & F. 486.

(*k*) *Reg. v. Phillpotts*, 5 Cox, C. C. 329, Erle, J. It was strongly urged, but in vain, that the document would be in the possession of the lessor of the plaintiff.

(*l*) *Reg. v. Robinson*, 5 Cox, C. C. 183. Pollock, C. B., and Erle, J.

(*m*) *Reg. v. Robinson*, *supra*.

(*n*) This was stated in 1 Stark. Ev. 404.

(*o*) Per Parke, B., *Dwyer v. Collins*, 7 Exch. R. 639.

(*p*) *Dwyer v. Collins*, *supra*, overruling *Cook v. Hearne*, 1 M. & Rob. 201. And the attorney may be called to prove that the document is in court, *ibid*.



notice that he is charged with the possession of it, as in actions of trover, for bonds or bills of exchange. (*q*) So in a prosecution for stealing a promissory note or other writing described in the indictment, parol evidence of the contents will be admissible, without any formal notice to the prisoner to produce the original. On an indictment for stealing a bill of exchange, all the judges held, that such evidence had been properly admitted, though it was proved that the bill had been seen, only a few days before the trial, in a state of negotiation, in the hands of a third person, who had been served with a subpoena, and did not appear: (*r*) and if it had been proved to have been in the custody of the prisoner, parol evidence might have been given of its contents without notice to produce. (*s*) So on an indictment containing a count for stealing a post letter, the direction of which is stated in the count, the direction may be proved without any notice to produce; for the count gives sufficient notice. (*t*) So on an indictment for forging a note, which the prisoner afterwards got possession of and swallowed, Buller, J., permitted parol evidence to be given of the contents of the note, though no notice to produce it had been given. (*u*) But there it might be said, that such a notice would be nugatory, as the thing itself was destroyed. (*v*) And it has since been held, on an indictment for forging a deed of release, that notice to produce the deed must be proved to have been given; but it appearing that the prisoner had stated that after he had obtained possession of the deed he had burnt it, it was held that secondary evidence of its contents was admissible. (*w*) In *Lager's case*, (*x*) on an indictment for high treason, where it was proved, that the prisoner had shown a person a paper, containing the treasonable matter laid in the indictment, and then immediately put it into his pocket, that person was permitted to give parol evidence of the contents of the paper. And in the case of *De la Motte*, (*y*) on an indictment for a traitorous correspondence with the French government, where the question was, whether examined

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(*q*) *How v. Hall*, 14 East, 274. Scott v. Jones, 4 Taunt. 865. Tidd's Pract. 853. The practice used to be otherwise, per Gibbs, J., 4 Taunt. 868.

(*r*) Aickles's case, 1 Leach, 294.

(*s*) 1 Leach, 297, per Heath, J.

(*t*) *Reg. v. Clube*, 3 Jur. (N. S.) 698, Pollock, C. B., who said, 'It is very common for a person to have on his garments labels stating his name and the date when the garments were furnished by the tailor; suppose a coat with such a label were stolen, surely it would not be requisite to give a notice to produce the label.' *Reg. v. Fenton*, *post*, p. 259, note (*b*), was cited in this case.

(*u*) *Sprague's case*, cited by Lord Ellenborough, C. J., in *How v. Hall*, 14 East, 276.

(*v*) Per Lord Ellenborough, C. J., *ibid*.

(*w*) *Reg. v. Haworth*, 4 C. & P. 254, Parker, J. See *Easter v. Pointer*, 9 C. & P. 718, where Gurney, B., held that a statement by the defendant's attorney that a paper was not in existence made secondary evidence admissible, although

a notice to produce had been served too late. In *Doe d. Phillips v. Morris*, 3 A. & E. 46, the court seem to have been of opinion that notice to produce was necessary, although there might be some evidence that the instrument was destroyed; 'for although a witness might be called to say that it had been destroyed, it might be in the hands of the adverse party notwithstanding,' per Lord Denman, C. J., and the defendant might dispute the fact of its destruction, and say, 'I have the document, but will not produce it, because I have not been served with notice,' per Patteson, J. Mr. Starkie, Ev. vol. 1, 398, after citing this case, adds, '*tamen quare*, for after destruction of the instrument it is no longer in the possession of any one.' It is conceived, however, that the observations of the court are perfectly accurate with reference to a case where the destruction of the document is disputed. C. S. G.

(*x*) 6 St. Tr. 263.

(*y*) *Coram Buller, and Heath, Js.*, 1 East, P. C. c. 2, s. 58, p. 124.

copies of the treasonable papers, which had been secretly opened at the post-office, and copied, and then forwarded to their place of destination, were admissible in evidence; the court held, that they might be admitted, after proof that the originals were in the handwriting of the prisoner. So on the trial of an indictment for administering an unlawful oath, it was held that a witness might prove that the prisoner read an oath from a paper, without giving him notice to produce it. (z) But an indictment for setting fire to a house, with intent to defraud an insurance office, does not convey such a notice that the policy of insurance will be required upon the trial, as to dispense with the necessity of a notice to produce it. (a) So where on an indictment for stealing iron out of a canal boat, it appeared that the boat had been weighed at a lock, and a ticket of the weight given to the prisoner, and it was proposed to give secondary evidence of its contents, although no notice to produce it had been given; Parke, J., held, that this was not allowable, because the rule which requires notice to be given extends to criminal as well as civil cases, except where the nature of the indictment itself expressly shows the prisoner that the deed or paper in question will be wanted at the trial. (b)

It was formerly supposed that neither party would be allowed, either in an examination in chief, or in a cross-examination, to enquire into the contents of a deed, merely because the opposite party had the original deed in his possession in court, at the time of the trial; and that the opposite party might object to parol

Where the document is in court.

(z) *Rex v. Moors*, 6 East, 419, note to *Rex v. Nield*. See also *Rex v. Hunt*, 3 B. & A. 566, *ante*, p. 223. And see the same case as to proving inscriptions on banners, &c., without notice to produce, *ibid*. So the principle of the rule requiring notice to produce does not extend to a case where a party to the suit has fraudulently got possession of a written instrument belonging to a third person; as where a witness was called on the part of the defendant, to produce a letter written to him by the plaintiff, and it appeared that, after the commencement of the action, he had given it to the plaintiff; in this case, though a notice to produce had not been given, parol evidence was admitted, because the paper belonged to the witness, and had been secreted in fraud of the subpoena. *Leeds v. Cook*, 4 Esp. N. P. C. 256. *Tidd*, Pr. 353.

(a) *Reg. v. Kitson*, *Dears*. C. C. 187. *Rex v. Ellicombe*, 5 C. & P. 522. 1 M. & Rob. 260, *Littledale*, J. In ordinary cases of felony it is not only the very nature of the indictment, but the charge before the magistrate, which gives notice to the prisoner at a sufficient time before the trial to be prepared with the particular document. But if an indictment were preferred without any previous examination before a magistrate, it may be questionable whether such indictment ought to be considered as giving sufficient notice to the prisoner, unless, indeed, he had information of the precise nature of

the charge contained in it at such a period before the trial as would be sufficient for the service of a notice to produce. C. S. G.

(b) *Rex v. Humphries*, *Stafford Spr. Ass.* 1829, MS. C. S. G. See *Reg. v. Fenton*, cited 3 C. B. 760. On an indictment for larceny of a coat contained in a paper parcel, Parke, B., held that evidence of the direction of the parcel could not be given without notice to produce it. *Sed quære*, and see the cases *ante*, p. 238. On an indictment against a son for stealing and a father for receiving boots and shoes, it appeared that a hamper which was alleged to have contained some of the articles had been sent by the son to the father, and it was proposed to prove how it was directed; but Maule, J., doubted whether the evidence was admissible, and thereupon it was withdrawn. *Reg. v. Hinley*, 2 Cox, C. C. 12, S. C., but not S. P., 2 M. & Rob. 524, Maule, J., said, 'The ground upon which the evidence may be admissible is the presumption that the direction does not exist; whereas there may not be the same reason for presuming that it is in existence. Therefore, unless you can show that it exists, it would appear that the evidence should be admitted.' 'Suppose an inscription on a bale marked "XX," would it be necessary to produce the bale?' According to the report in M. & Rob. the hamper had passed backwards and forwards between the son and father for several months. No authority was referred to in this case.

evidence of the contents, on account of his not having received a notice to produce the original. (c) But it has been held that if the document is in court in the possession of the opposite party, it may be called for without notice to produce it; (d) and if a witness be sworn and has a document in his possession, he may be compelled to produce it, although he has not been served with a subpoena *duces tecum*; (e) and if a person be sworn, and decline to produce a document, which he has in court, on any lawful ground, secondary evidence may be given of its contents, though he has not been served with a subpoena *duces tecum*; (f) and, therefore, it seems that in the first case by calling on the opposite party to produce the document, and in the other cases by calling the person in possession of the document, and requiring him to produce it, all difficulty may be avoided, for either the document will be produced, or secondary evidence of its contents may be given.

[746]

The document must be produced when called for.

A party called upon to produce a paper, must either produce it when called upon, or not at all: he cannot avail himself of it in a subsequent stage of the case. (g) Where, therefore, notice had been given to the defendant to produce certain receipts for rent, which the defendant refused to produce; it was held, that the defendant could not afterwards, as part of his case, put in the receipts for the purpose of showing that the rent was paid to the lessor of the plaintiff and another jointly. (h)

When a document must be read.

Where, after a notice to produce, a document is called for and produced, and handed to the counsel who called for it, but he does not read it, and declines to make use of it, he is, nevertheless, bound to put it in and have it read. (i)

The court must decide whether the document is the right one, and in whose custody it is.

Where a document is produced in consequence of a notice to produce, and it is alleged that the document is not the document in question, it is for the court to decide whether it be so or not. (j) And where a document is called for after notice to produce, and some evidence is given to show that it is in the possession of one party, the other side is entitled at once to give evidence to prove that it is not in the possession or under the control of such party, and it is for the judge to decide this question. (k)

Time to call for production.

The regular time of calling for the production of papers and books is not until the party who requires them has entered into his case; till that period arrives, the other party may refuse to produce them, and there can be no cross-examination as to

(c) 2 Phil. Ev. 226. 1 Stark. Ev. 404. And see *Doc v. Grey*, 1 Stark. 283. *Roe v. Harvey*, 4 Burr. 2484. Rose. Ev. 6.

(d) *Dwyer v. Collins*, 7 Exch. R. 639.

(e) *Snelgrove v. Stevens*, C. & M. 508. Cresswell, J.

(f) *Doc d. Loscombe v. Clifford*, 2 C. & K. 448. Alderson, B.

(g) 2 Phil. Ev. 220. *Doc d. Higgs v. Cockell*, 6 C. & P. 525. *Jackson v. Allen*, 3 Stark. R. 74. *Lewis v. Hartley*, 7 C. & P. 405.

(h) *Doc d. Thompson v. Hodgson*, 12 A. & E. 135; 2 M. & Rob. 282.

(i) *Smith v. Brown*, 2 Cox, C. C. 278. Coleridge, J., after consulting Pollock,

C. B.

(j) *Harvey v. Mitchell*, 2 M. & Rob. 366. In *Froude v. Hobbs*, 1 F. & F. 612, Byles, J., with the consent of the parties, left the question to the jury whether a book produced was the book in which the terms of a contract had been entered. But this was only to assist him in deciding the question.

(k) *Harvey v. Mitchell*, 2 M. & Rob. 366. Parke, B. If a defendant interposes such evidence, it does not give any right to the plaintiff to reply, as it is given merely for the purpose of enabling the judge to decide the question.



their contents, although the notice to produce them is admitted. (*l*)

If upon a notice to the adverse party to produce primary evidence in his possession, he refuses to produce the instrument required, it has been held that no inference is to be drawn from such refusal; but that the only consequence is, that the other party who has done all in his power to supply the best evidence will be allowed to go into secondary evidence. (*m*) If the party, giving due notice, declines to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party, (*n*) though it is otherwise when the papers are inspected. (*o*) Secondary evidence of papers, to produce which notice has been given, cannot be entered into till the party calling for them has opened his case, before which time there can be no cross-examination as to their contents. (*p*) Where a party, after notice, refuses to produce an agreement, it is to be presumed as against him that it is properly stamped. (*q*)

Consequences of giving notice to produce.

3. It remains to be considered what is good secondary evidence. (*r*) It must be observed that, previous to giving any such evidence of the contents of a deed, the original deed ought to be proved to have been duly executed. (*s*) Where the sessions found that B. was the attesting witness to a lost indenture of apprenticeship, it was held that evidence of his handwriting was unnecessary; for the proof of handwriting could only be required to establish the identity between the deceased and the attesting witness. (*t*) So where an original note of hand is lost, a copy cannot be read in evidence unless the note is first proved to be genuine. (*u*) In secondary evidence there are no degrees, that is, no precedence or superiority in point of admissibility. An attested copy of a written instrument is not of a superior order of proof to an examined copy, nor is an examined copy superior to parol evi-

3. What is good secondary evidence.

Of a deed: Original instrument must be proved to have been duly executed.

[747]  
No degrees of secondary evidence.

(*l*) 2 Phil. Ev. 222. *Graham v. Dyster*, 2 Stark. R. 23. *Sideways v. Dyson*, *ibid.* 49. 1 Stark. Ev. 403.

(*m*) *Cooper and another v. Gibbons*, 3 Campb. 363. That was an action for the value of a pipe of wine: notice had been given by the defendant to the plaintiffs to produce their books, but they were not produced. It was insisted for the defendant, that the jury were bound to draw an inference against the plaintiffs from such non-production. But Gibbs, C. J., said, 'I have considered this subject a good deal, and am of opinion, that the jury are not authorized to draw any such inference from the circumstance relied on. The non-production of the plaintiffs' books, after a notice to produce them, merely entitles the defendants to give parol evidence of their contents.' See the observations of Mr. Phillips, vol. 2, 222.

(*n*) *Sayer v. Kitchen*, 1 Esp. N. P. C. 210.

(*o*) *Wharam v. Routledge*, 5 Esp. N. P. C. 235. *Rosc. Ev.* 9 S. P., if they are at all material to the case, *Wilson v. Bowie*, 1 C. & P. 10, *Park, J. A. J. Calvert v. Flower*, 7 C. & P. 386.

(*p*) *Graham v. Dyster*, 2 Stark. 23. *Rosc. Ev.* 9.

(*q*) *Crisp v. Anderson*, 1 Stark. N. P. C. 35, but the party refusing is at liberty to prove the contrary, *ibid.*

(*r*) Where secondary evidence is let in, it is subject to the same rules as the best evidence which the case admits of: the evidence as to the contents of written instruments, when they cannot be produced themselves, must be of a nature which the law would receive in other instances. Per Lord Ellenborough, in *Fisher v. Samuda*, 1 Campb. 193.

(*s*) *Bull. N. P.* 254. *Rex v. Culpepper*, *Skin.* 673.

(*t*) *Reg. v. St. Giles*, 1 E. & B. 642. *Erle, J.*, said, 'In no case whatever when the instrument is lost, and the attesting witness is dead, can it be necessary to prove his handwriting.' But *Wightman, J.*, thought it not necessary to determine whether proof of such handwriting was indispensable; and *Crompton, J.*, thought there might be cases where it might be necessary to prove such handwriting.

(*u*) By Lord Hardwicke, C. J., in *Goodier v. Lake*, 1 Atk. 246.

dence of the contents. (v) As soon, therefore, as a party has accounted for the absence of the original document, he is at liberty to give any kind of secondary evidence. (w) A copy of a document taken by a machine which was worked by the witness who produces it, is good secondary evidence, though it was not compared with the original. (x) So a document sent by the plaintiff to the defendant with a letter stating it to be a copy of a deed, is sufficient, though notice to produce the deed has been given, and the deed is not called for. (y) But a paper delivered as a copy of a deed from the office of an attorney, but which he states he is unable of his own knowledge to vouch to be a copy, is insufficient. (z) The evidence of any one who recollects the contents of a letter is good secondary evidence of them, (a) although it is in the party's power to produce the clerk who wrote the letter. (b) If it be necessary to prove the contents of a license to trade granted from the crown, proof of its loss is not enough to let in parol evidence of them, because there must be some register of it at the secretary of state's office, and that register would be better than parol evidence. (c) So where it was proposed to prove that defendant was owner of a ship, by means of his affidavit, sworn for the purpose of obtaining a certificate of register, and a proper ground for the reception of secondary evidence had been laid; Lord Ellenborough held, that an entry in the register-book at the custom-house, stating that the certificate had been granted on an affidavit of the defendant that he was owner, was not admissible as secondary evidence. The collector's clerk, or some person who had seen the affidavit, and knew that it was made by the defendant, ought to have been called. (d) Where there are two parts of a written agreement, both executed at the same time, the one stamped and the other unstamped, the unstamped part is admissible as secondary evidence of the contents of the stamped part. (e) So where there was a properly stamped

Of a letter.

Of a license to trade.

Of an affidavit of ownership of ship.

Of lost agreement, &c., by unstamped counterpart.

(v) 2 Phil. Ev. 236. It was formerly thought that the next best evidence of a deed was a counterpart. Bull. N. P. 254, and see *Munn v. Godbold*, 3 Bing. 292, and if there were no counterpart, an examined copy, 1 Phil. Ev. 438, 6th ed.

(w) Per Parke, B., *Doe d. Gilbert v. Ross*, 7 M. & W. 102. In that case on the trial of an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and it was held that the shorthand writer's notes of the contents of the deed were admissible in evidence, although there was an attested copy, which being unstamped was rejected. In *Brown v. Woodman*, 6 C. & P. 206, Parke, J., held that parol evidence of the contents of a letter was admissible, although a copy of the letter existed. In *Doe d. Morse v. Williams*, C. & M. 615, Patteson, J., held that parol evidence of the contents of a notice to quit was admissible, although no notice had been served to produce the copy of the notice served on the defendant. In *Hall v. Hall*, 3 M. & Gr. 242, in trover for an expired lease by the lessor, the

lease or counterpart executed by the lessor not being produced by the defendant upon notice, it was held that the lessor might give parol evidence of the contents without producing the counterpart executed by the lessee. And see *Newton v. Chaplin*, 10 C. B. 356.

(x) *Simpson v. Thornton*, 2 M. & Rob. 433, Maule, J.

(y) *Ansell v. Baker*, 3 C. & K. 145. This decision, perhaps, rather rests on the ground that the plaintiff had admitted the existence of such a deed, and that such admission was evidence against him independently of the notice to produce; still it was an admission of the correctness of the copy.

(z) *Volant v. Soyer*, 13 C. B. 231.

(a) *Lielman v. Pooley*, 1 Stark. N. P. C. 167, by Lord Ellenborough. But a copy of the original copy of a letter is not good secondary evidence, *ibid*.

(b) *Rex v. Chadwick*, 6 C. & P. 181, Tindal, C. J.

(c) *Rhind v. Wilkinson*, 2 Taunt. 237. *Eyre v. Palsgrave*, 2 Campb. 605. *Sed quare*.

(d) *Teed v. Martin*, 4 Campb. 90.

(e) *Waller v. Horsfall*, 1 Campb. 501.

agreement under seal, and a counterpart of it unstamped, and the plaintiff proved the loss of the deed itself, and proposed to read a draft copy in evidence, it was held that the unstamped counterpart, which was produced after notice by the defendant might be read as secondary evidence of the contents of the lost deed. (f)

A copy of a copy of a document in the possession of the defendant, who had received notice to produce the document, was offered as secondary evidence of the contents, being produced by a witness, who stated that he had compared it with the first copy, which he had compared with the original document, Alderson, B., rejected the proposed proof. (g)

[748]

There are some particular cases, where the rule that the best possible evidence must be produced has been relaxed. Where it is necessary to prove an entry in a public book, the original book need not be shown; but from a principle of general convenience, an examined copy will be admitted. (h) The post-office marks in town or country, proved to be such, are evidence that the letters, on which they are, were in the office to which those marks belong at the dates those marks specify; (i) but a mark of double postage on such a letter is not in itself evidence that the letter contained an enclosure, (j) and it has been held that the post-mark is not evidence for the purpose of proving that the letter was put into the post-office at the place mentioned by such post-mark. (k) The muster-books of the King's ships, documented in the navy office, to which returns are regularly made, by the commanders, of the names, &c., of their respective crews, may be admitted as evidence of the persons therein named having served on board the several ships in the capacity there mentioned. (l) So in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments; (m) and that even in a case of murder. (n) A witness may be examined on the *voire dire* as to the contents of a written instrument, without notice having been given to produce it. (o) And where a witness is cross-examined for the purpose of impeaching his credit, such cross-examination is sometimes allowed to be conducted without regard to the rule under consideration. Thus, an accomplice or other witness, who appears for the crown on a criminal prosecution, is often asked on the part of the pri-

Cases where the rule is relaxed.  
Public books.  
Post-office marks.  
Muster-books.  
Persons acting in a public capacity.  
On the *voire dire*.  
On cross-examination to impeach a witness's credit.

(f) *Munn v. Godbold*, 3 Bing. 292. See also *Garnons v. Swift*, 1 Taunt. 507.  
(g) *Everingham v. Roundell*, 2 M. & Rob. 138, as cited 2 Phil. Ev. 239. 'This evidence was manifestly defective; it did not appear that the witness had compared the copy produced with the original document. After the rejection of this second copy, parol evidence of the contents of the original document would have been admissible.' Ibid.  
(h) 1 Phil. Ev. 432.  
(i) *Rex v. Plumer*, Russ. & Ry. 264. *Ante*, vol. 1, p. 366.  
(j) Ibid.  
(k) *Rex v. Watson*, 1 Campb. 215. *Ante*, vol. 1, p. 366, and *Fletcher v. Braddyll*, 3 Stark. N. P. C. 64.

(l) *Ante*, vol. 2, p. 924, *Rhodes's case*, 1 Leach, 24. And see *Aickles's case*, 1 Leach, 390, where it was held that the daily book of a prison is good evidence to prove the time of a prisoner's discharge.  
(m) 1 Phil. Ev. 432. *Ante*, p. 221.  
(n) By Buller, J., in *Berryman v. Wise*, 4 T. R. 366.  
(o) *Howell v. Locke*, 2 Campb. 15. 'An examination on the *voire dire* is for the purpose of establishing something of which the court is to be the judge and not the jury; it may well be, therefore, that the rule there is not so exclusive as in the case of an examination going to a jury.' Per Maule, J., *Macdonnell v. Evans*, 11 C. B. 930.



Rule applied only to proof of the issue, or of some fact material to the issue.

[749]  
Statements respecting writings.

soner, without any objection, whether he has not himself been tried for some offence, although, if the rule were strictly applied, that fact could only be proved by the best possible evidence, viz., the record. (*p*) So it has been argued by a very eminent writer, that a witness may be asked on cross-examination, for the purpose of trying his credit and veracity, whether he has not given an account in a letter different from his present testimony, without regard to the objection that the letter itself is the best evidence, and therefore the parol evidence of the witness inadmissible; (*q*) for the general rule, that the best evidence is to be produced which the nature of the thing admits, is to be understood as applying only to the proof of the issue, or of some fact material to the issue. (*r*)

Whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing. (*s*) The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument, is that they are not open to the same objection which belongs to parol evidence from other sources where the written evidence might have been produced, for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so. (*t*) And such an admission is legal evidence, not as second-

(*p*) 2 Phil. Ev. 428, *et seq.* See post [931].

(*q*) 1 Phil. Ev. 299, 7th ed.

(*r*) Ibid. 301, 7th ed.

(*s*) Per Parke, B., *Slatterie v. Pooley*, 6 M. & W. 664. This doctrine has been since much doubted; but as it should seem without sufficient reason. In *Boulter v. Peplow*, 9 C. B. 493 at p. 501, Maule, J., said, *Slatterie v. Pooley* 'certainly is not very satisfactory in its reasons. The decision was founded on a passage in 1 *Phillips on Evidence*, p. 364, 8th edit., which in itself does not seem to me very sound. What the party himself says is not before the jury; but only the witness's representation of what he said. What a man says, is, generally and very properly, evidence against him; but a verbal representation by a third person is quite another thing.' But this is plainly a fallacy. The evidence is admitted on the ground that the witness will prove *ipsisima verba* of the party, and the objection would equally apply to every admission by any party proved by any person. The rule is not confined to verbal statements; if a man by writing made an admission, it clearly would be evidence against him, as was held in *Boulter v. Peplow*. In fact, the objection goes to the weight, and not to the admissibility of the evidence. And there is really much less objection to the admissibility of an admission relating to a writing, than to an admission as to any other matter; for the writing may be

produced, and thereby any mistake or misrepresentation may be set right. In *Lord Gosford v. Robb*, 8 Irish Law R. 217, Pennefather, C. J., said, 'No admission of a party can be received in evidence in substitution for what would be otherwise required as proof of the execution of a deed.' This is clearly an error. It would exclude every admission by counsel or otherwise of the execution of a document. In *Lawless v. Queale*, 8 Irish Law R. 382, Pennefather, C. J., made some very strong remarks on *Slatterie v. Pooley*; but all those remarks really bear only on the dangerous nature of the evidence, and not on its admissibility; and it was well laid down by Erle, C. J., in *Tupper v. Folkes*, 9 C. B. (N. S.) 797 (after both these Irish cases had been cited), that 'the admission of the defendant is always evidence to prove everything that he intended to admit.'

(*t*) Per Parke, B., *Slatterie v. Pooley*. In *Erle v. Picken*, 5 C. & P. 542, Parke, B., held that a witness might be asked whether he had not heard the defendant say that a person had agreed to give a certain sum for an estate. In *Slatterie v. Pooley*, after a composition deed and schedule had been produced, and the latter not being duly stamped rejected, evidence of a verbal admission by the defendant that the debt mentioned in the declaration was the same with one entered in the schedule, was held admissible, for the purpose of proving the third issue in the cause. *Bloxam v. Elsie*, R. & M. N. P. R. 187, was

any evidence of the contents of a written instrument, but as original evidence. (*u*) And the principle is the same, whether the admission is by words or by acts: and a man may by his acts make an admission as clearly and as much in detail as he possibly could by words. (*v*)

If the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent oral testimony, such as payment of rent, or declarations of the tenant, notwithstanding it appears that the occupancy was under an agreement in writing; for here the writing is only collateral to the fact in question. (*w*) But if any of the terms of the tenancy, as, for example, who is the lessor, or what is the rent, or what rent is due, (*x*) are in issue, and it appears that there was a written contract for the tenancy, such contract must be produced. (*y*) But the statements made by a tenant of the terms upon which he is actually holding the premises, are admissible against him in order to prove the terms of his tenancy, though the tenancy was created by adopting the terms of a former demise in writing. (*z*)

Fact of tenancy.

Terms of it.

So the fact that a person is employed as a servant under a written agreement may be proved without its production, but not the terms of it. (*a*)

Facts of service.

Inscriptions on walls, and fixed tables, mural monuments, grave-stones, surveyors' marks on boundary trees, as they cannot be conveniently produced in court, may be proved by secondary evidence. (*b*) Such exceptions are in cases where the material on which the document is written is not easily removed; as in the case of things fixed to the ground or to the freehold, for the law does not expect a man to break up his freehold for the purpose of bringing a notice into court. But that ground of exception does not apply to the case of a notice painted on a board, fastened by a string to a nail in a wall, as there could be no difficulty or inconvenience in removing the board from the nail on which it was hung, and producing it in court. (*c*) Where on an indictment for murder, the point was very much argued whether the inscription on a coffin-plate could be given in evidence without pro-

Inscriptions on walls, &amp;c.

expressly overruled in this case. In *Howard v. Smith*, 3 M. & Gr. 254, the question in an action of replevin was, whether the plaintiff held under a demise at the rent of 20*l.*, payable quarterly, and evidence of verbal statements of the plaintiff that he so held were held sufficient, although it appeared that the tenancy was created by adopting the terms of a former demise in writing, which was not produced.

(*u*) Per *Patteson, J.*, *Reg. v. Basingstoke*, 14 Q. B. 611.

(*v*) Per *Coleridge, J.*, *ibid.* In this case it was held that the payment of relief to a pauper whilst resident in one parish by the overseers of another parish for several years, after a threat by the overseers of the former parish to remove the pauper, unless a certificate was obtained, was an admission that a certificate had been obtained.

(*w*) *Greenl. Ev.* 100. *Rex v. The Holy Trinity, Kingston-upon-Hull*, 7 B. & C. 611; 1 M. & R. 444.

(*x*) *Augustien v. Challis*, 1 Exch. R. 279.

(*y*) *Rex v. Rawden*, 8 B. & C. 708. *Rex v. Merthyr Tidvil*, 1 B. & Ad. 29. *Doe v. Harvey*, 8 Bing. R. 239.

(*z*) *Howard v. Smith*, 3 M. & Gr. 255.

(*a*) *Reg. v. Duffield*, 5 Cox, C. C. 404. *Reg. v. Rowlands*, 5 Cox, C. C. 415 (*b*).

(*b*) *Greenl. Ev.* 106, citing *Doe d. Coyle v. Cole*, 6 C. & P. 359, *Patteson, J.* *Rex v. Fursey*, 6 C. & P. 81. *Parke, J.*, and *Gaselee, J.*; where the contents of a paper notice affixed to a wall were proved by a copy. Parol evidence, however, is admissible in such cases. *Doe v. Cole*.

(*c*) *Jones v. Tarleton*, 1 Dowl. P. R. (N. S.) 625, 9 M. & W. 675.

ducing the coffin-plate itself, Maule, J., held that it could not, because the presumption was that it was in existence. (*d*)

Photograph.

On an indictment for bigamy, it has been held that a photograph taken from the prisoner, who said it was that of her first husband, might be shown to a witness, and he might be asked whether it represented the man, whom he had seen married. (*e*)

### SEC. III.

#### Of Hearsay Evidence.

[750]  
General rule  
that hearsay  
evidence is  
inadmissible.

THERE is no rule in the law of evidence more important or more frequently applied than the general one, that hearsay evidence of a fact is not admissible. If any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the truth; and the reason of the rule is, that evidence ought to be given under the sanction of an oath, and that the person who is to be affected by the evidence may have an opportunity of interrogating the witness as to his means of knowledge, and concerning all the particulars of his statement. (*f*)

And so also  
are written  
statements.

And the same rule applies to the written statements of either living or deceased persons. Where, therefore, after the death of one Stuart, a tin case containing papers was delivered by a servant to their master; and one of these papers was indorsed in Stuart's handwriting, 'My own private affairs,' and it contained a paper purporting to be a certificate of the minister and elders of the kirk session at Canongate in Edinburgh, and given by them to Stuart. It was usual for the minister and elders of the kirk session, when a person left the congregation, to give a certificate to enable him to be admitted into any other congregation. A book containing the minutes of the kirk session of their transactions was also produced, and the session clerk of Canongate was called to prove that he had learnt the handwriting of the parties who had signed the certificate by looking at the minutes in the book. It was objected that the witness could not be permitted to look at the book in order to become acquainted with the handwriting therein; 2nd, that the book itself was not evidence, and could not be used for any purpose; 3rd, that the certificate itself would not be evidence even if the signatures to it were proved; 4th, that as the servant who delivered the papers to the master was not called, there was no proof that the certificate had ever been in Stuart's possession; 5th, that the indorsement on the paper containing it was inadmis-

(*d*) Anonymous, stated by Maule, J., in *Reg. v. Hinley*, 1 Cox, C. C. 12.

(*e*) *Reg. v. Tolson*, 4 F. & F. 103. Willes, J., who said, 'The photograph was admissible, because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person, or the object it represents; and, therefore, is in reality

only another species of the evidence, which persons give of identity when they speak merely from memory.' But the right ground on which this photograph was admissible is, that the prisoner had said that it was that of her first husband.

(*f*) 1 Phil. Ev. 229, 7th ed.; 206, 9th ed.



sible, and that all it showed was that one paper had once been in his presence; and it was held that the certificate was inadmissible. (*g*)

There are, however, certain instances, which it will be the object of this section to point out, where hearsay evidence is admissible, because either the objection does not apply, or from the necessity of the case the rule is relaxed.

Many things which pass in words only are really acts, and are therefore admissible. Such are all contracts by parol. So is a claim to land or goods. (*h*) So directions given by words are admissible. (*i*)

Where words amount to acts.

When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, it is then admissible; for to exclude it might be to exclude the only evidence of which the nature of the case is capable. (*j*) Thus in *Lord George Gordon's* case, on a prosecution for high treason, it was held that the cry of the mob might be received in evidence as part of the transaction. (*k*) And, generally speaking, declarations accompanying acts are admissible in evidence as showing the nature, character, and object of such acts. (*l*) Thus where a person enters into land in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin, or the like; (*m*) or changes his actual residence, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself, or, in fine, does any other act material to be understood; his declarations made at the time of the transaction, and expressive of its character, motive, or object, are regarded as 'verbal acts indicating a present purpose and intention,' and are therefore admitted in proof like any other material facts. They are part of the *res gestæ*. (*n*) Thus, where a constable, who was indicted for a forcible entry into a house, had searched the house, having a warrant in his hand, Lord Tenterden, C. J., held that what he said at the time as to who he was searching for, was admissible, although the question was asked by his counsel, and the answer might be in his favour. (*o*) But where the pri-

Hearsay part of the transaction, or *res gestæ*.

(*g*) *Reg. v. Barber*, 1 C. & K. 434. Gurney, B., Williams, J., and Maule, J. The statement in the text is more accurate than that in C. & K. The judges did not intimate the ground on which the certificate was inadmissible.

(*h*) *Ford v. Elliott*, 4 Exch. R. 78. Rolfe, B., 'A claim may be manifested by words as well as acts. Whether it be by words or otherwise seems to me to be perfectly immaterial.' Alderson, B., 'If I were to say "Take these goods away," and put them into your hand, that would clearly be an act.'

(*i*) *Reg. v. Wilkins*, 4 Cox, C. C. 92, where Erle held that a witness might prove that he made inquiries, and in consequence of directions given him in answer to those inquiries he followed the prisoners until he apprehended them.

(*j*) *Rose*, Ev. 30.

(*k*) 21 How. St. Tr. 535.

(*l*) 1 Stark, Ev. 51, 87, 88, 89.

(*m*) *Co. Litt.* 49 *b*, 245*b*. *Robinson v.*

*Swett*, 3 Greenl. 316. 3 Bl. Com. 174, 175.

(*n*) Greenl. Ev. 120, citing *Bateman v. Bailey*, 5 T. R. 512. *Rawson v. Haigh*, 2 Bingh. R. 99. *Newman c. Stretch*, M. & M. 338. *Ridley v. Gyde*, 9 Bing. 349. *Smith v. Cramer*, 1 Bing. N. C. 585. *Gorham v. Canton*, 5 Greenl. 266. *Fellowes v. Williamson*, M. & M. 306. *Vacher v. Cocks*, M. & M. 353, 1 B. & Ad. 145.

(*o*) *Rex v. Smyth*, 5 C. & P. 201. And see 1 Stark. Ev. 62, 350, 351. *Walters v. Lewis*, 7 C. & P. 344. Where an agent paid money into a bank, *Littledale, J.*, held that what he said about the money at the time he paid the money into the bank was admissible. *Reg. v. Hall*, 8 C. & P. 358. The learned judge admitted the evidence, on the ground that it was a declaration by an agent acting within the scope of his authority; but it seems equally admissible, as a declaration accompanying the act of payment, and ex-

soner, who was indicted for burning a bible, had employed some boys to take books to a place where they were burnt by his direction, it was held that what a person, who first appeared when the burning was going on, said at the time he tore up a book and threw it into the fire, was not admissible, as there was no common object proved between him and the prisoner. (*p*)

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Complaints of  
injuries.

In an action by a husband and wife for wounding the wife, Lord C. J. Holt allowed what the wife said immediately upon the hurt received, and before she had time to devise anything for her own advantage, to be given in evidence as part of the *res gestæ*. (*q*) So on an indictment for manslaughter, in killing a party by driving a cabriolet over him, it has been held that a statement made by the deceased immediately after the accident, as to the cause of the accident, is admissible. (*r*) And Lawrence, J., said, in *Aveson v. Lord Kinnaird*, (*s*) that it is in every day's experience, in actions of assault, that what a man has said of himself to his surgeon is evidence to show what he suffered by the assault. Inquiries of patients by medical men, with the answers to them, are evidence of the state of health of the patients at the time; and what were the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing. (*t*) So a conversation as to the state of the health of a deceased person, between him and a witness, is admissible to prove that he was in good health at the time. (*u*) So on a prosecution for robbery, it has been held, that the fact of the party robbed making a complaint to a constable shortly after the robbery, and mentioning the name of a person, as the name of one of the persons who had robbed him, is admissible, but not the name so mentioned. (*v*) So on a prosecution for a rape, it has been held that

Robbery and  
rape.

planatory of the purpose of the payment. C. S. G.

(*p*) Reg. *v. Petcherini*, 7 Cox, C. C. 79, Crampton, J., and Greene, B. It seems clear that the acts of the person were inadmissible on the same ground.

(*q*) *Thompson v. Trevanion*, Skin. 402, cited by Lord Ellenborough, C. J., in *Aveson v. Lord Kinnaird*, 6 East, 193.

(*r*) *Rex v. Foster*, 6 C. & P. 325, Park, J. A. J., Patteson, J., and Gurney, B.

(*s*) 6 East, 193. 1 Phil. Ev. 191.

(*t*) By Lord Ellenborough, C. J., 6 East, 195. 'When a patient enters into a history of his complaint, and relates some earlier symptoms experienced at a former period, he is giving a narrative from memory rather than yielding to the impressions forced upon him by his situation; and it would seem, upon principle, that what he (so) says ought not to be receivable in evidence.' 1 Phil. Ev. 191. And 'although it is now settled that what a patient says to a medical man about his sufferings is receivable in evidence, it should seem that a statement by him respecting the particular cause of his sufferings (as, for example, the circumstance of an assault which he had received)

would be open to greater objection.' 1 Phil. Ev. 192.

(*u*) Reg. *v. Johnson*, 2 C. & K. 354.

(*v*) *Rex v. Wink*, 6 C. & P. 397, Patteson, J. It was also held that the constable might be asked whether in consequence of the prosecutor mentioning a name to him, he went in search of any person, and who that person was; but in *Reg. v. Osborne*, C. & M. 622, this point was questioned by Cresswell, J., who said, 'It seems to me to be rather too refined a distinction to prevent the name from being mentioned, and yet to permit it to be asked whether in consequence of what was said the witness apprehended a particular person. I think you ought not to go so far as that.' But where, on a trial for murder, it was proved that a shout was heard, and a witness went out of her house and saw the deceased, who seemed very weak and injured, and the moment she came up to him she asked him what was the matter; Monahan, C. J., held that the witness might add, 'he said he was robbed by the man who walked with him from the cross roads,' on the ground that this was part of the *res gestæ*. Reg. *v. Lunny*, 6 Cox, C. C. 477. This case deserves reconsideration.

the prosecutor may prove that the woman made a complaint recently after the injury: (*w*) so it has also been considered allowable, on an indictment for an assault on an infant of five years old, with intent to ravish her, to give evidence of the child's having complained of the injury recently after it was received. (*x*) But the particulars of such a complaint are not admissible in evidence on the part of the prosecution. (*y*) It is not, therefore, competent, on the part of the prosecution, to ask what name the prosecutrix mentioned at the time she made such a complaint. (*z*) And although what the prosecutrix said at the time of the committing the offence would be receivable in evidence, on the ground that the prisoner was present, and the violence going on, yet, if the violence was over, and the prisoner had departed, and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence. (*a*)

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The fact of the prosecutrix having made a complaint is only admissible for the purpose of confirming her testimony; in case, therefore, of her death, or absence from any cause, neither the particulars of the complaint, nor the fact of such complaint having been made, are admissible in evidence. (*b*)

On a charge of larceny, where the proof against the prisoner is, that the stolen property was found in his possession, it would be competent to show, on behalf of the prisoner, that a third person left the property in his care, saying he would call for it again afterwards; for it is material in such a case to inquire under what circumstances the prisoner first had possession of the property. (*c*)

Where a witness had had a conversation with a prisoner about arsenic, but could not fix the time when this happened, it was held that an observation respecting this conversation made by the witness after the prisoner left to a person in the shop at the time, might be proved by that person, in order to fix the time when the conversation took place. (*d*) Where a prosecutor had for three days concealed a burglary committed in his house, fearing the vengeance of the prisoners; Erle, J., held that his wife might prove that 'he told me not to tell of it; he said he was out late at night with his horses, and should not be safe;' for conversations that explain a man's conduct are admissible in evidence. (*e*)

Conversation admitted to fix a date,

to explain conduct.

If there has been a previous criminal prosecution between the same parties, and the point in issue was the same, the testimony of a deceased witness given upon oath at the former trial is ad-

Testimony of a deceased witness at a former trial.

(*w*) *Rex v. Clarke*, 2 Stark. N. P. C. 242. Such evidence is now considered quite essential in order to support the statement of the prosecutrix. C. S. G.

(*x*) 1 East, P. C. c. 10, s. 5, p. 444. *Ante*, vol. 1, p. 931.

(*y*) 1 Phil. Ev. 193, *ante*, vol. 1, p. 923, note (*c*).

(*z*) *Reg. v. Osborne*, C. & M. 622, Cresswell, J. But the counsel for the prisoner may, if he thinks fit, ask the prosecutrix as to the terms of the complaint, and if he does so, the counsel for the prosecution has a right to examine

as to all that was said by her in the same conversation. C. S. G.

(*a*) *Per Cresswell, J. Reg. v. Osborne*, *supra*.

(*b*) *Reg. v. Megson*, 9 C. & P. 420, Rolfe, B. *Reg. v. Guttridge*, 9 C. & P. 471. Parke, B., *ante*, vol. 1, p. 925; 1 Phil. Ev. 193.

(*c*) 1 Phil. Ev. 234, 7th ed.

(*d*) *Reg. v. Richardson*, 1 Cox, C. C. 361. Lord Denman, C. J., and Alderson, B.

(*e*) *Reg. v. Glandfield*, 2 Cox, C. C. 43.



Depositions.

missible on the subsequent trial, and may be proved by one who heard him give evidence; (*f*) but the witness must speak to the very words, and not merely swear to the effect of them. (*g*) ‘He ought,’ said Lord Kenyon, ‘to recollect the very words; for the jury alone can judge of the effect of words.’ (*h*) In what cases the depositions of a witness before a committing magistrate may be read in evidence at the trial, will be hereafter considered.

Dying declarations.

Besides the usual evidence of guilt in general in cases of felony, there is one kind of evidence peculiar to the case of homicide, which is the declaration of the deceased after the mortal blow as to the fact itself, and the party by whom it was committed. (*i*) The general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope in this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. (*j*) It is therefore evident

Deceased must be conscious of approaching death.

that declarations, though proved to have been made by a person in a dying state, are not admissible, unless it also appears that the deceased himself apprehended that he was in such a state of mortality as would inevitably oblige him soon to answer before his Maker for the truth or falsehood of his assertions. (*k*) ‘It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were *made under a sense of impending death*; but it is not necessary that they should be stated at the time to be so made; it is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case; all of which are resorted to in order to ascertain the state of the declarant’s mind. The length of time which elapsed between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence, though, in the absence of better testimony, it may serve as one of the expONENTS of the deceased’s belief that his dissolution was or was not impending. It is *the impression* of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though

The declarations must be made under a sense of impending death.

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(*f*) *Rex v. Carpenter*, 2 Show. 47; 2 Hawk. P. C. c. 46, s. 29; 1 Phil. Ev. 337; and Mr. Starkie’s note to *Rex v. Smith*, in the second volume of his Reports, p. 211.

(*g*) Lord Palmerston’s case, cited by Lord Kenyon in *Rex v. Jolliffe*, 4 T. R. 290.

(*h*) *Emm’s v. Donisthorpe*, MS. 1 Phil. Ev. 231, 7th ed. By this it is conceived his lordship meant, not that the witness’s

testimony would go for nothing, unless he could swear positively they were the very words used by the deceased, and no other; but that the present witness ought to say, ‘To the best of my recollection these were the very words used.’

(*i*) 1 East, P. C. c. 5, s. 124, p. 353.

(*j*) Per Eyre, C. B., in *Woodcock’s case*, 1 Leach, 500.

(*k*) Per Eyre, C. B., *ibid*.

death actually ensued in an hour afterwards, the declaration is inadmissible.'<sup>(l)</sup>

'With respect to the interval of time which may have elapsed between the dying declarations and the moment of death, there appears to be no rule founded on this circumstance alone, nor is it consistent with the principle upon which dying declarations are received in evidence (which, as we have seen, depends on the state of the declarant's mind), that such declarations should be excluded, if not made within any precise limit of time. It ought, however, to appear that the deceased believed his dissolution impending. And unquestionably the length of time may be a material consideration in forming an inference as to the state of the mind of the deceased with respect to his expectation of death at the time of making a declaration, especially if the deceased has not expressed his sense of his own situation.'<sup>(m)</sup>

As to the interval of time between the declaration and the death.

Upon the trial of *Welbourn*<sup>(n)</sup> for the murder of Page by poison, a witness deposed that the deceased and the prisoner lived with her as her servants; that perceiving the deceased alter and appear very ill, she taxed her with being with child, which she owned, and the next day continuing very ill, she confessed she had taken something, at which time the witness believed that the deceased was sensible of her situation and danger, though she did not say so. But when the apothecary came to see her the same evening, she said that she was very bad, and did not know if she should get the better of it. The apothecary deposed, that when he first saw the deceased she was then apparently dying, but he believed that she was not sensible of her danger; that after he had been with her some time he made her sensible of her danger, in order that he might get from her what she had done. She desired him to give her something to ease her pain. He told her he must first know what she had done; and that she would not live twenty-four hours unless proper relief were afforded (she did not in fact live above an hour afterwards). The witness had no other reason for thinking that she knew her danger from anything that she said, except that, on his telling her of her danger, she told him what was the cause, which she had before refused to do. She then described to him the symptoms of pain which she had felt, and again repeated that she wished he would give her something to compose her. The witness then again urged the necessity of knowing the cause of those symptoms, and she told him with reluctance, that she had been three or four months gone with child, and that during the last fortnight she had been constantly prevailed upon to take bitter apple in order to procure an abortion, but that not producing the desired effect, the person had prevailed on her to take a white powder (which was the day before she was taken ill), and that the symptoms came on in about three or four hours after. The witness then urged her to

*Welbourn's case.*

Where it did not sufficiently appear that the deceased knew she was in a dying state.

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(l) Greenl. Ev. 189.

(m) 1 Phil. Ev. 285. In Woodcock's case, *ante*, p. 250, the declarations were made forty-eight hours before the death. In Tinkler's case, 1 East, P. C. 354, some of them were made ten days before the death. In *Rex v. Mosley*, *post*, p. 255,

they were made eleven days before the death. In *Rex v. Bonner*, *post*, p. 256, they were made three days before death; and were all received. In *Rex v. Van Butchell*, *post*, p. 253, they were made seven days before the death and rejected.

(n) 1 East, P. C. c. 5, s. 124, p. 358.

say by whom she had been prevailed upon, when with increased reluctance and hesitation she told him it was by her fellow-servant Welbourn, and that he had prevailed upon her by assuring her that there was no crime in procuring an abortion whilst the child was so young. At this moment she was free from pain, and the witness thought that a mortification had taken place. From the deceased's description of the white powder, and from the inspection of the body afterwards, the witness believed it to be arsenic. On his cross-examination he said, that at the time she made this declaration he believed that she thought she was getting well, from the being so free from pain. The declaration was received, and the prisoner was found guilty. But a doubt afterwards occurring to the learned judge, whether, though in the first part of the apothecary's evidence he swore that he made the deceased sensible of her danger before she made the declaration, yet as he afterwards said, that at the time she made the declaration she believed that she was getting better from the pain ceasing, he should not have rejected the evidence; the prisoner was respited to take the opinion of the judges on the case, a majority of whom were of opinion that it did not sufficiently appear that the deceased knew or thought she was in a dying state when she made the declaration; on the contrary, she had reason to think that if she told what was the matter with her, she might have relief and recover. But as to what the apothecary had said on his cross-examination, they laid no stress on it, being mere opinion, unwarranted by fact. So where the deceased asked his surgeon if the wound was necessarily mortal, and on being told that recovery was just possible, and that there had been an instance where a person had recovered after such a wound, he said, 'I am satisfied;' and after this he made a statement; this statement was held by Abbott, C. J., and Park, J. A. J., to be inadmissible as a declaration *in articulo mortis*, as it did not appear that the deceased thought himself at the point of death, for, being told that the wound was not necessarily mortal, he might still have had a hope of recovery. (o)

Christie's case.

Any hope of recovery, however slight, renders a declaration inadmissible.

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Hayward's case.

Any hope of recovery, however slight, existing in the mind at the time of the declarations made will render the declarations inadmissible. Upon an indictment for murder, it was proposed to give in evidence a declaration of the deceased, and a surgeon proved that he had told the deceased that she would not recover, and that she was perfectly aware of her danger. She said she hoped the surgeon would do what he could for her for the sake of her family; he told her there was no chance of her recovery. Bosanquet, J., 'This shows a degree of hope in her mind. To render a declaration of this kind admissible, the deceased must have had the impression on her mind of an almost immediate dissolution. This will not do.' (p) So where upon an indictment for murder it appeared that, after the surgeon had examined the wound, the deceased inquired whether he was in danger, to which the surgeon answered that he was, and the only chance of his living was keeping himself quite quiet; upon which it was contended that the declarations made by the deceased were not made at a time when every hope in this world was gone, and when the party was aware that he must inevitably answer soon for the

(o) *Rex v. Christie*, Carr. Supp. 202.

(p) *Rex v. Crockett*, 4 C. & P. 544.



truth or falsehood of his statements, but that upon the surgeon's statement he must be taken to have had some hope of recovery. On which Tindal, C. J., observed, that any hope of recovery, however slight, existing in the mind of the deceased at the time of the declarations made, would undoubtedly render the evidence of such declarations inadmissible. But upon further examination of the surgeon it appeared, that before the declarations were made on the following evening, the deceased knew that he must die, and that the magistrate, previous to his receiving his declarations, desired him as a dying man to tell the truth, and that the deceased replied that he would. Upon this further evidence the declarations were held admissible. (q) So where upon an indictment for manslaughter, it was proposed to give in evidence a declaration of the deceased, and a surgeon was called, who stated that he saw the deceased on the evening of the day on which the injury was inflicted, and that the deceased appeared to think that he should never recover. He said, 'I feel that I have had such an injury in the bowel that I think I shall never recover;' the surgeon endeavoured to encourage him, as his symptoms were not then such as to lead the surgeon to consider him in danger of dying; but his expression was, that he felt satisfied that he should never recover. This was on the 10th of May, and the deceased died on the 17th. Hullock, B., 'The principle on which declarations *in articulo mortis* are admitted in evidence, is, that they are made under an impression of almost immediate dissolution. A man may receive an injury from which he may think that he shall ultimately "never recover," but still that would not be sufficient to dispense with an oath. I must reject the evidence.' (r)

Van Butchell's case. Belief that he will not recover.

In order to render a dying declaration admissible, it must be shown to have been made under such circumstances as necessarily exclude the supposition that the deceased might at the time entertain *some* hope of recovery. On an indictment for murder the clerk of the magistrates, who had taken down a statement made by the deceased while at an infirmary, a short time previous to his death, proved that he asked the deceased how he was, and he answered, 'I think myself in great danger;' and *Simpson's case* (s) being cited, Patteson, J., said, 'No man can have a higher respect for the opinion of Mr. J. Bayley than I have, but I have always considered that, in order to a statement being received as a dying declaration, it must be shown that at the time the deceased made it, not merely that he considered himself in danger, but that he was without hopes of recovery. It does not appear to me that the words 'I think myself in danger'

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Every hope of recovery must necessarily be excluded.

(q) *Rex v. Hayward*, 6 C. & P. 157. It is not stated in this case when the deceased died. Where the deceased said, 'I never thought I should recover; I have no great hopes of it now.' *Littledale, J.*, thought that it expressed some hope, though not a very great one, and inclined to disallow the reading of the declaration; but before he decided, the prosecutor's counsel waived it as a dying declaration. *Wilson's case*, 1 Lew. 78.

(r) *Rex v. Van Butchell*, 3 C. & P. 629. The learned Baron also said, 'I

must hear all that the deceased said, and I must judge from what he said, whether he had that impression on his mind, which will make his declarations admissible in evidence.'

(s) 1 Lew. 78. In this case the doctor said, 'You are in great danger;' the deceased said, 'I fear I am.' He soon recovered so much as to be out of danger, or to think himself so. Bayley, J., admitted the declaration under the above circumstances without a question. This is the whole report. C. S. G.

Absence of settling affairs, taking leave of relations and friends, &c.

necessarily exclude the supposition that the deceased might have, nevertheless, entertained some hope.' (t)

The absence of any settlement of affairs—of directions as to his funeral—of taking leave of his friends and relations, and such like—tends to show that all hope of recovery is not vanished from the mind, and may sometimes exclude a dying declaration. Upon an indictment for murder, it was proposed to give in evidence a declaration of the deceased, and his widow stated that she went to fetch the deceased home after he was hurt. He took to his bed the day after, and on that evening she asked him how he was, and he said he was worse, and that he should die this time. He died on Sunday, seven days after that. He was sometimes light-headed, and sometimes not. He several times had his children in to take leave of them before the Saturday. The brother proved that the deceased at times thought that he should recover, and at other times thought he should not. Another witness proved that on the day before he died he said he thought he should not recover; he was delirious at times on that day. On the Wednesday before his death he said he thought he should recover; he was then very ill, but sensible; on the day before he died, he was not sensible when the witness first saw him; he became sensible at twelve, and remained so for an hour. The witness asked him if he thought he should recover, and how he was; he said he thought he should not recover; he was so very ill. He did not take leave of his wife or give any orders about his funeral or his will, nor did he say any prayers. The surgeon proved that he was delirious from Thursday, but was sensible on Friday. The surgeon considered him in danger on the Thursday, but his opinion was not communicated to the deceased. Coleridge, J., 'It is an extremely painful matter for me to decide upon; but when I consider that this species of proof is an anomaly, and contrary to all the rules of evidence, and that if received it would have the greatest weight with the jury, I think I ought not to receive the evidence, unless I feel fully convinced that the deceased was in such a state as to render the evidence clearly admissible. It appears from the evidence of the witness that the deceased said that he thought he should not recover. Now, people often make use of expressions of that kind, who have no conviction that their death is near approaching. If the deceased in this case had felt that his end was drawing very near, and that he had no hope of recovering, I should expect him to be saying something of his affairs, and of who was to have his property, or giving some directions as to his funeral, or as to where he would be buried, or that he would have used expressions to his widow importing that they were soon to be separated by death, or that he would have taken leave of his friends and relations in a way that showed that he was convinced that his death was at hand. As nothing of this sort appears, I think that there is not sufficient proof that he was without any hope of recovery, and that I, therefore, ought to reject the evidence.' (u) So where on an indictment for murder it was proposed to give in evidence a declaration made by the deceased, and the surgeon proved that on the day but one before her

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Megson's case.

(t) Errington's case, 2 Lew. 148.

(u) Rex v. Spilsbury, 7 C. & P. 187.

The report does not state at what time the proposed declaration was made.

death she complained of her chest, and was suffering from inflammation of the lungs; she was extremely ill, and he then told her she was in a very precarious state; and on the day before her death she was much worse, and in his judgment in imminent danger; she then made a statement to him; immediately before she made the statement, she said that she found herself growing worse, and that she had been in hopes she should have got better, but as she was getting worse, she thought it her duty to mention what had taken place. She died the next day. Rolfe, B., 'I think that it does not sufficiently appear that the deceased was without hope of recovery. I think that I ought not to receive the evidence.' (v)

The case of *Rex v. Mosley* (w) affords an example of what is such a consciousness of danger as will render a declaration admissible; and further shows, that if it sufficiently appear that such a consciousness existed, it is immaterial that death did not ensue until a considerable time after the declarations were made. Upon an indictment for murder, a question arose respecting the admissibility of certain declarations, which were received in evidence, as the dying declarations of the deceased, as to the circumstances attending the commission of the crime, and as to the number of persons by whom he had been attacked. The injury that caused the death was done on the 30th of September, in consequence of which he was brought home and put to bed, and a surgeon was sent for on that evening to attend him. When the surgeon arrived, the deceased immediately complained to him of great pain in his chest, and particularly of his side, and of great difficulty of breathing. The surgeon continued to attend him until his death on the evening of the 10th of October following. The surgeon in his evidence said, 'I think the deceased did not speak to me of his prospects of dying during that time; I thought his state dangerous; I thought his complaint was of that nature that it might terminate in death. The last day that I saw him (the 10th of October), I was certain he would die that forenoon; I communicated to him his state; I told him the case was hopeless; I made no communication to him till then; I did not consider the case quite hopeless till then; I always told him there was danger, but I hoped he would be better; I held out hopes to him of his recovery; I do not know whether he entertained hopes or not; he never expressed any opinion either of hope or apprehension to me; I thought there was a probability of his recovering the day before he died; I at first thought the probabilities were against him; I did not communicate that to him.' In consequence of this evidence of the surgeon, the learned judge confined the counsel for the prosecution, in their examination of the witnesses, to inquiries whether any and what declarations were made by the deceased on this subject, after the time the surgeon made the above communication to him of his hopeless state; but no such subsequent declarations could be proved. This failing, it became material to inquire further as to the prior hopeless state of the deceased, and his consciousness of it from the commencement of, or during his illness, in order to ascertain whether declarations alleged to have been made by him during his illness, but prior to the above communication to him by the surgeon, were admis-

*Mosley's case.* If it sufficiently appear that the deceased was impressed with the conviction that he should soon die, the declarations are admissible, though the death does not take place till some days afterwards, and though the surgeon does not think the case hopeless, and continues to tell the deceased so until the day of his death.

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(v) Reg. v. Megson, 9 C. &amp; P. 418.

(w) R. &amp; M. C. C. R. 97.



sible in evidence or not. To this point a witness, of the name of Anne Newton, stated, ' That she was sent for to the deceased on the evening of the 30th of September, near eight o'clock; that he was in a very ill state indeed; that he said he was robbed and killed: that he should not get the better of it; that she assisted in putting him to bed, and continued to attend him till his death; that during that time he spoke of dying, and said he would not continue long, a few days would finish him; this he said about Tuesday; that he complained all along he was sure he would not get better: that he all along said he never would get better; that he never missed saying so one day before the latter end; that the deceased was sixty-eight years of age, and was in a very good state of health considering his years; she was a nurse accustomed to attend sick people, and very often found them low-spirited, and had known many persons say they should never get better, who have got better; the deceased talked in that way; that about the Tuesday before his death he said he should not continue many days; it was before that he told her all about it: that the first night he said he should not get better, and he continued to say so till the last day.' The learned judge was not disposed to receive on this evidence the declarations of the deceased, made previous to the surgeon's notifying to him his hopeless state as above mentioned; but on its being intimated that the proof would be otherwise insufficient for the conviction of the prisoners, he allowed them to be given in evidence. Accordingly evidence was received of the deceased's declarations made by him after he was on the Thursday evening brought home, and had said that he was robbed and killed, and should not get the better of it: and also at different times afterwards during his illness, and previous to the surgeon's communications to him of his hopeless state, as above mentioned; and upon that and other evidence the prisoners were convicted of the murder. The judges, upon a case reserved, were unanimously of opinion that the dying declarations of the deceased were properly received in evidence.

Bonner's case

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Declaration held admissible upon consideration of all the circumstances, the deceased being told he was in a dying state, and assenting to it.

Upon an indictment for manslaughter, it appeared that the accident which occasioned the death occurred early on Sunday morning, and the surgeon stated that he saw the deceased on Sunday, when he found him with six ribs broken, and other injuries; he explained to him the nature of the case and the danger he was in, and that he could not expect to recover; the deceased said he was perfectly convinced of the state he was in, and said he thought it would soon be over with him, and that he must go out of the world *unless he was relieved by medicine*. He was better on Monday, but worse that evening, and continued to get worse till the Saturday following, when he died. After the Sunday he frequently told the surgeon that he thought it would soon be over with him, *without any qualification*; and the surgeon never heard him after Sunday express any hope that his skill would do anything for him. A brother and son-in-law of the deceased proved that they were sent for by him, and saw him on the Wednesday, and that he told them he could not live long, and could not recover. On that day the deceased told his brother that he wished to see him on account of his family, as he could not live long; and he said he wished his brother to take the management of his affairs and family, for he could not stop in this world long. A

clergyman also proved that he saw the deceased on the Wednesday, and told him he thought he would not recover; the deceased shook his head and said it was a bad job. The clergyman said, 'Remember you are a dying; I hope you will state nothing but the truth.' He said, 'I freely forgive the man. I fear I am dying.' After that the deceased made a declaration. The deceased had previously asked the clergyman to make his will, and he had done so. It was objected that the declaration made on the Wednesday was not admissible. The observation made on the Sunday showed that the deceased entertained *some* hope, and therefore the declaration was inadmissible, and such declaration must be made under the firm belief of almost immediate death, which was not the case here, as he lived till the Saturday. (x) Patteson, J., 'I am of opinion that the declaration is admissible. The surgeon states that he told the deceased, on the Sunday, that he had no chance of recovery, and he then said he thought he had not, unless he could be relieved by the surgeon; but on the Wednesday, it appears from the evidence of the brother and son-in-law, that he wanted to see his brother on account of his family, and said he could not live long, and had no hopes of recovery. The clergyman says he told him he was a dying man, and he shook his head, and said he feared he was dying. Now it has been held that it is not necessary that the deceased should express any apprehension that he is a dying man, but that you may gather it from the circumstances. That was held in *John's case*. (y) It has also been held that it is not necessary to prove expressions of apprehension of immediate danger. *Rex v. Mosley* (z) seems to me to go the whole length of this case. Taking all the circumstances together, and the deceased being told that he was a dying man, and assenting to it, I think the evidence is admissible.' (a) So where a wound was inflicted on Tuesday, and the surgeon stated that he thought it mortal from the first, and that the deceased became aware of his great danger on the Sunday; but he had no conversation with the deceased on the subject of his danger: and his widow stated that, the morning after the injury, he thought he should recover; but after dinner he thought he should not, and should not live; and on the Thursday morning he said that he thought he should not get better; and appeared, from all that passed between them, to believe that he should die. A statement was made by the deceased after his wife left him, on the Thursday, and he died on the Sunday following. Gurney, B., said that upon the evidence of the surgeon alone he should have doubted; but taking it in conjunction with that of the widow, he thought, and Alderson, B., agreed with him, that enough had been shown to render the evidence admissible. (b) So where on an indictment

Smith's case.

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Ashton's case.

(x) *Rex v. Woodecock*, ante, p. 250; *Rex v. Welbourn*, ante, p. 251; *Rex v. Christie*, ante, p. 252; and *Rex v. Van Butchell*, ante, p. 253, were cited.

(y) *Post*, p. 266.

(z) *Ante*, p. 255.

(a) *Rex v. Bonner*, MSS. C. S. G. Hereford Spr. Ass. 1834, S. C., but not so fully reported, 6 C. & P. 386.

(b) *Smith's case*, 1 Lew. 81. In *Craven's case*, 1 Lew. 77, a person who had been

confined to his bed for weeks, said to the surgeon, 'I am afraid, doctor, I shall never get better,' and shortly afterwards died. *Hullock, B.*, held that an account given by the deceased to the doctor after this declaration was receivable as a dying declaration, although several weeks before his death, and stated that the subject had been lately before the judges, and his mind was made up about it.

for manslaughter, it appeared that the deceased said to the surgeon, 'Shall I recover?' The surgeon said 'No;' and at that time he thought as he said. The patient grew better; the surgeon changed his opinion, and thought she might. The patient then had a relapse, and again asked the surgeon if she should recover; the surgeon said, 'I think you will not recover.' The patient replied, 'I think so too.' After this conversation, but not immediately, a declaration, which was proposed to be given in evidence, was made. The surgeon had in the meantime attended the deceased, but not regularly. The question was not repeated by the patient on any of his subsequent visits. Alderson, B., after consulting Patteson, J., held the declaration admissible as a dying declaration. (c) So where upon an indictment for manslaughter, it appeared that on the Saturday of the week preceding the death of the deceased, she expressed an opinion that she should not recover, and that she made a declaration; but it also appeared that after she had made this declaration, she, on the same day, asked her nephew if he thought she would 'rise again;' but it was proved that, on a subsequent day, she made other declarations, at times when she was convinced she was dying. Gascolee, J., after conferring with Lord Denman, C. J., held that the declaration made on the Saturday was not admissible, but that the other declarations, made when she believed her recovery hopeless, might be received. (d) And so where the prisoner was tried for the rape and murder of a girl of sixteen, who lived only a few days after the perpetration of the offence, the particulars of which she communicated to her aunt, but did not intimate that she considered herself in a dying state, or that she had any apprehension of immediate death. It appeared, however, that previous to making this declaration, she had confessed, been absolved, and had received extreme unction from a priest, and that these are considered the last rites administered in the Catholic Church, and are esteemed sacraments by its disciples. Lord Kilwarden, C. J., with the concurrence of Kelly, J., admitted these declarations in evidence. (e)

Fagot's case.

Minton's case.

A declaration held admissible after various statements by the deceased that he thought he should die, although he declined an offer to send for a priest, and an offer to call in a magistrate to take his declaration, and although the surgeon had held out hopes to him that he might recover.

The deceased was shot in the thigh, and crawled to a house in a few minutes, and said, 'I am shot; I am dying:' and being laid on a bed in the house, he repeated several times that he was dying, and wished a doctor to be sent for. He was in very great pain, and complained much. This was in the night, and between one and two in the morning a surgeon found him in a weak, faint state; he was suffering very acutely; he never rallied from that weak state. Being removed to his lodgings and his wound dressed between four and five that morning, he said, '*Oh dear, doctor, I will never get over this!*' To which the surgeon made no observation. Between four and five the same afternoon, the deceased was no better; he did not seem less *desponding*. Another surgeon who had seen him from early the next morning till within an hour of his death, on first coming to him, said, 'Mac, how are you?' He replied, '*Oh doctor, I'll never get over this!*' The surgeon endeavoured to cheer him, and said, 'Mac, I hope we shall soon see you out again.' He said nothing, but shook his

(c) Ashton's case, 2 Lew. 147.

(d) Rex v. Fagot, 7 C. & P. 258.

(e) Minton's case, 1 M'Nally Ev. 386. Rose. Cr. Ev. 30.



head, and did not seem at all cheered by the hope expressed. The surgeon said the deceased appeared to have received a severe shock to the nervous system, and that he never rallied from it. During two or three hours that he remained with the deceased, he again said, '*Oh doctor, I'll never get over this!*' and added, that he seemed in a *desponding* state. Between four and five the same afternoon he was not materially worse, and the surgeon then told him that he hoped he would get better, but the remark did not appear to raise him in cheerfulness. About eleven the next morning fatal symptoms had come on, and there were no hopes of recovery, and the surgeon said that at that time his spirits were much depressed. Being desired to explain what he meant by the word '*desponding*,' the surgeon said, 'When I said, "*Mae, I hope we shall see you out again*," he shook his head in a very desponding way. I collected from it that he thought he never should rally again. That was my impression at the time. *From his speech and manner, deceased convinced me that he thought he should not recover.* He was not a person of low spirits but of firm mind.' A woman, with whom the deceased lodged, came into his room after the fatal symptoms had appeared, viz., about one o'clock, when he said, '*Mother, I shall never be well more.*' She replied, '*My dear, you have nothing to do but to pray to God to save your soul.*' He said nothing to that, but seemed as if he was going to expire—as if he had not power to speak. Another woman went to see him about two o'clock the same afternoon, and said, '*Oh, Mae, I am sorry to see this!*' He said, '*Yes, Mrs., this will finish me.*' Her child was brought to the bed-side, and he took its hand and said, '*My dear little boy, I shall never see you more.*' An inspector of police proved that he saw the deceased in the first part of the afternoon, and told him he would be provided for, not only in the present case, but also if he should be lame for life. He said, '*It's of no use, I shan't want it.*' What was said about providing for him did not appear to cheer him. Towards six or seven the same evening the inspector gave him a chamber-pot, and he endeavoured to pass water: after severe pain and struggle he did it, but it was chiefly blood. I supposed he saw it, because he made a motion with his hand to put the chamber-pot aside: he rested his head on my shoulder, and said, '*It's all up with me.*' In some part of this conversation, but in what part it did not distinctly appear, the inspector said, '*You are very severely wounded, and I believe mortally so.*' He said nothing, but slightly grasped the inspector's hand. The inspector waited a little time after the making the bloody water, and then began the conversation as to which the question arose. The inspector said the deceased was very serious at this time, and appeared to be sinking very fast; his manner was that of a man in a dying state. Soon after the conversation was over, the inspector proposed to fetch a priest. The deceased said, '*That's not of much use.*' The inspector said, '*Have you any objection to make a deposition to a magistrate?*' He said, '*No.*' The inspector said, '*Mr. Clark (a magistrate) is in the next room.*' He replied, '*Not yet.*' He then seemed very much suffering. The deceased was a Roman Catholic, and a Roman Catholic priest proved that if a Roman Catholic wishes to make his peace with God, he usually

sends for a priest to receive extreme unction, having previously made confession, and received the holy communion, if there be time. Except he be dead to all sense of religion, a person thinking himself on the point of death would send for a priest. There are, of course, different degrees of seriousness and devotion in our Church, but people who may generally have neglected the ordinances, invariably send for a priest. Extreme unction is not deemed by our Church necessary for salvation, but if a priest were at hand and offered his services, and a person at the point of death refused them, I should say either he was no Catholic, or not in the way of salvation. Attending Protestant places of worship is considered to be a proof of being a Christian and Catholic. (f) The nearest place where a Catholic priest resided was fourteen miles from the deceased, and he had attended the parish church and an independent meeting more than once, there being a Roman Catholic chapel in the neighbourhood. It was urged, on a case reserved, that neither the approach of death, nor the apprehension of its approach, were enough taken alone: there must be an entire abandonment of all hope of recovery. The nature of the wound here would not lead to the abandonment of all hope, as it was not in a vital part. The surgeon gave hope here in the last words that passed between him and the deceased. The policeman's offer would lead the deceased to entertain hope. There was nothing said as to the disposal of property, and no farewell of his friends. Declining the attendance of the priest amounted to declining confession, absolution, and extreme unction, and therefore the answer respecting the priest showed that the deceased did not think that his end was approaching. The deceased *put off* having his deposition taken; therefore he contemplated making another declaration; but a dying declaration must be a final declaration. Lord Denman, C. J., 'We all think the case beyond all doubt. Danger existed. The deceased clearly thought he was dying, and had no hope of recovery. There is no ground for holding his declaration inadmissible.' (ff)

The question turns rather on the state of mind at the time of making the declaration than upon the interval between it and the death. There need not be an apprehension of death in a certain number of days or hours.

In order to render a statement admissible as a dying declaration, it is necessary that the person who makes it should be under an apprehension of death; but there is no necessity that such apprehension should be of death in a certain number of hours or days. The question turns rather on the state of the person's mind at the time of making the declaration than upon the interval between the declaration and the death. (g) Where, therefore, the deceased made a declaration on the 23rd of October, concluding, 'I have made this statement believing I shall not recover,' and at that time the deceased was in a state, from the injuries that he had received, from which it was impossible that he could recover. His spine was broken, so that death must speedily follow, and he died on the 3rd of November: and the doubt as to the admissibility of the declaration was raised by a witness, who proved that, shortly before the deceased made the statement, he asked him how he was, and the deceased answered, 'I have seen the surgeon to-day, and he has given me some little hope that I am

(f) In 1 C. & K. 689 it is 'a lax Catholic.'

(ff) Reg. v. Howell, 1 Den. C. C. 1.

1 C. & K. 689.

(g) Per Pollock, C. B., Reg. v. Reaney, *infra*.

better; but I do not myself think I shall *ultimately* recover; and that before he left the room, on the same occasion, the deceased said that *he could not recover*; but it was held, on a case reserved, that the declaration had been properly admitted. The deceased was so injured, his *status* was such that he could not possibly recover, and his own opinion was that he could not recover; and in a case like this, where there was an injury to the spine, he was probably a more competent judge of his state than the doctor; he had no hope, though the doctor had held out hopes, and before the witness left the room he said that he could not recover. That was his own opinion of his case, and the impression on his mind was that death was impending. (*h*)

Where the deceased went to her sister's house on Friday, and asked to stay there, saying she was very ill, and then appeared very ill and shaking, and continued there till the next Wednesday, when her sister urged her to have a medical man; on which the deceased said, 'Then I suppose you think me dangerous?' and the sister replied, 'Yes I do; we all think you dangerous;' she then consented to have a medical man. On this day also she wished to see her niece, and said to her, 'Now, my dear niece, hear your aunt's dying words. I hope you will always act in accordance with your duty: you see what I am brought to.' The medical man did not come; but sent some medicine and a mustard poultice, which was put on her side, and appeared to give ease. She was, however, very ill that night, had the rattles very bad, but did not seem to know what they were. The next morning she appeared very anxious to see the medical man. She also sent for a person to make her will, and expressed her fears, if he did not come immediately, she should be gone before he came. Seeing her sister in tears, she said, 'Why are you crying? Are you crying because I am going to glory?' Her sister said, 'No, but it is hard to part.' Then said the deceased, 'We must part. The Lord's will be done.' She appeared very happy in the prospect of her dissolution, and her sister said to her, 'This, my dear sister, is the victory.' She replied—

'Oh how happy shall I be,  
When I have gained the victory!'

The medical man came on the Thursday morning, but before any opinion had been expressed as to her state, she made a declaration. Coleridge, J., 'The principle is perfectly clear, that no declarations are admissible unless made by a party lying under the conviction of impending dissolution, and without the least hope of recovery. In this case four facts present themselves for my consideration. The first is the manifest strong sense which the deceased had of her danger. This, however, did not arise from any knowledge of her complaint, but was founded on her sense of pain. Such a sense of danger does not exclude a hope that medical aid

Declarations made under a sense of danger, accompanied by an anxiety for the attendance of a surgeon, religious expressions, and a desire to make a will, held admissible.

(*h*) *Reg. v. Reaney*, D. & B. 151. Wightman, J., said, 'The statement must have been made under an impression upon the mind of the person making it that his death was about to happen shortly, or, to use the expression found in the books, that his death was impending: that, however, is a relative term, and does not, of course, import merely an expectation that the

sufferer would die at some time—for that is the debt which we all owe to nature—but it means an expectation that he is about to die shortly of the disease or injuries under which he is then suffering; that, in other words, he is without a reasonable or any hope of recovery.' 7 Cox, C. C. 209.



may afford relief. It is different from a case where a man knows that he has been shot through the lungs or in some other vital part, and, from a knowledge of the nature of the wound, must be aware that he could not live. The sense of danger by the deceased, I think, was not of a character to preclude some slight expectation that she might recover; and, therefore, on this ground I do not think the evidence admissible. The second fact is her anxiety about the surgeon's coming. I do not think that this is decisive one way or the other; for although it does certainly rather tend to the conclusion that some hope still lived in her mind, still, looking at it in connexion with her other expressions, I cannot but think that the solution of it may be, that it resulted from an expectation that the medical man would be able to relieve her pain. The third fact is the character of her religious expressions. Religious expressions are very often made use of by pious people without their having lost a hope of their recovery. They often call their children and friends around their bed, under the apprehension that they may not be able again to do so from the progress of their disorder, and still cherish a lingering hope that the disorder may take a favourable turn, and they may recover. Still language of this sort is evidence, and strong evidence, of the feelings and views of the party by whom it is made use of, and may in many cases be almost conclusive evidence of the abandonment of all hope. I think it assumes that character in this case. The deceased's expressions to her sister about going to glory, evidently refer to her belief that she was going to heaven; and when she repeated those lines—

“Oh how happy I shall be,  
When I have gained the victory”—

she plainly refers to the Scripture account of death, and shows that she was expecting death, and trusting that she should have its sting taken away. This evidence, therefore, weighs strongly in favour of receiving the declarations. Then there is the fourth fact, that of making a will. Now, in ordinary cases, the mere fact of making a will I should account as nothing; because any prudent man who felt himself ill would make a will on the mere chance that the illness might prove fatal, though he did not believe it would. But in this case there is not only the making the will, but the expression, that if the party sent for did not quickly come, she should be gone before his arrival. I think these facts put together import a thorough conviction on the part of the deceased that she had given up all hopes of life, and was expecting almost immediate dissolution; and I shall admit the declarations.” (*i*)

A surgeon found a transverse wound across the throat of the deceased, which had passed through the trachea, and the point of the instrument had reached the vertebra. Three days afterwards she stated to the surgeon that she did not think she should recover. He considered her in danger, but had a hope she would recover. To the nurse who attended her, she had repeated several times, both before and after the surgeon had seen her, that she should die. The nurse told her she thought she would get better. She said she thought she would, if the surgeon could see in her

Questions as to whether a declaration was spontaneous and under an impression that no hope of recovery existed.

(*i*) Reg. v. Thomas, 1 Cox, C. C. 52.

throat as he could see on her hands. This she said many times, and all day she said she should get better if it was not for her throat. The surgeon spoke cheerfully to her, and she appeared cheerful after that, and in better spirits. She got a little better, and was easier after the surgeon dressed the wounds. A magistrate saw her, and told her of her condition, and that she was in very great danger. He repeated two or three times, in various forms, something of the same kind—that she was likely to die; that she might die; and added, ‘I hope it may please Almighty God to bring you round, but I believe you are in great danger. I think it very possible this will end fatally with you. I am come to hear you, and whatever you say, should you die, will be produced in evidence on the trial of the prisoner. You must therefore tell me the truth, and nothing but the truth, without any fear or reserve.’ She said nothing. He then said, ‘It would be a very sad and awful thing for you to go into the presence of your Maker, having told me anything, in your present situation, which is false.’ From her not having said anything to him, he told her he should administer an oath to her, which he did, and by means of questions to her he got her to tell him, and what she said was reduced into writing, and read over to her; and he then said to her, ‘Now that is perfectly true, and the whole truth?’ and she said ‘It is.’ She then put her mark to it. It was objected that this declaration was not made spontaneously, and not under a sense of immediate and impending death; but it was held that it must be taken on the whole that the statement was spontaneous, and that, looking at her state, and at her expressions, there was not the slightest hope in her mind of recovery. (j)

Where a counsel, in opening a case, was proceeding to state declarations made by the deceased on his death-bed, when he believed that he should not recover, it was objected to the opening of these declarations; because, although the man believed himself to be past hope, yet at that time the surgeons who attended him were of opinion that his condition was not past hope of recovery. Willes, J., ‘At present I am of opinion that the declarations are admissible, unless the surgeons should give very different evidence to that in their depositions.’ Subsequently a medical witness stated that, at the time the declarations were made, he considered the disease to be progressing favourably, and that there were fair hopes of recovery. It was then urged that a dying declaration must be made upon a belief of impending death, and that belief must be well founded. It is not sufficient that there is a *bonâ fide* belief which is afterwards verified by a death within a short time afterwards, if at the time of making the declaration the surgeons are treating the man as a recovering patient. Willes, J., ‘It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant. There does appear to have been such an expectation in this case, and I shall therefore admit the declarations.’ (k)

Where a surgeon, at the time when a deposition of the deceased

A declaration admitted where the deceased was impressed with the belief that he should die, although the surgeon thought him getting better.

(j) Reg. v. Whitworth, 1 F. & F. 382. Watson, B., who refused to reserve the point, and the prisoner was executed.

(k) Reg. v. Peel, 2 F. & F. 21. I have

set out all the report. No statement of the evidence of what the deceased said is given.

was taken by a magistrate, said to her, 'I see, Mrs. Brooks, you are very poorly,' and she replied, 'I am;' and the surgeon said, 'I hope you will get over this,' to which she replied, 'I can't tell what the end of it may be;' and also said, 'I do not think I shall recover.' This occurred at nine o'clock at night, and at one o'clock of the same day she had asked her brother-in-law 'to take her home, that she might die.' It was held that the declaration was admissible. (*l*)

The judge must be clearly convinced that the deceased had no hope of recovery.

Where the deceased was found lying on her back with her throat cut, and bleeding profusely, and a witness said in her hearing, 'My God, the woman will bleed to death before assistance comes;' and added, 'She is dying,' which she heard. A policeman whispered something in her ear, and admitted that he might have said, 'If you do not send for assistance, she will bleed to death.' When the exclamations respecting her danger were used, she looked in the policeman's face, as though she wanted to say something, and he stooped down and put questions to her, and she answered them. Her answers grew fainter, but she talked distinctly, but low, as if she were faint, and died in five minutes. It was held that the safer course was to reject a statement made to the policeman. There must not only be an actual nearness of death, but an absolute conviction of it in the mind of the individual. No case had gone the length of saying that the latter could be dispensed with. The decision of points of this kind must always rest on the circumstances of each individual case; but here there was nothing but a mere inference that the deceased was probably aware that she could not recover. (*m*)

A belief of recovery after a declaration under a belief of dying.

Where the deceased had had the last rites of the Roman Catholic Church administered to him, and the surgeon, at the request of a magistrate, had asked him whether he had any hope of recovering, and he answered, 'I think I shall die;' he then made a statement. The surgeon stated that at the time he considered the deceased in a most dangerous state; but two or three days afterwards the deceased had expressed a belief that he should recover. Patteson, J., held that it would be hardly right under such circumstances to admit the declaration of the deceased. (*n*)

Cases where the court has not been satisfied that the deceased had a clear impression that he was in a dying state.

Where the deceased went to a hospital, and the doctor told her she was dangerously ill, and ordered that the clergyman should be sent for; but no person told her expressly that she was dying. The clergyman warned her to prepare for death; but she had not told any person that she knew she was dying; though she had been heard recommending her soul to God; it was held that her declaration was not admissible; as it was not proved to the satisfaction of the court that she was under a clear impression that she was in a dying state. (*o*)

So where a surgeon proved that he had been called in at first to attend the deceased, but had not attended till his death, and that he considered the case was hopeless, but did not tell him so; on the contrary, he told him to have a good heart; and there was nothing

(*l*) *Reg. v. Brooks*, 1 Cox, C. C. 6. Wightman, J., after consulting Cresswell, J.

(*m*) *Reg. v. Dalmas*, 1 Cox, C. C. 95, Gurney, B., and Williams, J. It was also held that the conversation was evidence

for the purpose of showing the condition of the deceased when she made the declaration.

(*n*) *Reg. v. Taylor*, 3 Cox, C. C. 84.

(*o*) *Reg. v. Mooney*, 5 Cox, C. C. 318. Pigot, C. B., and Moore, J.



in his state to show that he must have felt that he was a dying man. But a policeman proved that he had found the deceased in bed, and that he spoke about his condition, saying he was a murdered man, and it would have been better if they had killed him on the spot than left him to linger; he never expressed any hope of recovery; and being told by the policeman that he thought he would get better, he replied, 'I cannot say; I don't think I shall ever get over it;' Wightman, J., was disposed to receive the declaration. But the policeman further proved that the expression 'I am a murdered man' was often used by persons without their meaning that they were going to die immediately, and he thought the words used by the deceased were not used in any other sense. He asked him many questions which he would not have done if he had seen anything to indicate that he apprehended he was going to die. The question did not distress him, and from the way in which he answered them, the constable did not think there was any immediate fear of death on his mind, or that he thought he was in danger of his life. Wightman, J., then thought that the case was *without* the principle on which such declarations were admissible. (*p*)

So where a constable proved that from appearances I should judge that the deceased was dying. He was making his statement to me about a quarter of an hour. I believe he knew he was dying. I cannot recollect that he said anything about dying before he began his statement. As he finished he said, 'Oh God! I am going fast; I am too far gone to say any more.' The deceased died a few hours afterwards of a wound in the abdomen that penetrated the stomach. Cresswell, J., having consulted Williams, J., said, 'My brother Williams confirms the doubts I had on this subject; that it being possible the man did not discover the extent of his weakness till he had made the statement, and that it was only after he had made it he for the first time discovered that he was going fast; there is not, consequently, that clear ascertainment of his consciousness of his state, before he made it, to render it admissible.' (*q*)

Where the deceased was shot and was immediately afterwards found by a policeman and Bedford. He was shot under the breast-bone and was writhing in pain, and said to Bedford something which showed he was in dread of imminent death; but this the policeman did not hear him say. He said to the policeman, 'Remove me, or I shall die of cold.' At the time the policeman came up to him it did not appear to him that he was in expectation of immediate death. Erle, J., held that he could not, in the absence of evidence, presume that a man who had been shot through the body must necessarily feel that he was about to die, and rejected a declaration of the deceased. (*r*)

It is not necessary that the deceased should *express* any appre-

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(*p*) Reg. v. Qualter, 6 Cox, C. C. 357. Another statement made previous to an expression that the deceased had given up all in this world, had previously been rejected. The injury in this case was on the 20th of June, the death on the 8th of August, and the statement to the policeman on the 27th of June.

(*q*) Reg. v. Nicolas, 6 Cox, C. C. 120. The statement was, however, afterwards received, the counsel for the prisoner withdrawing his objection to it.

(*r*) Reg. v. Cleary, 2 F. & F. 850. The report does not state whether Bedford was examined or not; and the marginal note is unwarranted by the facts stated.

The deceased need not express apprehension of danger.

It is a question for the judge whether the deceased was in such a state of mind as to make his statements admissible.

As to what matters the judge will inquire.

hension of danger; for his consciousness of approaching death may be inferred, not only from his declaring that he knows his danger, but from the nature of the wound, or state of illness or other circumstances of the case. And if it may reasonably be inferred from the nature of the wound, the state of illness, and other circumstances, that the deceased was sensible of his danger, his declarations are admissible. (*s*)

All the judges agreed at a conference in Easter Term, 1790, that it ought not to be left to the jury to say whether the deceased thought he was dying or not; for that must be decided by the judge before he receives the evidence. (*t*) And where on a trial for murder in Ireland a dying declaration was tendered in evidence, and the judge left it to the jury to say whether the deceased knew when he made it that he was at the point of death, the question as to the propriety of the course adopted in that case was sent over for the opinion of the English judges, who answered that the course taken was not the right one, and that the judge ought to have decided the question himself. (*u*) And such has been the uniform practice in all the recent cases. 'The question whether any particular piece of evidence be admissible is, upon principle, always to be determined by the judge. But in the case under consideration that question depends on a difficult preliminary investigation of fact, much more within the province of juries than of judges; and where the evidence is admitted, it is scarcely to be expected that juries will pay implicit obedience to the decision of the judge, founded as it is on a conclusion of fact, a subject upon which the constitution regards them as peculiarly competent to form a right opinion.' (*v*)

The circumstances, under which the declarations were made, are to be shown to the judge, and he will hear all that the deceased has said relative to his situation, and will inquire into the state of illness in which he was; the opinions of medical and other persons as to his state, and whether they were made known to the deceased; the conduct of the deceased in settling his affairs; in making his will; giving directions as to his funeral or family; and whether he had recourse to those consolations and rites of religion, which are appropriate to the last sad hours of departing mortality; in a word, into every fact and circumstance which

(*s*) John's case, 1 East, P. C. c. 5, s. 124, p. 357, by the decision of all the judges in 1790. Woodcock's case, 1 Leach, 500. Dingler's case, 2 Leach, 561. Rex v. Bonner, 6 C. & P. 386. Patteson, J. Reg. v. Perkins, 2 Moo. C. C. R. 135, *post*, p. 272.

(*t*) John's case, 1 East, P. C. c. 5, s. 124, p. 357. Welbourn's case, *ibid.* 358, S. P., resolved by all the judges in Mich. Term, 1792. Rex v. Hucks, 1 Stark. N. P. C. 523. In Woodcock's case, tried in 1789, Eyre, C. B., left it to the jury to consider whether the deceased thought she was dying or not.

(*u*) Major Campbell's case, as stated by Parke, B. in 11 M. & W. 486.

(*v*) 1 Phil. Ev. 291. It has frequently occurred to the Editor that in this and similar cases, where a particular inde-

pendent fact is to be ascertained, it would be an expedient course to take the opinion of the jury separately as to that fact alone. At one time it was the practice in cases of indictments for a subsequent felony, first to leave the question of the subsequent felony to the jury, and afterwards that as to the identity of the party. This practice might afford a precedent for establishing such a practice as that suggested; which it is submitted would be advantageous, as it would relieve the judge from the painful responsibility of deciding on a question of fact; and the more so, as it is conceived the jury are not bound by the decision of the judge that the declarations are admissible to give credit to the testimony of the witness who proves them. C. S. G.

may tend to throw light upon the state of mind of the deceased at the time when the declaration was made, in order the better to enable him to arrive at a satisfactory determination as to whether the evidence be admissible or not. (*w*)

It is a general rule that dying declarations, although made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration. (*x*) In a late case, the defendant having been convicted of perjury, a rule nisi for a new trial was obtained; whilst that was pending, the defendant shot the prosecutor: and on showing cause against the rule, an affidavit was tendered of the dying declaration of the latter, as to the transaction out of which the prosecution for perjury arose. It was held, according to the rule above stated, that the affidavit could not be read. (*y*) In the case of *Rex v. Hutchinson*, (*z*) tried before Bayley, J., the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned judge rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of inquiry. And so where the prisoner was indicted for using instruments to procure the miscarriage of a woman, her dying declaration was held inadmissible, and the general rule laid down by Abbott, C. J., in *Rex v. Mead*, (*a*) was fully recognized by the court. (*b*)

Only admissible when the death of deceased is the subject of the charge, and the circumstances of the death the subject of the declaration.

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But where two persons died from the same act of poisoning, the declaration of one was held admissible on the trial of the prisoner for the murder of the other. On an indictment for poisoning King, it appeared that the poison was administered in a cake, which the deceased ate for breakfast; immediately after which he was taken ill, and his maid servant, who was present, and had made the cake, said that she was not afraid of it, and thereupon ate of it, and was in consequence poisoned and died. Her dying declarations (made after she knew of her master's death, and was conscious of her own approaching death) as to the manner in which she had made the

Declaration of one of two persons dying from the same act.

(*w*) See *Rex v. Van Butchell*, *ante*, p. 253, per Bolland, B. *Rex v. Spilsbury*, *ante*, p. 254, per Coleridge, J.

(*x*) By Abbott, C. J., *Rex v. Mead*, 2 B. & C. 605. In trials for robbery the dying declarations of the party robbed were held inadmissible by Bayley, J., on the Northern Spring Circuit, 1822, and by Best, J., on the Midland Spring Circuit, 1822. And in *Rex v. Lloyd*, 4 C. & P. 233, by Bolland, B., and in *rape Reg. v. Newton*, 1 F. & F. 641, by Hill, J. In *Rex v. Mead*, *infra*, in the argument for the admissibility of the evidence, the counsel cited the case of *Wright v. Littler*, 3 Burr. 1244, in which evidence of a dying confession of the subscribing witness to a deed was held admissible, and a case mentioned by Lord Ellenborough, C. J., in 6 East, 195, in which Heath, J.,

received the confession of an attesting witness to a bond, who in his dying moments begged pardon of heaven for having been concerned in forging the bond. Abbott, C. J., remarked that these cases were peculiar, inasmuch as the declarations amounted to a confession by the parties themselves of heinous offences which they had committed. See the observations of the Court of Exchequer in *Stobart v. Dryden*, 1 M. & W. 615, which render it at least very doubtful whether dying declarations would at the present day be admissible in any civil suit. 1 Phil. Ev. 280.

(*y*) *Rex v. Mead*, 2 B. & C. 605.

(*z*) 2 B. & C. 608, in note to *Rex v. Mead*.

(*a*) *Supra*.

(*b*) *Reg. v. Hind*, Bell, C. C. 253.



cake, and that she had put nothing bad in it, and that the prisoner was present eating his breakfast at one end of the table while she was making the cake at the other end of it, were tendered in evidence, and objected to, on the ground that the only person whose dying declarations could be received in evidence was the person whose death formed the subject of inquiry at the trial; and the preceding case was relied upon. But Coltman, J., after consulting Parke, B., expressed himself of opinion that, as it was all one transaction, the declarations were admissible, and accordingly allowed them to go to the jury: but he said he would reserve the point for the opinion of the judges. (*c*)

Declarations  
only evidence  
of facts.

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Dying decla-  
ration of a  
convict.

The declarations of the deceased are admissible only as to those things to which he would have been competent to testify, if sworn in the case. They must, therefore, in general speak to facts only, and not to mere matters of opinion, and must be confined to what is relevant to the issue. (*d*)

Of an accom-  
plice.

The declaration of a convict at the moment of execution cannot be given in evidence as a dying declaration: for as an attainted convict, he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive. (*e*) The dying declaration of an accomplice is admissible; (*f*) but this can only happen where the prisoner is charged with assisting in the self-destruction of the accomplice: for it has already appeared that dying declarations are never admissible, except where the death of the person who made them is the subject of the indictment.

A parol dying  
declaration is  
admissible,  
though a sub-  
sequent one  
was made and  
reduced to  
writing.

It is no objection to the admission of a dying declaration, that the deceased made a subsequent statement to a magistrate, which was taken down in writing, and is not produced. Where three several declarations had been made by the deceased in the course of the same day at the successive intervals of an hour each; the second had been made before a magistrate, and reduced into writing, but the others had not; the original written statement taken before the magistrate, was not produced, and a copy of it was rejected. A question then arose, whether the first and third declarations could be received; and Pratt, C. J., was of opinion that they could not, since he considered all three statements as parts of the same narrative, of which the written examination was the best proof: but the other judges held that the three declarations were three distinct facts, and that the inability to prove the second did not exclude the first and third; and evidence of those declarations was accordingly admitted. (*g*)

(*c*) *Rex v. Baker*, 2 M. & Rob. 33. The prisoner was acquitted.

(*d*) *Greenl. Ev.* 190. 1 Phil. Ev. 291. *Rex v. Sellers*, Carr. Supp. 233.

(*e*) *Drummond's case*, 1 Leach, 337, Eyre, B., and Gould, J. In this case, which was a trial for robbery, it was alleged that a man resembling the prisoner had been recently executed for robbery, and immediately previous to his execution had made a statement as to the robbery then being inquired into; and it

was submitted that it was admissible as a dying declaration: but it was held to be inadmissible on the ground stated in the text. But as a convicted prisoner is now a competent witness, the ground of this decision is gone, and, therefore, the admissibility of such a declaration will now depend on whether a dying declaration of any person except a murdered person be admissible.

(*f*) *Tinkler's case*, 1 East, P. C. 354.

(*g*) *Rex v. Reason*, 1 Str. 499. 6 St.

But if the statement of the deceased was committed to writing, and signed by him at the time it was made, it has been held essential that the writing should be produced if existing, and that neither a copy nor parol evidence of the declaration could be admitted to supply the omission. (*h*) But the decisions on this point are altogether unsatisfactory; for there is no authority, by Act of Parliament or otherwise, for taking a dying declaration in writing, and the words uttered by the deceased are just as much primary evidence as any writing in which they may be incorporated. (*i*)

When in writing.

If the statement of the deceased has been taken on oath before a magistrate, but is inadmissible as a deposition, in consequence of the prisoner not having been present when it was taken, or for any other reason, (*j*) it is admissible as a declaration *in articulo mortis*, if taken under such circumstances as would render such a declaration receivable in evidence. (*k*) And evidence is admissible to prove that the deposition was taken at a time when the deceased was aware of the near approach of death, although the deposition contains no statement to show that the deceased made it in contemplation of death. (*l*)

When taken on oath.

It is not necessary that the examination of the deceased should be conducted after the manner of interrogating a witness in the case; though any departure from this mode may affect the value and credibility of the declarations. Therefore, it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation. (*m*) Where a surgeon, in a case of murder, was called to prove a dying declaration, and stated that he put questions to the deceased for the purpose of ascertaining whether it would be necessary for a magistrate to come to her house to take her examination, and it was objected that the statement being in answer to questions, and not a connected continuous statement flowing from herself, could not be received; it was held that the declaration was admissible. (*n*)

As to the mode of eliciting the statements.  
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But whatever the statement may be, it must be complete in itself; for if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements,

Tr. 502. 2 Stark. Evid. 366. According to the report in the State Trials, the chief justice and Mr. J. Powys deemed the evidence inadmissible. At all events, it appears the evidence was received. Sir J. Strange was one of the counsel in the cause.

(*h*) Rex v. Gay, 7 C. & P. 230. Greenl. Ev. 199. Trowter's case, 12 Vin. Abr. 118, 119. Leach v. Simpson, in Scac. Pasch, 1839, 1 Law & Eq. Rep. 58.

(*i*) Rex v. Reason, *supra*, seems at variance with these cases, and see Robinson v. Vaughton, 8 C. & P. 252, and other cases, *ante*, p. 224, and *post*, p. [889], as to the grounds on which depositions are admissible. If the statement of the deceased were taken in writing, but not signed, it is clear that it could only be used to refresh the memory of a witness who was

present when it was taken down: and it may admit of doubt whether a statement signed by the deceased could be used for any other purpose. See Rex v. Bell, 5 C. & P. 162, *post*, p. [884]; and the judgment in Reg. v. Christopher, 1 Den. C. C. 536.

(*j*) Reg. v. Clarke, 2 F. & F. 2.  
(*k*) Rex v. Dingler, 2 Leach, 561. Rex v. Callaghan, McNally Ev. 385, Rose. Cr. Ev. 33.

(*l*) Reg. v. Hunt, 2 Cox, C. C. 239. Pollock, C. B., after consulting Coleridge, J.

(*m*) Greenl. Ev. 190, citing Rex v. Fagant, *infra*. Commonwealth v. Vass, 3 Leigh, R. 786. Rex v. Reason, 1 Str. 499. Rex v. Woodcock, 2 Leach, 561, and see Rex v. Welbourn, *ante*, p. 251.

(*n*) Rex v. Fagant, 7 C. & P. 238, Gaselee, J.

which he is prevented by any cause from making, they will not be received. (o)

In favour of  
the prisoner.

The dying declarations of the deceased are not only admissible against a prisoner, but also in his favour. Upon an indictment for manslaughter, a surgeon stated that the deceased seemed perfectly sensible of the dangerous state he was in, and said he knew he could not get better, and afterwards said, 'I don't think he would have struck me if I had not provoked him;' Coleridge, J., at first expressed some doubt whether he ought to receive the statement; but afterwards received the evidence, observing that it might have an influence on the amount of punishment. (p)

Prisoner in his  
defence may  
show the state  
of mind or  
character of  
the deceased.

As the declarations of a dying man are admitted, on a supposition that in his awful situation on the confines of a future world he had no motives to misrepresent, but, on the contrary, the strongest motives to speak without disguise and without malice, it necessarily follows, that the party against whom they are produced in evidence may enter into the particulars of his state of mind and of his behaviour in his last moments, or may be allowed to show that the deceased was not of such a character as was likely to be impressed by a religious sense of his approaching dissolution. (q)

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If a child be  
too young to  
be capable of  
understanding  
the religious  
obligation of  
an oath, his  
declarations  
are inadmis-  
sible.

If a child be too young to be capable of feeling the religious obligation of an oath, his declarations are inadmissible. Upon an indictment for the murder of a child aged four years, a statement made by the child to her mother shortly before her death as to the manner in which she had been treated by the prisoners was offered in evidence. Park, J. A. J., 'We allow the declaration of persons *in articulo mortis* to be given in evidence, if it appear that the person making such declaration was then under a deep impression that he was soon to render an account to his Maker. Now, as this child was but four years old, it is quite impossible that she, however precocious her mind, could have had that idea of a future state which is necessary to make such a declaration admissible. In the deposition of the mother, I find it stated that the deceased asked the deponent to lie down by her, which she did, and that on the child's asking her how long she would lie by her, the mother replied that she would lie by her till she got up; and that upon her saying this, the deceased said that she should never get up any

(o) Greenl. Ev. 190, citing *Commonwealth v. Vass*, 3 Leigh, R. 797.

(p) *Rex v. Seafie*, 1 M. & Rob. 551. See Drummond's case, *ante*, p. 268. The ground upon which dying declarations are admissible being that they are tantamount to statements made upon oath in the presence of the prisoner, and such statements being clearly admissible if in favour of the prisoner, there seems no reason to doubt the propriety of admitting a dying declaration which is in favour of the prisoner. Indeed almost every case of manslaughter, in which such declarations have been admitted, is an authority to that effect, as the *prima facie* presumption is, that the prisoner had murdered the deceased. And, moreover, a declaration in favour of a prisoner must ever be taken to be more likely to be true; as it is not probable

that a person should make a statement favourable to the person who has inflicted a mortal injury upon him, but rather the contrary. C. S. G.

(q) 1 Phil. Ev. 289. In *Reg. v. McCarthy*, Gloucester Sum. Ass. 1842, the case on the part of the prosecution was that the prisoner had assaulted the deceased, and that the deceased followed the prisoner along several streets for the purpose of giving him into the custody of the police; and Erskine, J., permitted the counsel for the prisoner to cross-examine the witnesses for the prosecution as to the bad character of the deceased, in order to show that the prisoner might have had a reasonable ground for supposing that the deceased followed him for the purpose of robbing him. C. S. G.



more; and then went on to tell her mother of something that had happened. Now this, though it shows that the deceased thought she was dying, does not show that she had any idea of a future state; indeed, I think that, from her age, we must take it that she could not have had any idea of that kind.' (r)

But if a child be of intelligent mind, and fully comprehends the nature of an oath, and the consequences, in a future state, of telling a falsehood, his declarations, made under the apprehension and expectation of immediate death, are admissible in evidence. Thus where upon a trial for murder it appeared that the deceased, who was a little more than ten years old, received a severe wound from a gun on one day, of which he died the following morning; and in order to show his state, when certain declarations were made on the evening after he was wounded, a surgeon was examined, who said, 'I was of opinion the boy could not survive many days. I said to him, "My good boy, you must know you are labouring now under a very severe injury, which in all probability you will not recover from, and the effects of it will most likely kill you." My father asked him if he was perfectly conscious where he should go if he told a lie, and where he should expect to go if he told the truth on the subject. In answer to the first he said he should expect to go to hell, and to the latter that he should go to heaven. My father said nearly similar words to what I said myself. When he was told that he was not likely to recover, I could see a change in the expression of his countenance. The appearances of tears came into his eyes, and an appearance such as it is difficult to describe—an appearance of distress; but he said nothing, that I can remember, expressing either assent or dissent. My father said to him, "You may recover, though in all probability you will not." The father, also a surgeon, said, "I said to the deceased, after feeling his pulse and examining the wound, "My little man, you appear to me to be much more sensible than, from the nature of the accident you have received, I should have expected. It is impossible for me to say whether you may survive the injury or not. I think it more than probable that you will not, and that you may be dead before morning." I then asked him if he was aware of the nature of an oath. He made no reply. I then said, "If you don't tell the truth, and how this accident occurred, where do you expect to go?" He then said, "To hell." "If you do speak the truth, I suppose you expect to go to heaven?" He made no reply. I then told him, "I put these questions to you that, in case of your death, the truth of the accident may be ascertained," or words to that effect. I don't think he made any reply. He expressed no opinion as to his state.' On cross-examination he said, 'I said you may recover; it is impossible for me to say, but I don't think it likely that you will be alive by the morning.' The child appeared at the time in a very debilitated state from the injury, but he appeared to be a very quick, intelligent child. Upon a case reserved, it was contended that there was not sufficiently strong proof to show that there was a perfect belief in the mind of the deceased of approaching death,

But if a child does fully understand the nature of an oath his declarations are admissible, if made under the apprehension of immediate death.

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(r) *Rex v. Pike*, 3 C. & P. 598. Park, J. A. J., had consulted Parke, J., before the case was tried, and he quite agreed

with the view of the case stated in the text.

and that the apprehensions of death in a child were not enough to render his declarations admissible, unless he was shown to be aware of the nature of an oath; but the judges were unanimously of opinion that the statements were receivable if made under the apprehension and expectation of immediate death, and they all (except Bosanquet, J., Patteson, J., and Coleridge, J.) thought they were so made and receivable. (*s*)

Of the effect  
of dying de-  
clarations.

With respect to the effect of dying declarations, it is to be observed that, though such declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances in respect of which the deceased was not likely to have been mistaken, are entitled to great weight (*t*) if clearly and distinctly proved, yet it is always to be recollected that the accused has not had the opportunity of cross-examination—a power quite as essential to the eliciting of *the whole* truth, as the obligation of an oath can be, and without which no statement made on oath, however solemnly administered, is admissible under any other circumstances; and that where the deceased had not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements, especially as the salutary and restraining fear of punishment for perjury is, in such cases, withdrawn. And it is further to be considered that the particulars to which the deceased has spoken were in general likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of the persons and to the omission of facts essentially important to the completeness and truth of the narrative. (*u*) When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, yet they are nevertheless open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination. (*v*) It may be added also that the deceased in many cases is labouring under injuries which may affect the brain, and prevent the possibility of reason guiding the words that may be uttered, and yet the means of ascertaining the state of his mind may be such as to render it in the highest degree difficult to discover whether a statement has been made under a morbid delusion of the mind, or in the tranquil exercise of calm reason, operated upon alone by the awful con-

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(*s*) Reg. v. Perkins, 2 Moo. C. C. R. 135. 9 C. & P. 395. S. C.

(*t*) See per Coleridge, J., Rex v. Spilsbury, *ante*, p. 254.

(*u*) Greenl. Ev. 192. 1 Phil. Ev. 292.

(*v*) Ashton's case, 2 Lew. 147. per Alderson, B. A striking instance of the danger of trusting to statements made after a mortal wound has been inflicted occurred in Reg. v. Macarthy, Gloucester Sum. Ass. 1842. The prisoner was in-

dicted for murder, and the deceased had been stabbed by the prisoner whilst he was pursuing him in order to give him into custody for an assault, and the deceased expressly stated that the prisoner had knocked him down, but two companions of the deceased, who were present during the whole time, distinctly proved that the deceased was not knocked down at all. C. S. G.

ciousness that he must almost immediately render an account to an all-knowing Creator.

Hearsay evidence is also admissible for the purpose of proving public rights, and rights in the nature of public rights. (*w*) Thus in questions concerning the boundary of parishes or manors, traditional reputation is evidence: (*x*) and the declarations of old persons deceased have been admitted in such cases, although they were parishioners and claimed rights of common on the wastes, which their evidence had a tendency to enlarge. (*y*) But although general reputation is evidence on a question of boundary or custom, yet the tradition of a particular fact (as that turf was dug or a post put down in a particular spot) is not admissible. (*z*)

Declarations or statements made by deceased persons, where they appear to be against their own interests, have in many cases been admitted: as entries in their books charging themselves with the receipt of money on account of a third person, (*a*) or acknowledging the payment of money due to themselves. (*b*) Thus a written memorandum by a deceased man-midwife, stating that he had delivered a woman of a child on a certain day, and referring to his ledger in which a charge for his attendance was marked as paid, was thought by the Court of King's Bench to have been properly received in evidence, upon an issue as to the child's age. (*c*) So where the point in issue was whether a certain waste was the soil of the defendant, entries by a steward, since deceased, of money received by him from different persons in satisfaction of trespasses committed on the waste were admitted in evidence, to show that the right to the soil was in his master, under whom the plaintiff claimed. (*d*) So receipts for rent found in the possession of a tenant are evidence that the person who signed them was seised in fee. (*e*) On the same principle, entries in the books of a tradesman by his deceased shopman, who thereby supplies proof of a charge against himself, have been admitted in evidence, as proof of the delivery of the goods, or of other matter there stated within his own knowledge. (*f*) But where the effect of the entry is not to charge the servant, it is not evidence. Thus, in an action for the hire of horses, an entry by the plaintiff's servant, since dead, stating the terms of the agreement with the defendant, is not

Hearsay in proof of public rights, boundaries of parishes, &c.

Hearsay of deceased persons making statements against their own interest.

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Entries in a tradesman's books by deceased shopman.

(*w*) 1 Phill. Ev. 238. But to prove prescriptive rights strictly private, it is doubtful whether hearsay evidence is admissible, see 1 Phill. Ev. 241. 1 Stark. Ev. 49. Rosc. Ev. 28.

(*x*) Nicholls v. Parker, 14 East, 331, in note to Outram v. Morewood. And it seems that a map made from the representations of a deceased person, who pointed out the boundaries, would be evidence of such boundaries. Reg. v. Milton, 1 C. & K. 58. Erskine, J.

(*y*) Nicholls v. Parker. But such declarations must not have been made *post item motum*, that is, after the very same point or question has become the subject of controversy. Rex v. Cotton, 3 Campb. 44. 1 Phill. Ev. 260.

(*z*) Weeks v. Sparke, 1 M. & S. 680. Ireland v. Powell, Peake's Ev. 15, *cor*.

Chambre, J. Chatfield v. Frier, 1 Price, 256. 1 Phill. Ev. 245.

(*a*) 1 Phill. Ev. 293. Middleton v. Melton, 10 B. & C. 317.

(*b*) Ibid.

(*c*) Higham v. Ridgway, 10 East, 109. Entries in the land-tax collector's books, stating A. B. to be rated for a particular house, and his payment of the sum rated, were held by Abbott, C. J., admissible evidence to show that A. B. was in the occupation of the premises at the time mentioned. Doe v. Cartwright, Ry. & Mood. N. P. C. 62.

(*d*) Barry v. Bebbington, 4 T. R. 514.

(*e*) Doe dem Blayney v. Savage, 1 C. & K. 487.

(*f*) 1 Phill. Ev. 319. Price v. Lord Torrington, 1 Salk, 285.



Entries in the course of business.

Death of person who made the entry must be proved.

Hearsay of persons having no interest to mis-state.

evidence. (g) Such declarations are admissible only on the ground that they are against the proprietary or pecuniary interest of the party making them, and a declaration is not receivable in evidence, because it would subject the party to a prosecution if he were living. Thus, if A. were indicted for murder, and B., who was dead, had made a declaration that he was present when the murder was committed, though that declaration was against his interest, and would have subjected him to a prosecution if living, yet it would not be admissible after his death. (h) There seems, however, to be more reason for considering that a rule exists which allows of declarations of deceased persons being received in evidence, even though not made against their interest, provided that in addition to a peculiar knowledge of the facts, and the absence of all interest to pervert them, the declarations appear to have been made in the ordinary course of official, professional, or other business or duty, and to have been immediately connected with the transacting or discharging of such business or duty, and to be contemporaneous, or nearly contemporaneous, with the transaction to which they relate. (i) And if a declaration be made in the discharge of a duty by a deceased person, it is admissible, whether oral or written. (j) In all these cases, the person who made the entry must be proved to be dead: if he be living, he ought to be produced as a witness, to explain the circumstances under which the entry was made. (k) Where it appeared that an entry was in the handwriting of a banker's clerk who was then in the East Indies, it was held inadmissible. (l)

In some cases also the declarations of a person deceased are admitted on the mere ground that he had a peculiar knowledge, and no interest to misrepresent. Thus, though the survey of a manor made by the owner is not evidence against a stranger in favour of a succeeding owner, (m) yet where A., seised of the manors of B. and C., causes a survey to be taken of the manor of B., which is afterwards conveyed to E., and after a long time there is a dispute between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence. (n) So entries by a deceased rector or vicar as to the receipt of ecclesiastical dues are admissible for his successor, on the ground that he had no interest to mis-state the fact. (o)

(g) *Calvert v. Archbishop of Canterbury*, 2 Esp. 646. *Rosc. Ev.* 34. *Webster v. Webster*, 1 F. & F. 401.

(h) *The Sussex Peerage case*, 11 Cl. & F. 85, per Lord Lyndhurst, C. In that case a declaration by a clergyman that he had solemnized a marriage, was held not to be admissible, on the ground that it might have subjected the clergyman to a prosecution for solemnizing the marriage. *Standen v. Standen*, Peake, N. P. C. 45, was strongly questioned in this case.

(i) 1 Phill. Ev. 318. See the cases there collected, and *Doe d. Patteshall v. Turford*, 3 B. & Ad. 899. *Poole v. Dias*, 1 Bing. N. C. 649. *Chambers v. Bernasconi*, 1 Tyrw. 335. 4 Tyrw. 531.

(j) Per Lord Campbell, C. J. *Stapylton v. Clough*, 2 E. & B. 933. *The Sussex Peerage case*, 11 Cl. & F. 113.

By the Jewish law the custom is that children are circumcised on the eighth day from their birth, and it is the duty of the Chief Rabbi to perform this rite, and make an entry of it in a book; but it has been held that an entry made by a Chief Rabbi of a circumcision is not evidence after his death. *Davis v. Lloyd*, 1 C. & K. 275, Lord Denman, C. J., & Patteson, J.

(k) *Cooper v. Marsden*, 1 Esp. 2, by Lord Kenyon, C. J.

(l) *Ibid.*

(m) *Anon.* 1 Stra. 95.

(n) *Bridgman v. Jennings*, 1 Lord Ray. 734. *Rosc. Ev.* 33.

(o) *Le Gros v. Lovemoor*, 2 Gwill. 529. *Armstrong v. Hewit*, 4 Price, 218. *Lord Arundel's case*, 2 Gwill. 620. *Pringal v.*

There are other exceptions to the general rule against the reception of hearsay evidence, such as the admission of declarations in cases of pedigree, and of old leases, rent-rolls, surveys, &c., which can occur so seldom in criminal proceedings, that it is not thought necessary to take further notice of them in this treatise. (*p*)

Other cases of hearsay.

Nicholson, Wightw. 63. *Walter v. Holman*, 4 Price, 171. *Parsons v. Bellamy*, 4 Price, 190. 1 Phill. Ev. 307, *et seq.* (*p*) See *post*, p. 300, as to evidence of character.

## CHAPTER THE SECOND.

THE PROOF OF NEGATIVE AVERMENTS.—THE RULE THAT THE EVIDENCE MUST BE CONFINED TO THE POINT IN ISSUE.—WHAT ALLEGATIONS MUST BE PROVED, AND WHAT MAY BE REJECTED;—AND THEREWITH OF SURPLUSAGE AND OF VARIANCE.

## SEC. I.

*Of the Proof of Negative Averments.*

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General rule that he who asserts the affirmative must prove it.

IT is a general rule of the law of evidence, in criminal as well as in civil proceedings, that it lies on him who asserts the affirmative of a fact to prove it, and not on him who asserts the negative, unless under peculiar circumstances where the rule does not apply. (*a*) Thus, on an indictment for bigamy, where the first marriage was by license, and the prisoner appeared to be under age at the time, it was held that it lay on the prosecutor to prove the consent of parents, required by the 26 Geo. 2, c. 33, in order to show the marriage valid, and not on the prisoner to prove the negative in his defence. (*b*)

The presumption of law in favour of innocence sometimes drives the prosecutor to prove the negative averments.

In criminal proceedings, however, where negative averments usually impute a breach of the law to the defendant, the operation of this rule is sometimes counteracted by the presumption of law in favour of innocence; which presumption, making, as it were, a *primâ facie* case in the affirmative for the defendant, drives the prosecutor to prove the negative. (*c*) Thus, on an information against Lord Halifax, for refusing to deliver up the rolls of the auditor of the Exchequer, the Court of Exchequer put the plaintiff upon proving the negative that he did not deliver them; for a person shall be presumed duly to have executed his office till the contrary appear. (*d*) On an indictment for obtaining money, &c. under false pretences, the prosecutor must prove the averments negating the pretences. In an action for the recovery of penalties under the Hawkers' and Pedlars' Act against a person charged with having sold goods by auction in a place in which he was not a householder, some proof of this negative,

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(*a*) Gilb. Ev. 131. Bull. N. P. 298.

(*b*) Rex v. Butler, R. & R. 61. Rex v. Morton, ib. 19, in note to Rex v. James, ante, vol. 1, p. 303. But since the 4 Geo. 4, c. 76, a marriage by a minor without consent is valid. Rex v. Birmingham, ante, vol. 1, p. 305.

(*c*) The same rule applies in civil proceedings. The principal cases on the sub-

ject are Monke v. Butler, 1 Roll. Rep. 83, 3 East, 199. Rex v. Hawkins, 10 East, 211. Powell v. Milbank, 2 W. Bl. 851. S. C. 3 Wils. 355. Williams v. East India Company, 3 East, 193. Rex v. Twynning, 2 B. & A. 386. Doe v. Whitehead, 8 A. & E. 571.

(*d*) Bull. N. P. 298.



namely, of the defendant not being a householder in the place, would be necessary on the part of the plaintiff. (e) On the trial of an indictment on the 42 Geo. 3, c. 107, s. 1, which made it felony to course deer on an inclosed ground, 'without the consent of the owner of the deer,' it ought to have appeared from the evidence produced on the part of the prosecution that the owner had not given his consent. (f)

But where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favour of innocence is not allowed to operate in the manner just mentioned; but the general rule, as above stated, applies, viz. that he who asserts the affirmative is to prove it, and not he who avers the negative.

Thus upon a conviction under the 5 Ann. c. 14, s. 2, against a carrier for having game in his possession, it was held sufficient that the qualifications mentioned in the 22 & 23 Car. 2, c. 25, were negated in the information and adjudication, without negating them in the evidence. (g) 'The question is,' said Lord Ellenborough, in that case, 'upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer who denies any qualification, to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute, to which the proof may be applied; and according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information.' (h)

In *Rex v. Hanson*, (i) the rule was again considered and laid down by the Court of King's Bench. In that case there had been a conviction by two justices for selling ale without an excise license. The information negated the defendant's having a license; but there was no evidence to support this negative averment; the only evidence to support the conviction being that the defendant had in fact sold ale. The question was, whether the informer was bound to give evidence to negative the existence of a license. In support of the conviction it was contended, that such evidence was unnecessary, and that it lay upon the defendant to prove that he had a license; for it is a rule, both of the civil and the common law, that a man is not bound to prove a negative allegation; *Rex v. Turner* was cited as an express

But this presumption does not operate when the affirmative is peculiarly within the knowledge of the party charged.

*Rex v. Turner.*

*Rex v. Hanson.*

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(e) 1 Phill. Ev. 494.

(f) *Rex v. Rogers*, 2 Campb. 654. See also *Rex v. Hazy*, 2 C. & P. 458, and *Rex v. Argent*, R. & M. C. C. R. 154, ante, p. 227; the former of which cases was an indictment for lopping and topping an ash tree without the consent of the owner, and the latter an indictment for taking fish out of a pond without the consent of the owner. According to the report of the case of *Rex v. Rogers*, Lawrence, J., seems to have thought it necessary to call the owner of the deer for the purpose of disproving his consent, and the owner not being called, the jury were directed to find a verdict of acquittal.

But this decision has been overruled; and it is now established that the non-consent may be inferred from the circumstances under which the act was done, or proved by the agents of the owner. *Ante*, p. 226.

(g) *Rex v. Turner*, 5 M. & S. 206. See also *Spieries v. Parker*, 1 T. R. 140, and *Jelfs v. Ballard*, 1 B. & P. 468, by Heath, J. In *Rex v. Stone*, 1 East, 639, the Court of King's Bench were equally divided on the point.

(h) 5 M. & S. 209.

(i) MS. Paley on Convictions by Dowling, p. 45, n. (1).

authority on the point. Abbott, C. J., 'I am of opinion that the conviction is right. It seems to me that this case is not distinguishable from *Rex v. Turner*. It is a general rule that the proof of the affirmative lies upon the party who is to sustain it. The prosecutor, in general, is not called upon to prove negatively all that is stated in the information as matter of disqualification. In *Rex v. Turner* all the learned judges concur in that principle. I concur in all the observations upon which the judgment of the court in that case was founded: and I think every one of them is applicable in principle to this. The general principle, and the justice of the case, is here against the defendant. It is urged, that if we decide against the defendant, we shall open the door to a great deal of inconvenience: that by no means follows; this man might have produced his license without any possible inconvenience, which would at once have relieved him from all liability to penalties. Probably the whole inquiry before the magistrates was as to the fact of selling the ale, and that nothing was said about the license; but, however, I think, by the general rule, the informer was not bound to sustain in evidence the negative averment that the defendant had not a license. I do not mean to say that there may not be cases which may be fit to be considered as exceptions to that general rule; there is no general rule to which there may not be exceptions; all I mean to say is, that this is not one of those exceptions. The party thus called upon to answer for an offence against the excise laws, sustains not the slightest inconvenience from the general rule, for he can immediately produce his license; whereas, if the case is taken the other way, the informer is put to considerable inconvenience. Discussions may arise before the magistrates, whether the evidence produced is proper to sustain the negative; whether a book should be produced, or an examined copy, and many other questions of that sort; whereas none can arise when the defendant himself produces his license. This, therefore, not being one of the excepted cases, but a case falling directly within the general rule, I am of opinion that judgment must be given for the crown.' (j)

Willis's case.

In *Willis's case* it is said to have been agreed that, although an indictment states that the prisoner 'then or at any time before, not being a contractor with or authorized by the principal officers or commissioners of our said Lord the King of the navy, ordnance, &c., for the use of our said Lord the King, to make any stores of war, &c.,' yet that it is not incumbent on the prosecutors to prove this negative averment, but that the defendant must show, if the truth be so, that he is within the exception in the statute. (k)

Apothecaries' Company v. Bentley.  
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Upon the same principle, the *Apothecaries' Company v. Bentley* (l) was decided. That was an action for a penalty on the 55 Geo. 3, c. 194, for practising as an apothecary without having obtained the certificate required by that Act. All the counts in the declaration contained the allegation that the defendant did act and practise as an apothecary, &c., *without having obtained such*

(j) So in *Rex v. Smith*, 3 Burr. 1475, which was a conviction for trading as a hawker and pedlar without a license, it was held that the onus of proving the license lay on the defendant.

(k) 1 Hawk. P. C. c. 89, s. 17, by the editor, *ante*, vol. 2, p. 598.

(l) Ry. & Mood. N. P. C. 159. S. C. 1 C. & P. 538.

*certificate as by the said Act is directed.* No evidence was offered by the plaintiffs to show that the defendant had not obtained his certificate. The plaintiffs having closed their case, the counsel for the defendant submitted that there must be a nonsuit. But Abbott, C. J., said, 'I am of opinion that the affirmative must be proved by the defendant. I think that, it being a negative, the plaintiffs are not bound to prove it, but that it rests with the defendant to establish his having a certificate.'

## SEC. II.

### *Evidence confined to the Point in Issue.*

No evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule, that the evidence is to be confined to the point in issue; for where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer. It is, therefore, a general rule, that the facts proved must be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge. Therefore, it is not allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted. Thus, in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time, and with another person, and that he has a tendency to such practices, ought not to be received in evidence. (a) Where upon an indictment for a burglary and stealing goods, the prosecutor failed to prove any nocturnal breaking, or any larceny subsequent to the time when the prisoners entered the house, which must have been after three o'clock in the afternoon of the day on which the offence was charged to have been committed, it was proposed to abandon the charge of burglary, and to give evidence of a larceny by the prisoners of some of the articles mentioned in the indictment, though committed before three o'clock on the day on which they were charged to have entered the house; but the court refused to receive the evidence, on the ground that it was a distinct transaction. (b) The prisoners were, therefore, acquitted on this charge, but were afterwards indicted again for the other offence, and convicted. In treason, no overt act, amounting

Evidence to be confined to point in issue.

Evidence must apply to the single transaction charged.

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Acts of prisoner charged in indictment alone can be proved.

(a) *Rex v. Cole*, Mich. T. 1810, by all the judges, MS. 1 Phill. Ev. 477. In an action against the acceptor of a bill of exchange, where the defence was, that the acceptance was forged, evidence that the party who negotiated the bill had been

guilty of other forgeries was held inadmissible. *Viney v. Barss*, 1 Esp. 292. See also *Balcetti v. Serani*, Peake, N. P. C. 142. *Graft v. Bertie*, Peake's Ev. 104.

(b) *Rex v. Vandercomb*, 2 Leach, 708. *Ante*, vol. 2, p. 64.



to a distinct independent charge, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; (*c*) but still, if it conduce to the proof of any of the overt acts which are laid, it may be admitted as evidence of such overt acts. (*d*) With this view the declarations of the prisoner and seditious language used by him are clearly admissible in evidence, as explaining his conduct and showing the nature and object of the conspiracy. (*e*)

Where larceny of goods not laid in indictment may be proved.

So, though it is not allowable in general to inquire into any other stealing of goods, besides that specified in the indictment, yet, for the purpose of ascertaining the identity of the person, it is often important to show that other goods, which had been upon an adjoining part of the premises, were stolen in the same night, and afterwards found in the prisoner's possession. This is strong evidence of the prisoner having been near the prosecutor's house on the night of the robbery; and in that point of view it is material. (*f*) Thus also, on an indictment for the crime of arson, it may be shown that property, which had been taken out of the house at the time of the firing, was afterwards found secreted in the possession of the prisoner. (*g*)

Acts of other persons engaged in the same design may be proved, whether they are indicted or not.

Where several are proved to have been engaged in the same design, the acts and declarations of one in furtherance of that design may be received in evidence against another, though not present; (*h*) and it seems to make no difference as to the admissibility of the act or declaration of a conspirator against a defendant, whether the former be indicted or not, or tried or not, with the latter; for the making one a co-defendant does not make his acts or declarations evidence against another any more than they were before; the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in one common design, a principle which is wholly unaffected by the consideration of their being jointly indicted. (*i*) Neither does it appear to be material what the nature of the indictment is, provided the offence involve a conspiracy. Thus, upon an indictment for murder, if it appeared that others, together with the prisoner, conspired to perpetrate the crime, the act of one done in pursuance of that intention would be evidence against the rest. (*j*) So where in a case of forgery several persons had been shown to be connected together in respect of the charge contained in the indictment, it was held that what was said by one of them to a witness, when they were met together, on the subject of the present forgery, was evidence against the others, although the person who said it was not upon his trial. (*k*)

Prosecutor confined to proof of one felony.

Where several different felonies are alleged in the same indictment, or the evidence appears to refer to more than one distinct unconnected felony, it is usual for the judge, in his discretion, to

(*c*) Fost. 245.

(*d*) Ibid.

(*e*) 1 Phill. Ev. 471, citing *Rex v. Watson*, 2 Stark. R. 134.

(*f*) 1 Phill. Ev. 169, 7th ed. See per Littledale, J., in *Rex v. Rooney*, 7 C. & P. 517, *post*, p. 284, note (2).

(*g*) *Rickman's case*, 2 East, P. C. c. 21, s. 11, p. 1035.

(*h*) *Rex v. Stone*, 6 T. R. 527. See also for examples of this rule, *Rex v. Standley*, R. & R. 305. *Rex v. Gogerley*, *ibid.* 343. *Rex v. Bingley*, *ibid.* 446.

(*i*) 2 Stark. Ev. 329. *Ante*, p. 167.

(*j*) Ibid.

(*k*) *Rex v. Stansfield*, 1 Lew. 118, Littledale, J. See *Rex v. Tattersall*, *post*, p. 289, note (*a*).

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call upon the counsel for the prosecution to select one felony, and to confine the evidence to that particular charge. (*l*) Thus, on an indictment against a receiver for receiving several articles, if it appear that they were received at different times, the prosecutor may be put to his election, (*m*) though on an indictment for stealing several articles it is no ground for confining the prosecutor's proof to some one of the articles, that they might have been, and probably were, stolen at different times, if they might have been stolen all at once. (*n*)

Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to show the character of the other. (*o*) On an indictment for stealing six shillings, it was proved that the prisoner was a shopman in the employ of the prosecutrix, and, his honesty being suspected, on a particular day the son of the prosecutrix put seven shillings, one half-crown, and one sixpence, marked in a particular manner, into a till in the shop, in which there was no other silver at that time, and the prisoner was watched by the prosecutrix's son, who from time to time went in and out of the shop, occasionally looking into and examining the till, while customers came into the shop and purchased goods. Upon the first examination of the till it contained 11s. 6d.; after that, the son of the prosecutrix received one shilling from a customer and put it into the till; afterwards another person paid one shilling to the prisoner, who was observed to go with it to the till, to put his hand in, and withdraw it clenched. He then left the counter, and was seen to raise his hand clenched to his waistcoat pocket. The till was examined by the witness, and 11s. 6d. were found in it instead of 13s. 6d., which ought to have been there. The prosecutrix was proceeding to prove other acts of the prisoner, in going to the till and taking money, when Wilde, Serjt., objected that evidence of one felony had already been given, and that the prosecutrix ought not to be allowed to prove several felonies. The learned judge overruled the objection, and the son of the prosecutrix proved that, upon each of several inspections of the till after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been found guilty, application was made to the Court of King's Bench for a rule for staying the judgment, on the ground that the prosecutor ought to have been confined in proof to one felony; but the court was of opinion that it was in the discretion of the judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts, which were all part of one entire transaction. (*p*)

So where on an indictment for stealing pork, a bowl, some knives, and a loaf of bread, it appeared that the prisoner entered

Proving one felony by showing prisoner guilty of another felony.

Where the felonies are connected. *Rex v. Ellis.*

*Birdseye's case.*

(*l*) *Young v. The King*, 3 T. R. 106, by Buller, J. *Rex v. Jones*, 3 Campb. 132. *Rex v. Kingston*, 8 East, 41. But this rule does not extend to misdemeanors. *Rex v. Finacane*, 5 C. & P. 551.

(*m*) *Rex v. Dunn*, R. & M. C. C. R. 146.

(*n*) *Ibid.*

(*o*) *Per Bayley, J. Rex v. Ellis*, 6 B. & C. 145.

(*p*) *Rex v. Ellis*, *supra*. The indictment had been removed into that court by *certiorari* from the city Court of Exeter.

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a shop and ran away with the pork, and returned in about two minutes, replaced the pork in a bowl, which contained the knives, and took away the whole together; in about half-an-hour after he came back to the shop, and took away the loaf of bread. Littledale, J., said, 'This taking away the loaf cannot be given in evidence upon this indictment. I think that the prisoner's taking the pork and returning in two minutes, and then running off with the bowl, must be taken to be one continuing transaction; but I think that half-an-hour is too long a period to admit of that construction. The taking of the loaf therefore is a distinct offence.' (q) So where the prisoner was indicted for stealing a halfpenny, and the prosecutor had marked a quantity of pence and halfpence and locked them up in a bureau, and had missed one halfpenny on the 9th of July, and others on the 13th; Erle, J., held that the prosecutor might prove that after the 13th the prisoner was searched, and all the marked pence found upon her; and that he could not say which of them was stolen on the 9th, but it must be one of them; for it mattered not that the evidence might apply to another charge if it were relevant and necessary for the support of this charge. (r)

An admission  
of another  
distinct felony.

But an admission by a prisoner as to another separate felony is not receivable. The prisoner was indicted for stealing one shilling. The prisoner was taken into custody, and the shilling, which had been marked, found in his possession, and the constable asked him if he had any more of the prosecutor's money about him, on which he produced some half-crowns, and said something about them; and it was held that the statement so made was not admissible, as it related to another felony. (s)

Case cited in  
*Rex v. Wylie*.  
Several bur-  
glaries in the  
same night.

In the case of *Rex v. Wylie*, (t) Lord Ellenborough said he remembered a case where a man committed three burglaries in one night; he took a shirt at one place, and left it at another; and they were all so connected, that the court went through the history of the three different burglaries. So where three burglaries were committed in the town of Uttoxeter, one at Keeling's and another at Bladon's, between twelve and three o'clock of the same night, and at Bladon's a crowbar was found, which fitted some marks on a chest broken open at Keeling's, and which was proved to have been in the possession of the prisoners previously to the night in question; Wightman, J., on the authority of the preceding case, allowed evidence to be given of the finding of the crowbar at Bladon's, and also of the finding goods stolen the same night from Bladon's in the possession of the prisoners, as such evidence tended to show that the prisoners had been at Bladon's, and that they might have left the crowbar there. (u) So where on an indictment for breaking into a counting house of the Midland Railway Station at Nether Whitacre, it was proposed to prove that the prisoners on the same night had successively broken into the stations of Wilnecote, Kingsbury, Nether Whit-

(q) *Rex v. Birdseye*, 4 C. & P. 386.

(r) *Rex v. May*, 1 Cox, C. C. 236. Erle, J., told the jury to convict, if they were satisfied that all the halfpence were identified, but to acquit if any was not identified.

(s) *Reg. v. Butler*, 2 C. & K. 221, Platt, B.

(t) 1 New Rep. 94, S. C. 2 Leach, 983. *Ante*, vol. 2, p. 837.

(u) *Reg. v. Stonyer and others*, Stafford Sum. Ass. 1843. MSS. C. S. G.



acre, and Forgehills, Nether Whitacre being at some distance from the other stations, and that some of the property taken from Nether Whitacre had been found on two of the prisoners, and property taken from another station on the third, and that jemmies had been found on each prisoner, which corresponded with marks on doors and drawers broken open at one or other of the stations; Bramwell, B., said, ‘I think that evidence of the acts of the prisoners during the same night is admissible in order to explain why none of the property taken from Nether Whitacre was found upon one of the prisoners. If it is proved that he was found in possession of other property stolen from another station on the same night, that, with other circumstances, might be evidence that all the men had been engaged in each burglary, and that the third man had received his share of the booty wholly from what was taken from the other stations. The events of that night, relating to these burglaries, are so intermixed that it is impossible to separate them.’ (v)

Where several felonies are all parts of the same transaction, evidence of all is admissible upon the trial of an indictment for any of them. Thus upon an indictment against two prisoners, charging each in different counts as principals in the first degree in committing a rape, and also as principals in the second degree in other counts, evidence has been held admissible that the prisoners, together with three other men, committed at the same place and time, the one after the other successively, rapes upon the body of the prosecutrix, the others aiding and abetting in turn. (w) So where there were three indictments against the prisoner for setting fire to three ricks belonging to three different persons, and it appeared that the ricks, which were in sight of each other, were set on fire one immediately after the other, but the strongest evidence being as to the last, that indictment was tried first; the confession of the prisoner relating to all the three ricks, and the evidence of an accomplice as to all, was admitted, as the whole constituted part of the same transaction. (x) And where an indictment for arson contained five counts for setting fire to five different houses, which were all in one row, and the fire from the one first on fire had communicated to the others, it was held that, as it was all one transaction, the evidence as to all the houses was admissible. (y) So where upon an indictment against the prisoners for robbing Woodward, there being another indictment against them for robbing Urwick of a watch, it appeared that Woodward and Urwick were travelling in a gig, when they were stopped and robbed; Littledale, J., held that evidence might be given that Urwick lost his watch at the same time and place that Woodward was robbed, but that evidence was not admissible of the violence that was offered to Urwick. One

Where several felonies are all parts of the same transaction, evidence of all is admissible upon the trial of an indictment for any of them.

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(v) Reg. v. Cobden, 3 F. & F. 833.

(w) Rex v. Folkes, R. & M. C. C. R. 354. And the same was held in Rex v. Lea, 2 Moo. C. C. R. 9. 7 C. & P. 836. There several rapes committed in one boat were given in evidence; but other rapes committed in another boat, to which the prosecutrix was carried from the first boat, were not offered in evidence, as they

were the subject of another indictment. C. S. G.

(x) Rex v. Long, 6 C. & P. 179, Gurney, B.

(y) Reg. v. Trueman, 8 C. & P. 727. Erskine, J., refused to put the prosecutor to elect as to which count he would proceed.

question in the case was, whether the prisoners were at the place in question when Woodward was robbed; and as proof that they were so, evidence was admissible that one of them had got something which was lost there at that time. (z) And where upon an indictment for robbing George and Henry Pritchard, it appeared that the prisoners attacked and robbed George and Henry Pritchard when they were walking together, Tindal, C. J., held that the prosecutor was not bound to elect as to which robbery he would proceed. It was all one act, and one entire transaction; the two prosecutors were assaulted and robbed at one and the same time, and there was no interval of time between the assaulting and robbing of the one and the assaulting and the robbing of the other. If there had been, the felonies would have been distinct, but that was not so in the present case. (a) So where the prisoner was indicted under the 8 & 9 Will. 3, c. 26, s. 1, for having in his possession an edger, contrived for marking money round the edges, and proof being offered that the prisoner had used this instrument for graining the edges of counterfeit half-crowns, it was objected that the act of coining being a species of treason higher in degree than the one the prisoner was charged with, the greater offence ought not to be given in evidence to prove the less; but Burrough, J., held that the evidence was admissible, as whatever went to prove that the prisoner was guilty of the offence he was charged with was evidence, however it might also go to show him guilty of another offence. (b)

Several connected larcenies from a coal mine.

The prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s. 37, for stealing from the mine of H. J. Gunning, coal, the property of H. J. G., and in the same count he was charged with stealing from the mines of thirty other proprietors other coal, the property of each of such proprietors. (c) The prisoner had been lessee of a mine, which he had been working from November 1842 till January 1848, and in opening the case it was stated that he had, from the shaft opened to work this mine, carried on extensive workings of coals by means of levels, driftways, tunnels, cuttings, and drains; and by means of these workings he had gotten coal belonging to about forty different proprietors, without their sanction or knowledge; and in doing so had undermined part of the yard of the parish church, 144 yards of the main street of Wigan, and 220 private houses; and he had unlawfully possessed himself of £10,000 worth of the coal of other persons. It was urged that it was not competent to proceed under this indictment for felonies so entirely distinct. One of such felonies might have been committed upwards of four years before another of them, and by

(z) *Rex v. Rooney*, 7 C. & P. 517. Littledale, J., added, 'I think it makes no difference that Urwick's watch is the subject of another indictment.' 'Suppose Mr. Urwick had not been there at all, and that when Woodward was robbed a watch had been under the seat of his gig, and that after the robbery he had discovered that the watch was missing, I have no doubt that evidence might be given of the loss of the watch at the place.'

(a) *Reg. v. Giddins*, C & M. 634.

(b) *Rex v. Moore*, 2 C. & P. 235.

(c) There were other counts charging the prisoner with the severing of coal with intent to steal, and with common larceny; and in each count the coal was laid as the property of H. J. G., and of the said thirty other separate and distinct owners. Quære whether all the counts, except those for common larceny, were not clearly bad, as charging thirty-one separate felonies, which by no possibility could be committed together?

means of different workmen, and under the superintendence of different agents. Each severance of coal being a felony, there were thirty-one distinct felonies charged in each count, and if no restriction were put on the prosecution, there would be laid before the jury, and the prisoner would have to answer, evidence relating to many thousands of distinct felonies. What would be an unanswerable defence to one charge, might be wholly inapplicable to another, and every defence might require a different set of witnesses. Erle, J., ‘The question is what, in such a case as this, is one entire transaction. It may be that the making a level, a tunnel, a drain, and a cutting, may all be necessary in order to take particular coal; if so, all would, I think, be part of one transaction, and might properly be given in evidence. I cannot interfere at present.’ The evidence for the prosecution extended to all the operations mentioned in the opening of the case; to the getting the coal continuously during a period of upwards of four years, to operations conducted by different under-lookers and by many different workmen, and to coals taken from the coal fields of thirty or forty different owners. On the case for the prosecution closing, the counsel for the prisoner urged that the prosecutor ought to elect some single charge; which he declined, unless directed so to do. Erle, J., ‘I will not so direct; but for convenience sake the prisoner’s counsel may address himself to the charge of stealing the coal taken under the churchyard. The whole workings may be relied on to show a felonious intent, though they may go into twenty different counties, and into the separate properties of twenty different persons, and extend over fifteen or twenty years, if the mining operations be continuous for that time;’ and in summing up Erle, J., said, ‘It has been urged that the taking of each day was a separate felony, and that only one felony could be inquired into by you on this indictment; but I should say that as long as coal was gotten from one shaft, it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people. As, however, complaint was made by the counsel for the prisoner, I have thought it better that your attention should be confined to the charge of taking the coal of one owner; but in order to show that when the prisoner took the coal of Mr. Gunning he knew he was out of his boundary, I have permitted it to be proved that he has gone out of his boundary in many other instances, and into the property of many other persons, taking in all 15,000 yards of coal.’(d)

Upon an indictment against a son for stealing on the 20th of November, 1843, twenty-six pairs of boots, twenty pairs of shoes, and 128 pounds weight of leather, and against his father for receiving the said goods, knowing them to have been stolen, it appeared that the son from the beginning of March 1843 till the 10th of November following was in the employ of the prosecutors, who were curriers and dealers in boots and shoes. The two prisoners lived together at Kirkstall till the end of April; when the elder removed to Preston, taking with him a hamper, which passed and repassed afterwards repeatedly between the father and the son down to October. On the 10th of November the lodgings

Where several felonies are in fact so mixed as not to be separated without inconvenience to the prosecutor, evidence of all may be admitted, and therefore letters referring to several



transmissions  
of stolen  
goods from  
the principal  
to the receiver  
in such a case  
are admissible.

of the son at Kirkstall were searched, and a quantity of shoes and leather found there belonging to the prosecutors, and at the same time and place sundry letters were found from the father to the son, which induced the prosecutors to search the shop of the father at Preston, and in that shop there were also found boots, shoes, and leather of the prosecutors of the value of about £150, and letters from the son to the father. It was proposed, on the part of the prosecution, to put in the letters, both from the father to the son and from the son to the father; these letters were dated at various periods between May and October following, and referred to the transmission from the son to the father of goods of the nature of those found in the father's house. It was objected that these letters could not be read, or at any rate not all of them. As they referred continually to the transmission of property, the effect of giving them in evidence would be to assist the proof of a single felony by proof of other felonies. It was answered that it did not appear that there had been more than one taking and one receiving; and at all events the letters were evidence against the father, as showing guilty knowledge. Maule, J., 'Judges are in the habit of not allowing several felonious acts to be given in evidence under one indictment, where, as will often be the case, the effect of so doing will be to create confusion, or to surprise the prisoner, or otherwise embarrass the defence. But here embarrassment and injustice would be produced by putting the prosecutors to their election. They cannot possibly know at what time the several larcenies and receivings (if more than one) took place. The whole seems to constitute a continuous transaction; therefore I shall admit evidence relating to any takings and receivings under the circumstances, provided the indictment contains corresponding charges.' (e)

Where other felonies are the subject-matter of other indictments.

It is in the discretion of the judge to admit evidence of other felonies in such cases.

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It was formerly considered that if there were separate indictments for offences which constituted parts of the same transaction, evidence of an offence which was the subject-matter of one indictment was not admissible upon the trial of another. (f) But it has been since held in several cases that there being another indictment pending makes no difference. (g) And it has been laid down by a very learned judge that the correct rule in such cases is, that it is in the discretion of the judge to admit or reject evidence of other felonies which form the subject of other indictments, and that such discretion will be guided by the evidence appearing to be necessary or unnecessary in support of the indictment on which the prisoner is being tried. (h) Thus where there were three indictments against a prisoner for stealing notes from three letters, and it appeared that the prisoner stole notes out of one letter, and then opened another letter, and took out of it the notes it contained, and substituted for them notes to an equal amount out of the first letter, it was held on the trial for stealing the notes out of the first letter that the notes stolen out of the second letter might be traced to the prisoner, because such evidence was essential to the chain of facts necessary to make out the case. (i) But where on an indictment for night-poaching, in

(e) *Reg. v. Hinley*, 2 M. & Rob. 524.

(f) *Rex v. Smith*, 2 C. & P. 633.

(g) See the cases, *ante*, vol. 2, p. 841, and per Littledale, J., *Rex v. Rooney*,

*ante*, p. 284, note (z).

(h) *Per Pattenon, J., Rex v. Salisbury*, MS. C. S. G. S. C. 5 C. & P. 155.

(i) *Rex v. Salisbury, supra*.

order to prove the identity of one of the prisoners, it was proposed to prove that a coat lost by one of the keepers on the occasion in question had been found in the house of that prisoner, there being a separate indictment for stealing the coat; Patteson, J., refused to receive the evidence, unless the prosecutor consented to an acquittal on the indictment for larceny. (*j*)

Where it becomes necessary to prove a guilty knowledge on the part of the prisoner, evidence of other offences committed by him, though not charged in the indictment, is admissible for that purpose. Thus upon an indictment for uttering a forged bank-note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner, in order to show his knowledge of the forgery; (*k*) but not on an indictment for forgery. (*l*) So on a prosecution for uttering counterfeit money, it is the practice, for the purpose of showing a guilty knowledge, to receive proof of more than one uttering committed by the party about the same time, though only one uttering be charged in the indictment. (*m*) So, though on an indictment against a receiver for receiving several stolen articles, if it be proved that they were received at several times, the prosecutor may be put to his election, yet evidence may be given of all the receipts for the purpose of proving guilty knowledge. (*n*) But possession of other stolen property, being evidence of stealing, is not admissible on an indictment for receiving stolen goods for the purpose of showing guilty knowledge. (*o*)

On an information against a publican for unlawfully permitting prostitutes to assemble in his house, evidence that some of the same prostitutes had on other previous occasions been in the house is admissible, in order to prove his knowledge of their character. (*p*)

Evidence of other acts of prisoner as proof of his guilty knowledge.

To prove knowledge of character.

(*j*) *Rex v. Westwood*, 4 C. & P. 547. In *Rex v. Salisbury*, *supra*, Patteson, J., stated that he refused to admit the evidence in this case on the ground that he did not think it necessary in support of the offence charged.

(*k*) See *ante*, vol. 2, p. 836, *et seq.*, and the cases there cited, viz., *Wylie's case*, 1 New Rep. 92. S. C. 2 Leach, 983. *Rex v. Ball*, Russ. and Ry. 132. 1 Campb. 324. So the possession of other forged instruments may be proved as evidence of a guilty knowledge. *Ante*, vol. 2, p. 836. *Rex v. Hough*, R. & R. 120; but there must be regular proof that they are forged, *ante*, vol. 2, p. 841. *Rex v. Millard*, R. & R. 245. It has been questioned whether it may be proved that the prisoner had uttered forged bills or notes of a different kind. Bayley on Bills, 4th ed. 450. But see *ante*, vol. 2, p. 838. Where the second uttering was made the subject of a distinct indictment, Vaughan, B., held that it could not be given in evidence to show a guilty knowledge. *Rex v. Smith*, 2 C. & P. 633, but see the cases, *ante*, vol. 2, p. 841.

(*l*) Where in an action on several bills of exchange drawn by one Skull, the question was whether the defendant had accepted them, and his name appeared on

each as acceptor, and evidence was given for the plaintiff that the signatures were those of the defendant, and for the defendant that the signatures were forgeries, and the defendant proposed to prove that a number of bills and other papers had been taken away by the plaintiff's brother from Skull's house, and that among the bills so taken away were several bills on which the defendant's signature appeared, which signature was forged; and that the plaintiff had been circulating such forged bills since; and it was contended that the jury were at liberty to infer that the bills on which the action was brought were part of the bills so taken from Skull's house; Tindal, C. J., rejected the evidence, and it was held that he was right in so doing, as it clearly would have been inadmissible on an indictment for forgery. *Griffiths v. Payne*, 11 A. & E. 131.

(*m*) *Ante*, vol. 1, p. 127, and see *Reg. v. Jarvis*, Dears. C. C. 552, *ante*, vol. 1, p. 131, and *Reg. v. Weeks*, L. & C. 18, *ante*, vol. 1, p. 118.

(*n*) *Rex v. Dunn*, R. & M. C. C. R. 146.

(*o*) *Reg. v. Oddy*, 2 Den. C. C. 264, *ante*, vol. 2, p. 570.

(*p*) *Parker v. Green*, 2 B. & S. 299.

Cases of false pretences.

On an indictment for obtaining money on a chain by falsely pretending that it was a silver chain, it was held admissible to prove that the prisoner, a few days afterwards, offered a chain similar in appearance to another pawnbroker, requesting him to advance ten shillings upon it, and that twenty-six similar chains were found on the prisoner when he was apprehended. (*q*) But on an indictment for obtaining money by false pretences, it has since been held that evidence of obtaining money by similar false pretences within a week afterwards was not admissible for the purpose of proving the intent with which the money was obtained. (*r*)

Proof of other acts of the prisoner as evidence of his guilty intent.

If it be material to show the intent with which the act charged was done, evidence may be given of a distinct offence not laid in the indictment. Thus upon an indictment for maliciously shooting, if it be questionable whether the shooting was by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person. (*s*) So on an indictment for arson of a house, previous attempts to set it on fire have been held admissible, though not proved to have been made by the prisoner, for the purpose of showing that the fire was not accidental. (*t*) So on an indictment for setting fire to a rick by discharging a gun very near to it, evidence is admissible that it had been on fire the day before, and that the prisoner was then near it with a gun in his hand. (*u*) So where upon an indictment for robbery it appeared that the prisoners went with a mob to the prosecutor's house, and one of the mob went up to him, and very civilly, and, as the prosecutor then believed, with a good intention, advised him to give them something to get rid of them, and prevent mischief, upon which the prosecutor gave them the money laid in the indictment; it was held that for the purpose of showing that this was not *bonâ fide* advice, but, in reality, a mere mode of robbing the prosecutor, evidence was admissible of other demands of money made by the same mob at other houses, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present. (*v*) So upon an indictment for administering sulphuric acid to horses with intent to kill them, it has been held that the prosecutor is not confined to the proof of a single act of administering, but that other acts of administering may be given in evidence to show whether it was done with the intent charged in the indictment. (*w*) So where upon an indictment for robbing the prosecutor of his coat, the robbery having been committed by the prisoner's threatening to charge the prosecutor with an unnatural crime, Holroyd, J., received evidence of a second ineffectual

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(*q*) Reg. v. Roebuck, D. & B. 24.

(*r*) Reg. v. Holt, Bell, C. C. 280, *ante*, vol. 2, p. 691. This case was not argued; and the conviction in Reg. v. Roebuck, *supra*, was affirmed without any reference to the admission of the evidence stated in the text. Possibly in this case the possession of similar fabricated chains may have been considered like the possession of other counterfeit coin in Mint cases, and in Reg. v. Holt it may have been considered that the subsequent false pretence could not prove the intent of the previous false pretence.

(*s*) Rex v. Voke, R. & R. 531.

(*t*) Reg. v. Bailey, 2 Cox, C. C. 311, Pollock, C. B., *ante*, vol. 2, p. 1051; and see Reg. v. Taylor, 5 Cox, C. C. 138, and other cases, *ante*, vol. 2, p. 1052.

(*u*) Reg. v. Dossett, 2 C. & K. 306, Maule, J.

(*v*) Rex v. Winkworth, 4 C. & P. 444, Parke, J., Alderson, J., and Vaughan, B., and Lord Tenterden, C. J., afterwards concurred in opinion.

(*w*) Rex v. Mogg, 4 C. & P. 364, Park, J. A. J.



attempt to obtain a £1 note the following evening by similar threats, and upon a case reserved the judges were of opinion that the evidence was admissible to show that the prisoner was guilty of the former transaction. (x) On a prosecution for a libel, the publication of other libels by the defendant, not laid in the indictment, may be given in evidence, to show *quo animo* the defendant published that in question. (y) On the trial of an indictment for murder, former grudges and antecedent menaces are admitted to be given in evidence as proof of the prisoner's malice against the deceased. (z) And it has been considered, in a case where three persons were charged with uttering a forged note, that other acts done by all of them jointly, or any of them separately, shortly before the offence, may be given in evidence to show the confederacy and common purpose, although such acts constitute distinct felonies. (a) On an indictment for sending a threatening letter, prior and subsequent letters, from the prisoner to the party threatened, may be given in evidence, as explanatory of the meaning and intent of the particular letter on which the indictment is framed. (b)

Evidence of the murder of one person may be given upon the trial for the murder of another person, if such evidence tends to show that the prisoner might have had a motive arising out of the other murder for committing the murder with which he is charged. Upon an indictment for the murder of one Hemmings, it was opened that great enmity subsisted between Parker, the rector of a parish, and his parishioners, and that the prisoner had used expressions of enmity against the rector, and had said he would give £50 to have him shot, and that the rector was shot by Hemmings, and that the persons who had employed him, fearing they should be discovered as having hired him to murder the rector, had themselves murdered Hemmings; and that Hemmings's bones had been found in a barn occupied by the prisoner at the time of the murders. After evidence had been given of declarations of the prisoner, showing that he entertained malice against the rector, it was proposed to show that Hemmings was the person by whom the rector was murdered; it was objected that this was not admissible, as the rector's death was not the subject of the present inquiry. Littledale, J., 'I think that I must receive the

Evidence of one murder to show the motive for committing another.

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(x) *Rex v. Egerton*, R. & R. 375, S. C., mentioned by Holroyd, J., in *Rex v. Ellis*, *ante*, p. 281.

(y) *Ante*, vol. 1, p. 369. *Stuart v. Lovell*, 2 Stark. N. P. C. 95. So subsequent letters relating to the same subject, although libellous themselves, are admissible in an action for a libel, and although such libel needs no explanation. *Pearson v. Lemaitre*, 5 M. & Gr. 700.

(z) 1 Phill. Ev. 476. So the declarations of the prisoner, and the seditious language used by him, are clearly admissible in evidence on an indictment for high treason, explaining his conduct, and showing the nature and object of the conspiracy. *Rex v. Watson*, 2 Stark. N. P. C. 134. 1 Phill. Ev. 471. On a trial for murder, *Cresswell, J.*, and *Williams, J.*,

were rather inclined to reject evidence of what the prisoner had done to the deceased ten days before the cause of death, no declaration accompanying the act; neither the evidence proposed to be given nor the cause of death is stated. The objection was that the act done could have no tendency to show subsequent intention. *Reg. v. Mobbs*, 6 Cox, C. C. 223. In many cases evidence of previous violence has been given in cases of murder without objection, and such evidence clearly tends to prove ill-will.

(a) *Rex v. Tattersall*, MS. Bayley, J. *Ante*, vol. 1, p. 50.

(b) *Robinson's case*, 2 Leach, 749. 2 East, P. C. c. 23, s. 2, p. 1110. *Ante*, p. 211.

evidence. On the part of the prosecution it is put thus—that the prisoner and others employed Hemmings to murder Mr. Parker, and that he being detected, the prisoner and others then murdered Hemmings, to prevent a discovery of their own guilt; now, to ascertain whether or not that was so in point of fact, it is necessary that I should receive evidence respecting the murder of Mr. Parker.’ (c)

Of other  
poisonings.

Upon an indictment for murder by poisoning with arsenic, on the 3rd of November, 1816, evidence was given, without objection, that on the 19th of October previously the deceased drank tea with the prisoner, upon which occasion she was seized with sickness, and much indisposed; and that on the 3rd of November she again drank tea with the prisoner, and was afterwards taken ill in the same manner, but more violently than before. (d) So on an indictment for murder by prussic acid, administered in porter on the 1st of January, evidence was given, without objection, that in September previously the prisoner had visited the deceased and sent for some porter, and that after the prisoner left the deceased was very sick and ill. (e)

To prove  
knowledge of  
a poison.

If a person were charged with having wilfully poisoned another, and it was a question whether he knew a certain white powder to be arsenic, evidence would be admissible to show that he knew what the powder was, because he had administered it to another person who had died, although that might be proof of a distinct felony. (f)

Geering’s  
case.  
Evidence of  
several poi-  
sonings after  
the one  
charged.

The prisoner was indicted for the murder of her husband, Richard Geering, in September, 1848, by arsenic. She was also charged in three other indictments with the murder of her son George by arsenic in December, 1848, of her son James by arsenic in March, 1849, and of an attempt to murder her son Benjamin by arsenic in April, 1849. (g) On the part of the prosecution evidence was tendered of a *post-mortem* analysis of the intestines, of the contents of the stomach, heart, &c., of Richard, James, and George, and also of a medical analysis of the vomit of Benjamin, who was still alive, in order to show that arsenic had been taken into the stomach of the three latter persons; that two of them had died of poison, and that the symptoms of all the four were the same. Evidence was also tendered that the four, during their lives, lived with the prisoner, and formed part of her family; that she generally made tea for them, cooked their victuals, and distributed the same to them on their leaving the house to go to their work in the morning. It was objected that the facts proposed to be proved took place after the death of the husband, and that the effect of them was to show that the three cases of poisoning, were felonious. (h) It was answered that the evidence was admissible in order to prove, not that the prisoner had feloniously poisoned

(c) *Rex v. Clewes*, 4 C. & P. 221.

(d) *Rex v. Donnell*, 2 C. & K. 308, note, Abbott, J.

(e) *Reg. v. Tawell*, 2 C. & K. 309, note, Parke, B.

(f) *Reg. v. Dossett*, 2 C. & K. 306, per Maule, J.

(g) Benjamin had stated to the surgeon who attended him, that his symptoms

were precisely the same as those exhibited by his father and his two brothers, and this statement had been reduced into writing, and read over to the prisoner, and she said, ‘It is quite right.’

(h) It was conceded that the evidence would have been admissible had the deaths taken place *previously* to the death of the husband.

the deceased, but that the deceased had in fact died of poison administered by some one; and, secondly, for the purpose of proving that the death of the husband was not accidental. Pollock, C. B., 'I am of opinion that evidence is receivable that the death of the three sons proceeded from the same cause, namely, arsenic. The tendency of such evidence is to prove, and to confirm the proof already given, that the death of the husband, whether felonious or not, was occasioned by arsenic. In this view of the case I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband. The domestic history of the family during the period that the four deaths occurred is also receivable in evidence to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine whether such taking was accidental or not. The evidence is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony.' (i)

The prisoner and his wife were indicted for the murder of his mother by poison. The prisoner's former wife died in March, 1861, and his present wife was then their servant. The prisoner's mother lived with him after his second marriage, and died in December, 1861. He sold arsenic for agricultural purposes, and there was evidence of administration by the prisoners of articles of food in which arsenic might be contained, and of arsenical symptoms following. There was, however, evidence that three horses, one of them belonging to the male prisoner, had been accidentally poisoned by arsenic, and that some of his customers, against whom he was not supposed to have any ill-feeling, had suffered from arsenical symptoms, evidently arising from some accident; and it was held that, in order to prove that the administration of the poison to the mother was wilful, evidence was admissible of the circumstances which attended the death of the first wife, and to show that she had died of arsenic. (j)

Evidence of a previous poisoning.

The prisoner was indicted for the murder of Ann James, the keeper of an eating-house, of which the prisoner was the manager. She had had living with her Mrs. Townsend, William, Thomas, and Martin Townsend, and was visited by Jane Cafferata and her husband. Between September and the February following Mrs. Townsend, William, and Thomas Townsend, successively sickened and died, after very short illnesses, which in each case exhibited exactly similar symptoms. In February Mrs. James, who had long been ill, became worse, and so continued until June, when she died, and, on examination of her body, traces of a sufficient quantity of antimony to have caused death were found. The other bodies were examined, and all found to be saturated with antimony. Evidence given before the magistrate established in his opinion a *prima facie* case as to all four deaths against the prisoner. The prosecution proposed to give evidence of the three other deaths—1st, to exclude the supposition of accidental poisoning in the present case; 2nd, to show that the prisoner had then antimony

(i) Reg. v. Geering, 18 Law, J. (N. S.) M. C. 215. Pollock, C. B., who consulted Alderson, B., and Talfourd, J., and they agreed with him in opinion, and therefore the point was not reserved.

The prisoner was executed. The C. B. spoke as if the third son had died whenever he mentioned the number of deaths.

(j) Reg. v. Garner, 3 F. & F. 681. Willes, J., after consulting Pollock, C. B.



in his possession, but this could only be done by proving that he administered *something* to two of them, and that antimony was found in them, and that they died of it; 3rd, in order to exculpate Mrs. Cafferata, whom the prisoner charged with poisoning Mrs. James, it was material to prove that she could not possibly have poisoned one of the other three; 4th, as it would be competent to the prisoner to prove that when all the others sickened and died he was absent and could not have poisoned them, so evidence might be given to prove that the prisoner poisoned the whole, from the four crimes being so connected as to be substantially but one transaction. With reference to the present question it was answered—1st, that the evidence would not exclude the supposition of accident in Mrs. James's case; if the three others were wilfully poisoned by some one it would not prove as against the prisoner that Mrs. James's death was not accidental; 2nd, that the mere fact of '*something*' being administered by the prisoner, and of antimony being found in the bodies, did not prove possession by the prisoner of antimony at the time of Mrs. James's death; the '*something*' might have been exhausted by the three former poisonings; 3rd, that evidence to exculpate Mrs. Cafferata was wholly collateral, unless the prisoner attempted to prove her guilt; 4th, that the prisoner could not prove that he did not poison the three others. Martin, B., after consulting Wilde, B., refused to admit the evidence. (*k*)

Of other wounds.

So evidence may be given of other wounds inflicted by the prisoner on other persons at the same time and place for the purpose of identifying the instrument used. On an indictment for maliciously stabbing it appeared that the prisoner stabbed both the prosecutor and Redman at the same time and place, and it was held that evidence might be given of the shape of the wound inflicted upon Redman for the purpose of identifying the instrument with which the wound was inflicted on the prosecutor. (*l*) Where on a trial for murder it appeared that three grenades had been exploded, by one of which the deceased was killed, it was held that evidence of the nature of the wounds inflicted at the same time on other persons, who were killed or wounded, was admissible for the purposes of showing the character of the grenades, which were the first instruments of the kind which had been used. (*m*)

To show that false entries were intentional.

We have seen that on an indictment for embezzlement where the entries of sums were correct, but the castings up incorrect, a series of similar errors in casting up, both previously and subsequently to the cases to which the indictment referred, were held

(*k*) Reg. v. Winslow, 8 Cox, C. C. 397. The proposed evidence is not stated. This case is opposed to all the preceding cases, none of which was cited. At most it can only be taken to show that the learned judges in their discretion did not think fit to admit the evidence. With the utmost deference to their opinion, it seems to have been the very case in which the evidence ought to have been admitted; for it would have most effectually tended to show that the opinion

of the medical men that the particular death was caused by poison, and that that poison was antimony, was correct. It would also have strongly tended to prove that the antimony was not taken accidentally.

(*l*) Rex v. Fursey, 6 C. & P. 81, Parke, J., and Gaselee, J.

(*m*) Reg. v. Bernard, 1 F. & F. 240, Lord Campbell, C. J., Pollock, C. E., Erle, J., and Cresswell, J.

admissible in order to negative the defence that these were merely accidental errors. (*n*)

Where on a trial for rape it was elicited on cross-examination that the act had not caused any pain, Rolfe, B., held that it might be proved on re-examination that the prisoner had done the same thing on previous occasions; for that evidence tended to explain the fact that the act in question had not caused any pain. (*o*)

To explain facts.

If a prisoner call evidence to prove an alibi, evidence may be given in reply, for the purpose of rebutting the alibi, that the prisoner committed another robbery near the place where the offence charged was committed. On an indictment for robbery the defence was an alibi, and in order to show that the prisoner was near the place of the robbery at the time it was committed, Alderson, B., held that a witness might be examined to show not merely that he had been accosted by the prisoner on the road shortly before the prosecutor was robbed, but that he had also been in fact robbed by the party who accosted him. (*p*)

To rebut an alibi.

On an indictment for abusing a child under the age of ten years, the first occasion spoken to by the child was a Thursday morning, on which the prisoner threatened to beat her if she told, and it was held that evidence of subsequent perpetrations of the offence on Saturday and Monday was admissible. Willes, J., 'The practice is, no doubt, in the discretion of the court, to call on the prosecution to elect, but that is a course never taken where the acts are all in substance part of the same transaction; and here, in my opinion, it is so. It has repeatedly appeared to me, in cases of this sort, that the man, by a threat of violence, deters the child from complaining, and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions, and this seems to me to give a continuity to the transaction, which makes such evidence properly admissible.' (*q*)

Where all the acts are part of the same transaction.

As other acts and declarations of the prisoner, besides those charged in the indictment, may be given in evidence on the part of the prosecution, so he himself in his defence may in some cases prove other acts and declarations of his own, as evidence of his innocence. Thus on a charge of murder, expressions of goodwill and acts of kindness on the part of the prisoner towards the deceased are always considered important evidence, as showing what was his general disposition towards the deceased, from which the jury may be led to conclude that his intention could not have been what the charge imputes. (*r*) So in the case of *Rex v. Lambert*, (*s*) where the supposed libel, which was the subject of prosecution, was contained in a paragraph of a newspaper, of which the defendants were the printer and proprietor, Lord Ellenborough, C. J., held that the defendants had a right to have read in evidence any other paragraph in the same newspaper connected with the subject of the passage charged as libellous (although disjointed

Proof of other acts and declarations of prisoner as evidence for him of his innocence.

(*a*) Reg. v. Richardson, 2 F. & F. 343, ante, vol. 2, p. 464.

(*o*) Reg. v. Chambers, 3 Cox, C. C. 92.

(*p*) Reg. v. Briggs, 2 M. & Rob. 199.

(*q*) Reg. v. Reardon, 4 F. & F. 76.

(*r*) 1 Phill. Ev. 470.

(*s*) 2 Campb. 400, and see Thornton

v. Stephen, 2 M. & Rob. 45. The same was done in *Newton v. Rowe*, Gloucester Spr. Ass. 1843, cor. Erskine, J. MSS. C. S. G. So subsequent letters, relating to the same subject, are admissible in an action. *Pearson v. Lemaitre*, 5 M. & Gr. 700, *Camfield v. Bird*, 3 C. & K. 56.

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Walker's case.

from it by extraneous matter, and printed in a different character) for the purpose of showing the intention and mind of the defendants with respect to the specific paragraph laid in the indictment. And as in trials for conspiracies, whatever the prisoner may have done or said at any meeting alleged to be held in pursuance of the conspiracy is admissible in evidence against him on the part of the prosecution, so, on the other hand, any other part of his conduct at the same meetings will be allowed to be proved on his behalf; for the intention and design of the party at a particular time are best explained by a complete view of every part of his conduct at that time, and not merely from the proof of a single and insulated act or declaration. (t) In the case of *Walker* and others, who were tried for a conspiracy to overthrow the Government, and evidence was produced, on the part of the prosecution, to show that the conspiracy existed, and was brought into overt act at meetings in the presence of Walker, the counsel for the prisoners was allowed to ask a witness whether, at any of these times, he had ever heard Walker utter any word inconsistent with the duty of a good subject. The question was opposed, but held by Mr. J. Heath to be admissible. The prisoner's counsel were also allowed in the same case to inquire into the general declarations of the prisoner at these meetings, whether the witness had heard him say anything that had a tendency to disturb the peace of the kingdom; and questions to the same effect were put to many other witnesses in succession. (u)

Hardy's case.

On the trial of *Hardy* for high treason, where the overt act charged was that the prisoner, for the purpose of accomplishing the treason of compassing the King's death, did conspire with others to call a convention of the people, in order that the convention might depose the King; the counsel for the prisoner were allowed to ask a witness whether, before the time of the convention which was imputed to the prisoner, he had ever heard from him what his objects were, and whether he had at all mixed himself in that business. (v) But the better opinion seems to be that, in order to make such other acts or declarations of the prisoner applicable to his defence, it must be shown that they are in some way connected with the facts proved against him. (w) In the case of *Horne Tooke* and others, however, for high treason, several publications having been given in evidence on the part of the Crown, containing republican doctrines and opinions, the distribution of which had been promoted by the prisoners during the period assigned in the indictment for the existence of the conspiracy, the

But such acts and declarations of the prisoner must be connected with the facts proved against him.

(t) 1 Phill. Ev. 478.

(u) Ibid. and 23 St. Tr. 1131. See the observations of Alderson, B., in Reg. v. Vincent, 9 C. & P. 91.

(v) 24 How. St. Tr. 1097. On an indictment for a conspiracy against the defendant and Brown (who was gone to America) with intent to defraud Sir C. C. of a sum of money advanced by him by way of annuity, some letters between the defendant and Brown were put in evidence on the part of the prosecution, and the defence was that the defendant had been made a dupe by Brown, and was not

himself a participator in the fraud, and Lord Tenterden, C. J., held that, under the peculiar circumstances of the case, the whole of the correspondence between the defendant and Brown, on both sides, previously to the time of the execution of the annuity deeds, was admissible, but that all letters subsequent to that time were inadmissible. Rex v. Whitehead, 1 C. & P. 67, D. & R. N. P. R. 61. S. C.

(w) Rex v. Lambert, 2 Campb. 400. Lord George Gordon's case, 21 How. St. Tr. 542. Hanson's case, 31 How. St. Tr. 4281. 1 Phill. Ev. 480.



prisoner was allowed to read in his defence various extracts from works which he had published at a former period of his life; and these the jury were permitted to carry along with them when they retired to consider of their verdict. (*x*) But the propriety of allowing such a defence has been questioned by very high authority. (*y*)

It may also happen that, from the nature of the offence charged, it is impossible to confine the evidence to proof of a single transaction. Thus on an indictment against several defendants for a conspiracy to cause themselves to be believed persons of large property, for the purpose of defrauding tradesmen, Lord Ellenborough allowed the prosecutor to prove various instances of their giving false representations of their circumstances; (*z*) observing that the indictment was for a conspiracy to carry on the business of common cheats, and cumulative instances were necessary to prove the offence. The same sort of evidence, said his lordship, is allowed on an indictment for barratry; (*a*) and in a prosecution for high treason itself, the gravest of all offences.

The rule is clear and general, that no question can be put which is not relevant to the issue (unless for the purpose of impeaching the credit of a witness); but the applicability of the rule must obviously depend upon the particular circumstances of each individual case, and will not admit of a general demonstration. It may, however, be useful to state some criminal cases, where questions as to the relevancy of evidence have arisen and been decided. On the trial of an indictment against several persons for a conspiracy, in unlawfully assembling for the purpose of exciting discontent and disaffection, it would be irrelevant to inquire, on behalf of the defendants, what the conduct of those, employed to disperse the meeting, may have been at the time of the dispersion, if no evidence has been previously offered, on the part of the prosecution, as to the conduct of the meeting at that time or subsequently; for the conduct of the dispersers of the meeting can have no bearing on the intention and object of the meeting itself; in other words, it is irrelevant to the matters in issue. (*b*) In such a prosecution, as the material points for the consideration of the jury are, the general character and intention of the assembly, and the particular case of each defendant as connected with that general character, it would be relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organized in the same manner, and acting in concert. It would be relevant also to show, that early on the day of the meeting, in a spot at some distance from the place of meeting (from which very spot a body of men came afterwards to the place of meeting), a great number of persons, so organized, had assembled, and had there conducted themselves in a disloyal, riotous, or seditious manner. (*c*)

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Evidence of several transactions when cumulative instances are necessary to prove the offence charged.

Cases as to the relevancy of evidence.

Unlawful assembly.  
Hunt's case.

(*x*) 1 East, P. C. c. 11, s. 8, p. 61. 25 How. St. Tr. 545.

(*y*) By Lord Ellenborough in *Rex v. Lambert*, 2 Campb. 400.

(*z*) *Rex v. Roberts*, 1 Campb. 400, *ante*, p. 168. But see *Reg. v. Steel*, C. & Mars. 337, *ante*, p. 169.

(*a*) The prosecutor must, before the trial, give the defendant a note of the par-

ticular acts of barratry he intends to prove against him; and will not be at liberty to give evidence of any other. *Ante*, vol. 1, p. 266.

(*b*) *Rex v. Hunt*, 3 B. & A. 566, 577. 1 Phill. Ev. 476. See also *Redford v. Burley*, 3 Stark. N. P. C. 87, 88, 91.

(*c*) *Ibid*.

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Further, it would be relevant, on such a trial, to produce in evidence certain resolutions, which had been proposed, by one of the defendants, at a large assembly in another part of the country, very recently held for the same professed object and purpose as were avowed by the meeting in question, that defendant having acted at both meetings as president or chairman; in a question of intention as this is, it is most clearly relevant to show, against that individual, that, at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. (*d*)

Articles found  
in prisoner's  
house after his  
apprehension.

Writings  
found after  
prisoner's ap-  
prehension.

In cases of treason and felony, it may be proved that articles were found secreted in the prisoner's house, after his apprehension. In *Watson's case*, evidence was admitted that a quantity of pikes had been found secreted in the prisoner's house subsequently to his apprehension. (*e*) With respect to writings found after the prisoner's apprehension, it appears to have been laid down in *Hardy's case* (*f*) that papers found in the possession of conspirators with the prisoner, but subsequently to his apprehension, ought not to be read against him, unless there was evidence to show their previous existence; for otherwise there was no evidence that the prisoner was a party to it. And on a prosecution for a conspiracy, it was held that some letters which were directed to the prisoners, and intercepted at the post-office after their apprehension, were not admissible in evidence against them, as they had never been in the custody of the prisoners, or in any way adopted by them. (*g*) So on an indictment for uttering a forged bank-note, knowing it to be forged, it was held that a letter purporting to come from the prisoner's brother, and left by the postman pursuant to its direction at the prisoner's lodgings, after he was apprehended, and during his confinement, but never actually in his custody, could not be read in evidence as proof of his knowledge that the note was forged. (*h*) But in *Watson's case* (*i*) it was held that papers found in the lodgings of a conspirator at a period subsequent to the apprehension of the prisoner might be read in evidence, although no absolute proof was given of their previous existence, where strong presumption existed that the lodgings had not been entered by any one in the interval between the apprehension and the finding, and where the papers were intimately connected with the objects of the conspiracy as detailed in evidence. (*j*) Writings found in the prisoner's

Writings

(*d*) *Rex v. Hunt*, 3 B. & A. 566, 577. 1 Phill. Ev. 477. See also *Redford v. Burley*, 3 Stark. N. P. C. 87, 88, 91.

(*e*) 2 Stark. N. P. C. 137. Lord Ellenborough, in giving his opinion on this point, cited a case from recollection, where a butler to a banker at Malton had been taken up upon suspicion of having committed a great robbery; the prisoner had been seen near the privy, and this circumstance having excited suspicion in the minds of the counsel, who considered the case during the assizes at York; at their instance, search was made, and in the privy all the plate was found. The plate was produced, and the prisoner was in consequence convicted; he had

been separated from the custody of the plate, since he had been confined in York Castle for some time: but no doubt was entertained as to the admissibility of the evidence. Abbott, C. J., also observed, that an assize had scarcely ever occurred where it did not happen that part of the evidence against a prisoner consisted of proof that the stolen property was found in his house after his apprehension. See *Reg. v. Courvoisier*, 9 C. & P. 362.

(*f*) 24 How. St. Tr. 452.

(*g*) *Rex v. Hevey*, 1 Leach, 235.

(*h*) *Huet's case*, 2 Leach, 820.

(*i*) 2 Stark. N. P. C. 140.

(*j*) A letter found upon the prisoner may be read, but it is no evidence of the

possession, but not published, if plainly connected with the treasonable design charged, are evidence of such design upon an indictment for treason, though not published. (*h*) But it seems that, if it be doubtful whether they are so connected, they are not admissible. (*l*) In *Watson's case*, one of the objections made to the admission of a paper found in the house of a co-conspirator was, that there was no proof that it had been published; and *Sidney's case* was cited: but the court distinguished that case from the present, and Abbott, J., said that he had always understood the ground of objection in *Sidney's case* was, not that the papers had never been published, but that they had no relation to the treasonable practices charged in the indictment, and he referred to 1 *East's P. C.* 119, where it is said, 'writings plainly applicable to some treasonable design in contemplation are clear and satisfactory evidence of such design, although not published.' If, say Mr. J. Foster and Mr. J. Blackstone, 'the papers found in Sidney's closet had been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him.' That was the objection which had constantly been made to the reception of the evidence in *Sidney's case*. The paper there was not only an unpublished paper, but appeared to have been composed several years before the crime charged to have been committed. (*m*)

found in prisoner's possession, though not published, may be read if relevant to the charge in the indictment.

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So where on a trial for murder committed by the explosion of grenades, it appeared that the grenades had been ordered by Allsop, and, after the apprehension of the prisoner, a letter was found in the prisoner's house, which was in the handwriting of Allsop, and bore a memorandum in the handwriting of the prisoner. It was held that the letter was admissible. It must be assumed to have been in the prisoner's possession, and it must be admitted, not on the ground that the writer of it was a co-conspirator with the prisoner, but on the ground that it was in the prisoner's possession, and that its contents were relevant to the present inquiry. (*n*) But where on an indictment for fitting out a ship to be employed in the slave trade, the prisoner was a merchant in London, and the ship was seized off the coast of Africa, several

facts it states. Thus on an indictment against a person employed in the post-office for secreting a letter containing a bill of exchange, the contents of the letter, which was found upon him, were held inadmissible to prove that the bill was enclosed in it. *Rex v. Plumer, R. & R.* 264.

(*k*) *Rex v. Watson*, 2 Stark. N. P. C. 141.

(*l*) *Ibid.*

(*m*) 2 Stark. N. P. C. 147.

(*n*) *Reg. v. Bernard*, 1 F. & F. 240, Lord Campbell, C. J., Pollock, C. B., Erle, J., and Cresswell, J. The letter alluded to the assassination of the Emperor of the French. But where two prisoners lodged together, and a portmanteau was found in their lodgings, which Rehden said was Hare's, and the prosecutor's invoice of the

stolen shawls was found in it, and also a paper folded in the shape of a letter, and indorsed in Rehden's handwriting, 'J. Rehden, private,' and inside this was an inventory of the shawls that had been pawned, but this was not in Rehden's handwriting; it was held that this inventory was not admissible; for *non constat* that the words 'private' and the prisoner's name might not have been written previously to the writing on the other side. *Reg. v. Hare*, 3 Cox, C. C. 247. The Common Serjt., after consulting Maule, J., and Wightman, J. But quære whether, as the portmanteau was in the prisoners' lodgings, they were not both of them in possession of its contents? If the shawls had been in the portmanteau, would they not have been in the possession of both prisoners?



Without proof of being in prisoner's handwriting.

On an indictment against a county for not repairing a bridge, evidence may be given that individuals have repaired it.

Whether a prisoner may in his defence give evidence of a conspiracy to suborn witnesses against him.

Evidence of character.

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Character of prosecutor.

letters then found on board of her were held inadmissible, as they were not traced in any way to his knowledge. (o)

If the papers found in the prisoner's custody be plainly relative to the design charged, they may be read in evidence without any proof of the handwriting being that of the prisoner. (p)

On an indictment against a county for not repairing a public bridge, the defendants may show under the general issue that the bridge had been repaired from time to time by private individuals: for one question is, whether the bridge is a public bridge; and upon that question it is material to inquire, by whom and in what manner it had been repaired, with a view of ascertaining whether those repairs were adapted to the service of the public, or merely to the purposes of ornament or private convenience. (q) It is one medium of proof to show that the bridge has been repaired by individuals, though that alone would be of very little weight. (r)

In a question put by the House of Lords to the judges, in the course of the proceedings in the *Queen's case* it was assumed that proof of the existence of a conspiracy between the prosecutor and others to suborn witnesses against the accused is a legitimate ground of defence. Lord Chief Justice Abbott, in delivering their opinion, observed, that the judges understood that such an assumption had been made in the question put to them, and that the House did not ask their opinion on that point; (s) from which it may perhaps be inferred, that their lordships had doubts whether such a defence is allowable.

In civil suits, as the evidence is to be confined to the points in issue, the character of either party cannot be inquired into, unless it is put in issue by the nature of the suit itself. (t) In criminal proceedings, the prosecutor being usually also a witness, his character may be attacked in the prisoner's defence, in the same way as is applicable to the impeachment of the credit of witnesses generally. In the particular instance of an indictment for a rape, or for an assault with an intent to commit a rape, evidence is admissible on the part of the prisoner, not merely, as in the case of an ordinary witness, that from her general bad character the prosecutrix ought not to be believed on her oath, but her character as to general chastity may be impeached by general evidence. (u) And although evidence of particular facts to impeach her chastity was once held inadmissible, (v) yet it has since been held that the prosecutrix may be cross-examined as to particular discreditable transactions, (w) and as to her having had connection with the prisoner previously to the alleged rape; (x) and if she deny such connection, the prisoner may show that she has been previously connected with him, (y) or with others. (z) And in actions for

(o) *Reg. v. Zulueta*, 1 C. & K. 215, Maule, J., and Wightman, J.

(p) 1 East, P. C. c. 11, s. 56, p. 119.

(q) *Rex v. (Inhab.) Northamptonshire*, 2 M. & S. 262.

(r) 1 Phill. Ev. 170, 7th ed.

(s) *The Queen's case*, 2 B. & B. 310.

(t) 1 Phill. Ev. 176, 7th edit. 467.

(u) *Ante*, vol. 1, p. 925.

(v) *Rex v. Hodgson*, R. & R. C. C. R.

211. *Ante*, vol. 1, p. 925.

(w) *Rex v. Barker*, 3 C. & P. 589, *ante*, vol. 1, p. 926.

(x) *Rex v. Martin*, 6 C. & P. 562, *ante*, vol. 1, p. 926.

(y) *Rex v. Aspinall*, 3 Stark. Ev. 952, *ante*, vol. 1, p. 926.

(z) *Reg. v. Robins*, 2 M. & Rob. 512, Coleridge, J.

seduction it has been held that the daughter of the plaintiff may be cross-examined as to her having had connection with particular persons, at particular times and places, and if she deny it, witnesses may be called to contradict her as to such particular facts. (a)

In all criminal prosecutions the prisoner is always permitted to call witnesses to speak to his general character, (b) who are usually examined in his behalf, as to how long they have known him, and what his general character for honesty, humanity, or peaceable conduct (according to the nature of the offence charged) has been during that time. The inquiry ought manifestly to bear some analogy and reference to the nature of the charge against the prisoner. On a charge of stealing it would be irrelevant and absurd to inquire into his loyalty or humanity; on a charge of high treason, it would be equally absurd to inquire into his honesty and punctuality in private dealings. (c) The inquiry must also be made with reference to the general character of the prisoner; for it is general character alone which can afford any test of general conduct, or raise a presumption that the person, who had maintained a fair reputation down to a certain period, would not then begin to act an unworthy part: and, therefore, proof of particular transactions, in which the prisoner may have been concerned, is not admissible. (d)

It is not the practice to cross-examine witnesses to character unless there be some definite charge against the prisoner, to which to cross-examine them. (e) But where a witness for the prisoner having proved that he had known him for some years, and given him a good character, stated, on cross-examination, that he had never heard anything against him; but admitted that he had heard of a robbery, which had taken place in the neighbourhood some years previously; and was then asked, 'Did you ever hear that the prisoner was suspected of having done it?' it was objected that it was not competent to inquire about particular offences imputed to the prisoner. Parke, B., 'The question is not whether the prisoner was guilty of that robbery, but whether he was *suspected* of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one. The question may be put.' (f)

Soon after the passing of the 6 & 7 Will. 4, c. 114, the Act allowing persons indicted for felony to make their defence by counsel or attorney, the judges promulgated, amongst others, the

Evidence of prisoner's good character;

must be applicable to the charge;

must not refer to particular acts.

Cross-examination as to character.  
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Reply.

(a) *Verry v. Watkins*, 7 C. & P. 308, *Grinnell v. Wells*, Gloucester Spr. Ass. 1843, *Erskine, J.*, MS. C. S. G. And see *Andrews v. Askey*, 8 C. & P. 7, *ante*, vol. 1, p. 926.

(b) Formerly evidence of the prisoner's good character was admitted in capital cases only, *in fuvorem vite*. *Rex v. Harris*, 2 St. Tr. 1038. This evidence is now admitted in all prosecutions which subject a man to corporal punishment; but not in actions or informations for penalties, though founded on the fraudulent conduct of the parties. *Peake's Ev.* 7. The true line of distinction, C. B. *Eyre* observed, is this: in a direct pro-

secution for a crime such evidence is admissible; but where the prosecution is not directly for the crime, but for the penalty, it is not. *Attorney-General v. Bowman*, cited 2 B. & P. 582.

(c) 1 Phill. Ev. 469.

(d) *Ibid*.

(e) *Rex v. Hodgkiss*, 7 C. & P. 298, *Alderson, B.* It sometimes, however, is proper to ascertain from the witnesses whether they have had sufficient opportunities of knowing the prisoner's character; as whether they have lived near him, or known him down to the time of the commission of the offence. C. S. G.

(f) *Reg. v. Wood*, 5 Jurist, 225.

following rule of practice in cases of felony, that 'if the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do.' (g) And it has been since held in a case of felony that the counsel for the prosecution has in strictness the right to reply, (h) on the whole case, and not merely on the evidence to character, (i) although the counsel for the prisoner only calls witnesses to character; but this is not a right which in practice ought to be exercised, except under very special circumstances. (j)

The practice in cases of misdemeanor has uniformly been that when witnesses have been called, on the part of the accused, to character only, and for no other purpose, the counsel for the prosecution has not addressed the jury in reply, (k) but it seems that in strictness the right exists in cases of misdemeanor, though it ought rarely, if ever, to be exercised. (l)

6 & 7 Will. 4,  
c. 111 and  
24 & 25 Vict.  
c. 96, previous  
conviction.

The 6 & 7 Will. 4, c. 111 and the 24 & 25 Vict. c. 96, s. 116, (m) and c. 99, s. 37, (n) provide that if upon the trial of any person for any subsequent offence, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous offence before the verdict of guilty of such subsequent offence shall have been returned, and the jury shall inquire concerning such previous conviction at the same time that they inquire concerning the subsequent offence. If a prisoner cross-examines the witnesses for the prosecution as to his character, he 'gives evidence' within the meaning of these sections, and the previous conviction may be proved. (o)

Method of  
leaving evi-  
dence of pri-  
soner's cha-  
racter to the  
jury.

It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but that when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their conclusion, upon the whole of the evidence, whether an individual whose character

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(g) Rules of Practice in cases of felony, promulgated by the Judges before the Spring Circuit of 1837. 7 C. & P. 676, *post*, p. 353.

(h) *Rex v. Stannard*, 7 C. & P. 673, Patteson, J., and Williams, J.

(i) *Rex v. Whiting*, 7 C. & P. 771, Bolland, B.

(j) *Rex v. Stannard*, *supra*.

(k) Per Patteson, J., in *Rex v. Stannard*, 7 C. & P. 673.

(l) *Rex v. Stannard*, *supra*, per Patteson, J., and Williams, J.

(m) *Ante*, vol. 2, p. 348 and p. 350.

(n) *Ante*, vol. 1, p. 121.

(o) *Reg. v. Gadbury*, 8 C. & P. 676, *ante*, vol. 2, p. 353. *Reg. v. Shrimpton*, 2 Den. C. C. 319. *Ibid.* p. 354.



was previously unblemished, has or has not committed the particular crime for which he is called upon to answer. (*p*)

The prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so, by calling witnesses in support of it; and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being put into issue, but coming in collaterally. (*q*)

Prosecutor cannot show the prisoner's bad character, unless he gives evidence of good character.

Where a prisoner called witnesses to character, and the prosecutor claimed to call witnesses to contradict them, and urged that a new issue was raised; Rolfe, B., said, 'I do not think this is a new issue. It is a new fact introduced, and it is, therefore, clearly competent to you to call evidence to contradict it.' (*r*) But where a witness gave evidence of the prisoner's general good character, and the prosecutor called a witness, and proposed to ask him, 'Does the prisoner bear a good character or a bad character?' Martin, B., held that the question could not be put or answered. (*s*)

Where on an indictment for committing an indecent assault, several witnesses were called for the prisoner, who gave him an excellent character as a moral man, and on the part of the prosecution it was proposed to contradict this evidence; it was objected that such evidence was not admissible, and the preceding case was cited; but the sessions held the evidence to be admissible, and a witness who stated that he knew the prisoner was asked, 'What is the prisoner's general character for decency and morality of conduct?' and replied, 'I know nothing of the neighbourhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers, who were also pupils of his, is, that his character is that of a man of the grossest indecency and the most flagrant immorality.' It was objected that this was not legal evidence at all of bad moral character; but the sessions held that it was some evidence, and left the effect of it as an answer to the evidence of good character to be determined by the jury; and, upon a case reserved upon the questions—1, whether, when witnesses have given a prisoner a good character, is any evidence admissible to contradict? 2, whether the answer made by the witness in this case was properly left to the jury? it was held by all the judges that where a prisoner calls witnesses to character, general evidence of bad character may be given to rebut it; and it was also held by a majority of the judges that the answer of the witness ought not to have been left to the jury.

General evidence may be given by the prosecutor to negative evidence of good character given by the prisoner, but particular facts cannot be proved.

(*p*) In *Rex v. Stannard*, 7 C. & P. 673, Paterson, J., said, 'I cannot in principle make any distinction between evidence of facts and evidence of character; the latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty; the object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case.' And per Williams, J., 'It is evidence to be submitted to the jury, to induce them

to say whether they think it likely that a person with such a character would have committed the offence.'

(*q*) Bull. N. P. 296, citing *Martyn v. Hind*, Cowp. 437. The ordinary course, however, is to ask the witness in cross-examination whether he has not heard that the prisoner has been tried for a particular offence. *Rex v. Hodgkiss*, 7 C. & P. 298, Alderson, B.

(*r*) *Reg. v. Hughes*, 1 Cox, C. C. 44.

(*s*) *Reg. v. Burt*, 5 Cox, C. C. 284. Martin, B., afterwards consulted Erle, J., and said they agreed in thinking such evidence inadmissible. This case is overruled by *Reg. v. Rowton*, *infra*.

Cockburn, C. J., 'The question of the general good character of the prisoner is not a collateral issue in the ordinary sense of the term; it is one of the elements of the case, from which the jury are to find their verdict. If the prisoner thinks proper to raise the question of his general good character by giving evidence of it, nothing could be more injurious to the interests of justice than that it should not be allowed to the prosecutor to rebut it, because, if the true character of the prisoner were known to the jury, they would not be likely to be misled in giving their verdict. Assuming, then, that evidence to rebut the evidence of the prisoner's general good character was properly received, the other question is, whether the answer of the witness given to a legitimate question was an answer which it was proper to leave to the consideration of the jury. In the first instance it is necessary to consider what is the meaning of evidence of character. It is laid down in the text-books that the prisoner is entitled to give evidence as to his general good character. Does that mean evidence of the reputation he holds among those who know him, or of the disposition or tendency of his mind in relation to the character of the offence charged? I quite agree that what it is desirable to get at is the tendency of the prisoner's mind as to his liability to commit the offence charged against him; but the only way allowed by law to get at that is by producing evidence as to the prisoner's general character. . . . The next question is, within what limits must the evidence rebutting general good character be confined? In my opinion it must be evidence of the same general description. In the present case the witness disclaims all knowledge of the general reputation of the prisoner, but says that in his opinion the prisoner's disposition is that of a man capable of the grossest indecency and immorality, for in that sense the word character was obviously used. I am strongly of opinion that that answer was not receivable. It is not, however, because an objectionable answer has been given to an unobjectionable question that a verdict can be impeached; and if the court had told the jury not to take it into their consideration, but to disregard it, I should not have been disposed to disturb the conviction; but here the court told them to take it into their consideration, and the evidence became part of the case; therefore I think the conviction ought not to stand. I rest on the fact that it has been uniformly laid down by text-writers that evidence of general character must be general evidence in the sense of reputation, and that evidence of particular facts to establish the disposition or tendency of the mind of the accused, and to show his capability of committing the offence charged, is inadmissible, and therefore I am of opinion that this conviction must be set aside.' (t)

(t) *Reg. v. Rowton*, 11 Law T. 745. Erle, C. J., and Willes, J., differed from the other judges. On the second point Erle, C. J., said that the answers to the questions 'ought to be regulated by attending to the important interests of truth. And if a prisoner having a bad character chooses to raise the question of his character by calling evidence to it, I am of opinion that the impression likely to be so created ought to be removed by

evidence on the part of the prosecution.' . . . 'On the general question, what is the principle of admitting character in evidence in criminal cases, I am of opinion that such evidence is admitted for the purpose of showing the disposition of the accused, and raising a presumption from it that the accused did not commit the crime charged. Evidence of character can only be obtained from the opinion of other persons than the accused;

Where on an indictment for stealing a shawl evidence of the prisoner's good character was given, it was held that evidence of stealing another shawl on the same evening was not admissible

The evidence must be of character previous to the offence.

that opinion must be formed from the personal experience of the witnesses, or from that of others who have formed an opinion of the character of the accused from their own personal experience. The point at issue now is whether the court is at liberty to receive evidence of the reputation of the prisoner founded on the personal experience of the witnesses called to prove it. I am of opinion that both sources of evidence are admissible, both the general rumour prevalent in the neighbourhood where the accused resides, and the personal experience of those who have had abundant opportunity of forming an opinion of the character of the accused. This is the first case which has been regularly argued on these questions, and there are several important points wholly unnoticed in it. On some points there can be no doubt. A prisoner is entitled to give evidence of his good character, and the general rule unquestionably is, that this evidence ought to be confined to the general reputation he has borne; still this evidence is invariably accompanied by particular facts, e. g., the knowledge the witness has had of the prisoner, and the time during which such knowledge has lasted, and the means which the witness has had of becoming acquainted with the prisoner's character. Again, it has never been doubted till recently that it was competent to the prosecutor to give evidence to contradict the evidence so given by the prisoner. Evidence of character is a *fact*, and whenever it is admitted on one side, it follows as a necessary consequence that it may be contradicted by the other, and this point may be considered as fully recognised by this case. Then the next question is, in what manner may the evidence of character given by the prisoner be contradicted? The first thing to be ascertained is, what in point of fact is an answer to such evidence; for the general rule undoubtedly is, that whenever a fact is endeavoured to be proved on one side, any evidence which negatives that fact is admissible on the other side. Now, when a prisoner sets up a good character, he in fact affirms that for a given number of years he has borne a good character; but suppose that during that time he has been convicted of a felony of the same kind as that for which he is tried, is not that undoubtedly in point of fact an answer to his evidence of character? Then why may not it be proved? It is said that, because the evidence of good character must be general evidence, therefore the evidence to disprove it must be general evidence also. But there seem to be some fallacies in this allegation. The proof of good character must be general, because good character can only be proved by

general reputation; but the disproof of good character may be not only by general but by particular evidence. Any number of isolated acts of good conduct will not prove a general good character, because, notwithstanding them, there may be other acts of gross immorality. But a single act of gross criminality will utterly upset any amount of evidence of good character. The truth is, the evidence in proof of good character and in opposition to it may be totally different. Again, if a man sets up a good character for ten years, this is in effect an allegation that during the whole and every part of that period he has borne that character, and he must give general evidence for that time; but if the prosecutor denies that fact, it is enough for him to prove that at any time during that period the prisoner was convicted of felony. If a man avers that for a period of twenty years he has been entitled to a right of way, of water or the like, this allegation is disproved by evidence which shows that at any time during those years such right did not exist. In cases where the character of a witness is attacked, the rule is completely settled that general evidence can alone be given; and the reason is that, although the witness may be supposed capable of defending his general character, no man can come prepared to give an answer to particular facts, which may be sworn against him to impeach his character, without any previous notice being given to him, *post*, p. [939]. But this reason in no way applies where the prisoner himself sets up a good character, and comes prepared to prove it. It has been the regular practice to cross-examine witnesses called to character for nearly forty years within my own knowledge, and such witnesses have generally, if not invariably, been cross-examined as to particular facts; as, for instance, whether they have not known or heard that the prisoner has been previously convicted or accused of offences. Nay more, judges have repeatedly in my hearing said that it is not usual to cross-examine witnesses to character except you have some definite charge to which to cross examine them. See *Reg. v. Hodgkiss*, 7 C. & P. 298, *supra*, and *Reg. v. Wood*, 5 Jurist, 225, which are two of the numerous instances where this practice has been followed, and neither of which were cited in this case, see note (g) *supra*; and this practice has been universally admitted to be right by the common practice of the counsel for the prosecution giving notice to the counsel for the prisoner that if witnesses to character were called they would be cross-examined. Now by this practice particular facts are constantly proved against a prisoner, and the very object of such cross-examination



Bad character as a ground of suspicion of committing a felony.

in answer to the evidence of character, though evidence of a prior robbery would have been very material. (*u*)

On an indictment for wounding and assaulting a constable in the execution of his duty, it appeared that the constable saw the prisoner carrying a bundle of larch trees, which appeared to have been recently pulled up, and that the prisoner wounded the constable when he endeavoured to apprehend him. In his examination in chief the constable was asked, 'What did you know had been the prisoner's previous character?' This question was objected to, but allowed by the court, and the constable answered, 'I knew the prisoner to be a very bad character.' The constable was proceeding to mention previous convictions, but was stopped, on the ground that parol evidence of the previous convictions could not be received. But the constable was allowed to state that he had seen him in the court and before the magistrates on one occasion; and in cross-examination he said, 'I saw him in the other court at the last sessions. I gave evidence against him; he was acquitted.' On a case reserved, it was held that the question, 'What did you know had been the prisoner's previous character?' ought not to have been put, and the answer to it ought not to have been received. Pollock, C. B., 'The question is not limited to what the witness knew of the prisoner, but what he knew of the prisoner's character. The witness was entitled to say that he entertained reasonable grounds for suspecting him of having stolen the trees; but that did not justify him in going into those grounds. It was open to the other side to go into them. In the first instance we think the question ought not to have been put, and certainly the answer of the policeman as to the grounds of suspicion ought not to have been given. The object of the law in precluding such evidence is to prevent any evidence coming out so as to prejudice the prisoner in his defence.' (*v*)

is to prove such particular facts, and thereby to negative the evidence of good character. I have known sundry instances where some witnesses have denied all knowledge of such previous conviction or accusation, and the fact has afterwards been elicited from another witness, and in such cases the fact so elicited has been left to the jury by the judge as negating the evidence of the other witnesses. It, therefore, is perfectly clear that evidence of particular facts may be elicited from the prisoner's witnesses, and this is a strong ground for admitting them to be proved by witnesses for the Crown. Suppose a witness for the Crown were on cross-examination to give the prisoner a good character; these cases plainly show that on re-examination his previous conviction might be elicited. These remarks have been made because the present decision may lead to this great anomaly, that a prisoner who has been convicted of an atrocious crime may be presented to the jury as a perfectly honest man, whilst his previous conviction may be lying on the desk before the officer of the court; and it cannot be doubted that this decision tends to the exclusion of the truth, and

to the case of a prisoner being left to the jury in a more favourable point of view than it deserves.

(*u*) Reg. v. Rogan, 1 Cox, C. C. 291, Erle, J.

(*v*) Reg. v. Tuberfield, 11 Law T. 385. With all deference it is submitted that this decision is erroneous. Every constable is justified in arresting any person whom he has reasonable grounds to suspect of having committed a felony; and in every case where the question arises whether he had such reasonable grounds of suspicion, it is perfectly clear that it is competent to prove the grounds of such suspicion; otherwise a right to apprehend would exist without the power of justifying the arrest. In civil cases (unless the defendant be authorized to plead the general issue by statute) the grounds of suspicion *must* be alleged in a plea to an action for the arrest; Davis v. Russell, 5 Bingh. R. 354, Hailes v. Marks, 7 H. & N. 56; and the reason is that, whether there were reasonable grounds of suspicion is a mixed question of law and fact. West v. Baxendale, 9 C. B. 141; and as where the grounds of suspicion are alleged in a plea, they must

SEC. III.

*What Allegations must be proved, and what may be rejected.*

IN the present section it is proposed to consider, 1st, What allegations in an indictment must be proved to support it, and what may be disregarded in evidence; and, therewith, of the subjects of surplusage, and the divisibility of averments. 2ndly, With what precision those allegations, which cannot be disregarded in evidence, must be proved; and, therewith, of the subject of variance.

1st. What allegations must be proved, and what may be disregarded in evidence. In order to convict a man of an offence, all the material facts which constitute the offence, and which are necessary to enable the parties to avail themselves of the verdict and judgment, should the same charge be again brought forward, must be stated upon the indictment; and all these requisite allegations must be satisfied in evidence, and proved as laid. But allegations not essential to such a purpose, which might be entirely omitted, without affecting the charge against the prisoner, and without detriment to the indictment, are considered as mere surplusage, and may be disregarded in evidence. (*w*) Thus where the prisoner was charged with robbery *near the highway*, in a case that occurred soon after the 3 Will. & M. c. 9 (which took away clergy from all robberies, whether near the highway or elsewhere), and a robbery in a house was the offence proved, all the judges were of opinion that the prisoner was ousted of the benefit of clergy. (*x*) So upon an indictment which charged the prisoners with robbing a person in a field, near the highway, where the jury found a verdict, 'Guilty of the robbery, but not near the highway,' it was holden by all the judges that the prisoners were ousted. (*y*) So where Pye was convicted upon an indictment, which charged him with robbing Fernyhough *in the dwelling-house* of

1st. What allegations must be proved.

Surplusage. Examples of surplusage.

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be proved on the trial; so where the general issue is given by statute, they must be proved on the trial, *Davis v. Russell, supra*; and so in a criminal case like the present the grounds of suspicion must be proved, in order that the jury may determine whether in fact the grounds existed, and that the court may decide, if they did exist, whether they were reasonable grounds. If a witness were asked whether he had reasonable grounds of suspicion, the question would clearly be erroneous; as the answer would be a conclusion of law and fact. In these cases 'the question is on what grounds and motives the constable acted at the time,' per Burrough, J., *Davis v. Russell*. Now it cannot be doubted that the bad character of the party may form one ground of suspicion; and the ordinary rule applicable to the receipt of evidence of character is that general evidence is alone admissible; but in a case like the present, as both the general character of the party and particular facts might operate on the mind of the constable, it

is plain that evidence of both would be admissible. It is obvious too that the general character of the party might be infamous, and yet the constable might himself know nothing of such general character except from what he had been told by others; to limit the question, therefore, to what the constable knew of the prisoner would be to exclude all evidence of his general character, which possibly formed a most material ground of suspicion. Lastly, evidence of the character or conduct of a prisoner is always admissible in order to show that the acts of others, especially of officers of justice, are lawful; which is a totally different issue from that raised as to the guilt of the prisoner, though that issue may depend upon the other.

(*w*) *Rex v. Holt*, 2 Leach, 593. 1 Phil. Ev. 498.

(*x*) *Ante*, vol. 2, p. 142. *Summers' case*, 2 East, P. C. c. 16, s. 168, p. 785.

(*y*) *Wardle's case*, R. & R. 9. S. C. 2 East, P. C. c. 16, s. 168, p. 785.

Aaron Wilday, and it was proved that the robbery was committed in a house, but it did not appear who was the owner of it; on reference to the judges, they all held the conviction proper. (z) In *Minton's case*, the indictment charged, that she feloniously, &c., in the night-time set fire to the barn of P. G., and burned the same. The jury found the prisoner guilty of setting fire to and burning the barn, but not in the night-time. And the judges held that she was properly convicted. (a) Upon an indictment on the 8 & 9 Will. 3, c. 26, s. 1 (now repealed) for having a die *made of iron and steel* in possession, without lawful authority, the judges, on a case reserved for their opinion, held that, as it was immaterial to the offence of what the die was made, proof of a die, either of iron or steel, or both, would satisfy this charge. (b) So where the indictment was upon the repealed statute 4 Geo. 2, c. 32, 'for stealing so much lead belonging to the Rev. G. C. W., and then and there fixed to a certain building called Hendon Church,' Buller, J., thought the charging the lead to be the property of any one was absurd and repugnant, property (in this respect) being only applicable to personal things; that it should only have been charged to be lead affixed to the church; and that, therefore, the allegation as to property ought to be rejected as surplusage. (c)

In libel.

An ex-officio information for a libel stated that before the publishing of the libel the King had issued a proclamation, and after the said proclamation had been issued *divers addresses* on the occasion of such proclamation had been presented to his Majesty by divers of his subjects; and that the defendant, well knowing the premises, &c., but intending to bring *the said proclamation* into contempt, &c., and to stir up sedition, &c., published the libel in question, entitled, 'A letter addressed to the addressers on the late proclamation,' which was averred to mean his said Majesty's proclamation, after which followed the proclamation. After conviction it was objected, on behalf of the defendant, that there was no legal evidence at the trial to prove that the addresses had been presented to the King. Buller, J., after stating his opinion that the fact had been sufficiently proved, observed, 'However, on this information I do not think the prosecutor need have given any evidence at all of these addresses; the averment respecting these addresses seems unnecessary, for the information, after stating the proclamation and the addresses, charges the defendant with a seditious intent to bring the said proclamation into contempt, without noticing the addresses again. The distinction between material and immaterial averments is perfectly well settled; if the averment be material, that is, if it be connected with the charge, it must be proved; but if it be totally immaterial, and if the libel be not connected with the averment, it need not be proved.' (d)

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(z) *Pye's case*, 2 East, P. C. c. 16, s. 168, pp. 785, 786. S. P. by all the judges in *Johnstone's case*, *ibid.*

(a) *Minton's case*, 2 East, P. C. c. 21, s. 5, p. 1021.

(b) *Rex v. Oxford*, R. & R. C. C. R. 382. *Rex v. Phillips*, *ibid.* 369.

(c) *Rex v. Hickman*, 1 Leach, 318. S. C. 2 East, P. C. c. 16, s. 31, p. 593. On the authority of this case, Holroyd,

J., doubted whether, on an indictment on the repealed stat. 3 Will. & M. c. 9, s. 5, for stealing in a lodging let to the prisoner, the allegation of the person *by whom* the lodging was let might not be rejected as surplusage. *Rex v. Healey*, R. & M. C. C. R. 1.

(d) *Rex v. Holt*, 5 T. R. 446. S. C. 2 Leach, 593. See also *Rex v. Phillips*, 3 Campb. 74. *Ante*, vol. 1, p. 301.



In considering the subject of surplusage, it must always be remembered that it is a most general rule that no allegation, whether necessary or unnecessary, which is *descriptive* of the *identity* of that which is legally essential to the charge in the indictment, can ever be rejected. (e) Thus if a man were to be charged with stealing a *black* horse, the allegation of colour, although unnecessary, yet being descriptive of that which is material, could not be rejected. (f) So where the prisoner was indicted on the Black Act for maliciously shooting at H. Sandon in the dwelling-house of James Brewer and John Sandy, and it appeared upon the evidence that it was in the dwelling-house of John Brewer and James Sandy, the court held the variance fatal, and said that the prosecutor had thought proper to state the names of the owners of the house where the fact was charged to have been committed; and that although perhaps that averment was not necessary (the statute saying, who shall maliciously shoot at any person in any dwelling-house or other place), yet, having averred that it was the house of James Brewer and John Sandy, he was bound to prove it as laid. (g) So upon an indictment under the 57 Geo. 3, c. 90 (now repealed), for being found armed with intent to destroy game in a certain wood 'called the *old walk* of, and belonging to, and then in the occupation of, John James, Earl of Waldegrave,' it was proved that the wood in question was in the occupation of the Earl of Waldegrave, but it was also proved that the wood had always been called the *long walk*, and had never been called or known by the name of the *old walk*. And upon a case reserved for the opinion of the judges, it was held that, though it is not necessary, where the name of the owner or occupier of the close is stated, to state the name of the close also, yet that the averment could not be rejected, and the variance was fatal. (h) So where the indictment was for breaking, &c., the house of J. Davis, 'with intent to steal the goods of J. Wakelin, in the said house being,' and there was no such person who had goods in the house, but J. W. was put by mistake for J. D., the prisoner was held entitled to an acquittal; and it was ruled that the words 'of J. W.' could not be rejected as surplusage, for the words were sensible and material, it being material to lay truly the property in the goods; and without such words the description of the offence would be incomplete. (i) This is not like the case of laying a robbery in the dwelling-house of A., which turns out to be the dwelling-house of B., because that circumstance is perfectly immaterial in robbery. (j) Where an indictment for stealing a bank note described it as *signed by A. Hooper*, for the Governor and Company of the Bank of England, it was held by the judges, on a case reserved, that there could be

Descriptive averments.  
No allegation can be rejected which is descriptive of the identity of any thing essential to the charge.

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(e) 1 Stark. Ev. 628.

(f) 1 Stark. Ev. 374, 2d ed. So upon an indictment for stealing four *live* tame turkeys, the judges held that the word 'live,' being a description of the quality of the thing stolen, could not be rejected as surplusage. Rex v. Edwards, R. & R. 497.

(g) Duroure's case, 1 East, P. C. 415. S. C. 1 Leach, 351; but see Pye's case,

and Johnstone's case, ante, p. 306.

(h) Rex v. Owen, R. & M. C. C. R. 118.

(i) Jenks' case, 2 East, P. C. c. 15, s. 25, p. 514. So also on an indictment for burglary, where the name of the owner of the dwelling-house is mis-stated, the error is fatal. An'e, vol. 2, p. 46.

(j) Ibid.

no conviction without evidence of the signature being by *A. Hooper. (k)*

Name of the party.

So the name of the person in whom the property which is the subject of the charge is laid, or on whom the offence is stated to have been committed, cannot be rejected as surplusage, but must be proved, both as to Christian and surname, according to the indictment; for if the names there stated are not his real names, or the names by which he is usually known, the prisoner must be acquitted, *(l)* unless the indictment be amended under the 14 & 15 Vict. c. 100, s. 1, as it ought to be in such a case. But if there be a sufficient description of the person and degree of the owner of the property, which is supported in evidence, any subsequent addition may, it seems, be rejected as surplusage. Thus where in an indictment for larceny, before the Irish union, the goods stolen were stated to be the property of 'James Hamilton, Esq., commonly called Earl of Clanbrassil, in the kingdom of Ireland,' and it appeared in evidence that the prosecutor was an Irish peer, viz. Earl of Clanbrassil, in Ireland, the judges, on a case reserved, were of opinion that, though the correct mode of describing the person of the prosecutor would have been 'James Hamilton, Esq., Earl of Clanbrassil, in the kingdom of Ireland,' yet as 'James Hamilton, Esq.,' was a sufficient description of his person and degree, the subsequent words, 'commonly called Earl of Clanbrassil, in the kingdom of Ireland,' might be rejected as surplusage. *(m)*

Conviction *pro tanto*.

Although it be true, as above stated, that in order to convict a man of an offence, that offence must be completely averred in the indictment, and the evidence must correspond with, and support, the whole of the material averments; yet it by no means follows that it is necessary to prove the offence charged in the indictment *to the whole extent laid*, for it is fully settled that in criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law. *(n)* 'The distinction,'

*(k)* *Rex v. Craven*, R. & R. 14.

*(l)* See *post*, p. 314, as to variances in respect of the name of the party injured.

*(m)* *Rex v. Graham*, 2 Leach, 547. From what is said in the latter part of the opinion of the judges, as delivered by Peryn, B., it is not clear whether their lordships thought the words stated above should be rejected as surplusage, or only the words 'commonly called.' Where the prisoner was indicted for stealing goods, the property of Andrew Wm. Gother, Esq., and it appeared that the prosecutor was not an esquire, it was objected that it was a fatal variance; but Burrough, J., overruled the objection, and held that the addition of esquire to the name of the person in whom the property was laid, was mere surplusage. *Rex v. Ogilvie*, 2 C. & P. 230. *Reg. v. Keys*, 2 Cox, C. C. 225, Wilde, C. J., S. P. It has been said, however, that where the person injured has a name of dignity, as a peer, baronet, or knight, he should be described by it; and that if he be described as a knight, when in fact he is a

baronet, or the contrary, the variance would be fatal; because a name of dignity is not merely an addition, but is actually part of the name, Archb. Cr. P. 30.

*(n)* *Rex v. Hollingberry*, 4 B. & C. 329. This rule, however, must be understood, as it should seem, with this qualification; that if a prisoner be indicted for murder or felony, he cannot be convicted of a misdemeanor, except it be an attempt to commit the offence charged. See vol. 1, p. 1. Thus where upon the facts stated upon a special verdict upon an indictment for felony, the Court of King's Bench was of opinion that the prisoner could not be convicted of felony, Lee, C. J., started a question, whether, as the case amounted undoubtedly to a great misdemeanor, they could not give judgment as for a trespass; and the counsel for the Crown, in support of the power of the court to do so, cited 2 Hawk. P. C. 440, and Cro. Jac. 497. *Martin Lecker's case*, 1 And. 351. Kel. 29, Dalt. 531. *E contra*, it was insisted that by this means a defendant would be deprived of

said Lord Ellenborough, in the case of *Rex v. Hunt*, (a) 'runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified.' (p) On a charge of petit treason, if the killing with malice were proved, but no circumstance of aggravation were proved to make the offence treasonable, the prisoner might have been found guilty of the murder. (q) If A. be charged with the murder of B., i.e. with feloniously killing B. of malice prepense, and all but the fact of malice prepense be proved, A. may clearly be convicted of manslaughter, for the indictment contains all the allegations essential to that charge; A. is fully apprized of the nature of it, the verdict enables the court to pronounce the proper judgment, and A. may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts. (r)

On an indictment for burglary and stealing goods, if it appear that no burglary was committed—as where the breaking and entering were not in the night, or on a charge of robbery, where the property was not taken from the person by violence, or by putting in fear—the prisoner may be found guilty of the simple larceny only. (s)

On an indictment for stealing in a dwelling-house, persons being therein, and put in fear, the prisoner may be convicted of simple larceny. (t) And in all complicated larcenies the prisoner may be acquitted of the circumstances of aggravation, as the fear or violence, and found guilty of the simple larceny. (u) So upon an indictment for horse-stealing, which is bad for not describing the animal by any term used in the statute, there may be a conviction for simple larceny. (v) So if a man had been indicted upon the statute of 1 Jac. of stabbing *contra formam statuti*, the jury might

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It is sufficient to prove so much of the indictment as constitutes a crime punishable by law.

many advantages; for if he was indicted properly, he might have counsel, a copy of his indictment, and a special jury. The court ordered the prisoner to be discharged; and said, that in the cases cited *pro Rege*, the judges appear to have been transported with zeal too far. *Rex v. Westbeer*, 2 Stra. 1133. S. C. 1 Leach, 12. (o) 2 Campb. 585.

(p) The same distinction applies to the averments in the indictment. If an offence sufficient to maintain the indictment be well laid, it is enough, though other matters which would increase the offence are ill averred. In a civil action, where one part of the declaration is ill, and the jury find entire damages, the judgment must be arrested, because the court cannot apportion them: but in indictments the court assesses the fine, and they will set it only according to those facts which are well laid. *Reg. v. Ingram*, 1 Salk. 384.

(q) Case of Swan and Jefferys, Fost. 104. 1 Phil. Ev. 501.

(r) Mackalley's case, 9 Rep. 67 b. Co. Litt. 282 a. Gilb. Ev. 233.

(s) 2 Hale, P. C. 302. 1 Phil. Ev. 501. So where the prisoners were acquitted of the burglary, upon an indict-

ment for a burglary and larceny, and found guilty of stealing in the dwelling-house to the amount of forty shillings, it was holden that they were excluded from their clergy, though there was no separate and distinct count in the indictment on the 12 Anne, c. 7, and the judges were of opinion that the indictment contained every charge that was necessary in an indictment upon that statute. *Ante*, vol. 2, p. 65. *Rex v. Withal*, 1 Leach, 88.

(t) *Rex v. Etherington*, 2 Leach, 671. S. C. 2 East, P. C. 635, *ante*, vol. 2, p. 79.

(u) 2 East, P. C. 784. But where, upon an indictment for robbery from the person, a special verdict was found, stating facts which in judgment of law did not amount to a taking from the person, but showed a larceny of the party's goods; yet as the only doubt referred to the jury was, whether the prisoners were or were not guilty of the felony and robbery charged against them in the indictment, the judges thought that judgment as of larceny could not be given upon that finding; but they remanded the prisoners to be tried upon another indictment for that offence. *Ibid*.

(v) *Rex v. Beaney*, R. & R. 416.



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The minor offence must be charged in the indictment.

Instances of divisible averments.

acquit him upon the statute, and find him guilty of manslaughter at common law. (*w*) And if a man had been indicted of stealing of goods of the value of ten shillings, the jury might find him guilty only of goods to the value of sixpence, and so guilty only of petit larceny. (*x*) But in order to convict of any offence which is not the offence primarily charged in the indictment, it is necessary that the minor offence should be substantially charged in the indictment. Thus where an indictment alleged that the prisoners feloniously made an assault on the prosecutor, and feloniously and violently did 'rob, steal, take, and carry away from his person certain money and goods,' and the jury found that the prisoners assaulted the prosecutor with intent to rob him, it was held that the conviction could not be sustained, because the indictment contained no statement of an intent to rob. (*y*)

If an indictment for treason charge several overt acts, it is sufficient to prove one. (*z*) If the indictment charges, that the defendant did, and caused to be done, a particular act, as 'forged, and caused to be forged,' it is enough to prove either one or the other. (*a*) If the defendant is charged with composing, printing, and publishing a libel, he may be convicted only of the printing and publishing. (*b*) So where the prisoner was indicted for having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt; Bayley, J., informed the jury, that if they were of opinion that the defendant had published the libel with either of those intentions, they ought to find the prisoner guilty. (*c*) Where the indictment charged the prisoner with having assaulted a female child, with intent to abuse and carnally to know her; and the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention charged carnally to know her; Holroyd, J., held that the averment of intention was divisible, and that the prisoner might be convicted of an assault with intent to abuse simply. (*d*) On an indictment on the 7 Geo. 3, c. 50, s. 1 (now repealed), stating the prisoner to have been employed in two branches of the post-office, proof of his having been employed in either was held sufficient. (*e*) And in the same case, the letter embezzled having been described in the indictment as having contained several notes, proof of its having contained any one of them was held sufficient. (*f*) Upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by such part, is sufficient. (*g*) So an indictment for embezzling need not specify the exact sum embezzled; as where the indictment charged

(*w*) 2 Hale, P. C. 302.

(*x*) Ibid.

(*y*) Reg. v. Reid, 2 Den. C. C. 88. The 24 & 25 Vict. c. 96, s. 41, *ante*, vol. 2, p. 98, now authorizes a conviction of an assault with intent to rob in such a case.

(*z*) Fost. 194.

(*a*) By Lord Mansfield in Rex v. Middlehurst, 1 Burr. 400.

(*b*) Rex v. Hunt, 2 Campb. 583. Rex

v. Williams, *ibid.* 646.

(*c*) Rex v. Evans, 3 Stark. N. P. C. 35.

(*d*) Rex v. Dawson, 3 Stark. N. P. C. 62.

(*e*) Rex v. Ellins, R. & R. C. C. R. 188. *Ante*, vol. 2, p. 507. And see Shaw's case, *ibid.* p. 508.

(*f*) Ibid.

(*g*) Rex v. Hill, R. & R. 190. *Ante*, vol. 2, p. 680.

the prisoner with embezzling, among other things, notes for one pound each, and evidence was given that there were one pound notes in the sum of money embezzled; this was held to support the indictment. (*h*) Where an information for publishing a malicious and seditious libel contained an averment that outrages had been committed *in and in the neighbourhood* of Nottingham; it was held that such averment was divisible, and that it need not be proved that they had been committed in both places. (*i*) But if it be necessary to state a prescription in an indictment, such prescription must be proved to the whole extent laid, otherwise the consequence might be, that the record would be evidence of a right which had been expressly disproved at the trial. (*j*)

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Where the indictment charges several with a joint offence, any one of them alone may be found guilty. But they cannot be found guilty separately of separate parts of the charge, and if two be so found guilty separately a pardon must be obtained, or *nolle prosequi* entered, as to the one who stands second upon the verdict, before judgment can be given against the other. Thus where Hempstead and Hudson were indicted upon the statute of Anne for stealing in a dwelling-house to the value of £6 10s., and the jury found Hempstead guilty as to part of the articles of the value of £6, and Hudson guilty as to the residue; the judges (upon a case reserved) held that judgment could not be given against both, but that upon a pardon or *nolle prosequi* as to Hudson it might be given against Hempstead. (*k*)

Joint offence charged against several, and one alone convicted.

2dly. It is to be considered with what precision of proof those allegations, which cannot be disregarded in evidence, must be supported; or, in other words, what is a fatal variance between a material averment in an indictment and the evidence adduced in support of it. The general rule on this subject is, that a variance between the indictment and the evidence is not material, provided the substance of the matter be found. (*l*)

2dly. With what precision of proof the allegations which cannot be disregarded must be supported, and herein of variance.

Upon this principle, where an indictment for the murder of a serjeant at mace of the City of London supposed that the sheriff of London, upon a plaint entered, made a precept to the serjeant at mace to arrest the defendant, and it appeared that there was not any such precept made, and that, by the custom of London, after the plaint entered, any serjeant *ex officio*, at the request of the plaintiff, might arrest a defendant, *absque aliquo præcepto, ore tenus vel aliter*, it was holden that this statement of the precept was but circumstance, not necessary to be supported in evidence, and that it was sufficient if the substance of the matter were proved without any precise regard to circumstance. (*m*) In an indictment for perjury in an answer to a bill in chancery, the bill was stated to have been filed by A. against B. (the present defendant) and *another*; it appeared in evidence that it was filed against B., C., and D., but the perjury was assigned on a part of

Rule that it will be sufficient to prove the substance of the issue.

(*h*) Carson's case, R. & R. 303. So on an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. Per Holt, C. J. Rex v. Burdett, Lord Raym. 149. See also Rex v. Gillham, 6 T. R. 265. Serjeant v. Tilbury, 16 East, 416. Rex v. Hill, 1

Stark. N. P. C. 369.

(*i*) Rex v. Sutton, 4 M. & S. 532.

(*j*) Rex v. Marquis of Buckingham, 4 Campb. 189.

(*k*) Rex v. Hempstead, R. & R. C. C. R. 344.

(*l*) 1 East, P. C. c. 5, s. 115, p. 345.

(*m*) Rex v. Mackally, 9 Co. 67 a.

the answer, which was material between A. and B.; and Lord Ellenborough held this not to be a fatal variance. (*n*)

Proof of offence charged.

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And with respect to the proof of the offence charged the rule is universal, that it is sufficient if the evidence agree in substance with the averments in the indictment. Thus on an indictment for murder, it will be sufficient if the manner of the death proved agree in substance with that which is charged. Therefore if it appear that the party was killed by a different weapon from that described, it will maintain the indictment, as if a wound or bruise alleged to have been given with a sword be proved to have been given with a staff or axe, or a wound or bruise alleged to have been given with a wooden staff be proved to have been given with a stone. So if the death be laid to have been by one sort of poisoning, and it turn out to have been by another, the difference will not be material. (*o*) But if a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a species of death entirely different, as by shooting, starving, or strangling. (*p*) So where upon an indictment for murder, which charged that the prisoner with a certain piece of brick, which he then and there held in his right hand, struck the deceased, thereby giving to him, with the piece of brick aforesaid, one mortal wound of which he died; and the jury found, not that the prisoner struck with the piece of brick, but that he struck with his fist, and that the deceased fell from the blow upon the piece of brick, and that the fall upon the brick was the cause of the death, the judges were unanimously of opinion that the means of death were not truly stated, and that the variance was fatal. (*q*) So where the indictment stated that the prisoner assaulted the deceased, and struck and beat him on the head, and then and there gave him divers mortal blows and bruises, of which he died; and the evidence was that the prisoner knocked the deceased down by a blow on the head, and that in falling down upon the ground he received the injury which caused his death; the judges, on a case reserved, held that, the cause of death not being truly stated, the prisoner could not be convicted. (*r*) If the indictment charges that A. gave the mortal blow, and that B. and C. were present, aiding and abetting, &c., but on the evidence it appears that B. struck, and that A. and C. were present, aiding, &c., this is not a material variance; for the stroke is adjudged in law to be the stroke of every one of them, and is as strongly the act of the others, as if they all three had held the weapon, and had all together struck the deceased. The

(*n*) *Rex v. Benson*, 2 Campb. 508, S. P., by Abbott, C. J. *Rex v. Powell*, R. & M. N. P. C. 101.

(*o*) So where an indictment on the 43 Geo. 3, c. 58, s. 2, charged the prisoner with having administered to a woman a decoction of a certain shrub called *savin*; and it appeared that the prisoner prepared the medicine which he administered, by pouring boiling water on the leaves of a shrub; the medical men who were examined stated that such a preparation is called an *infusion*, and not a decoction (which is made by boiling the substance in the water); upon which the prisoner's counsel insisted that he was

entitled to an acquittal, on the ground that the medicine was mis-described. But Lawrence, J., overruled the objection, and said that infusion and decoction are *ejusdem generis*, and that the variance was immaterial; that the question was, whether the prisoner administered any matter or thing to the woman to procure abortion. *Rex v. Phillips*, 3 Campb. 74.

(*p*) 1 East, P. C. c. 5, s. 107, p. 341, 2 Hale, 185.

(*q*) *Rex v. Kelly*, R. & M. C. C. R. 113.

(*r*) *Rex v. Thompson*, R. & M. C. C. R. 139.



identity of the person supposed to have given the stroke, says Mr. J. Foster, is but a circumstance, and in this case a very immaterial one. (s)

'The cases which relate to the necessity of proving particular averments,' said Mr. J. Chambre in the case of *Turner v. Eyles*, (t) only distinguish between that which is material and that which is impertinent, but make no distinction between that which is inducement, and that which is the immediate cause of action.' The same learned judge in *Smith v. Taylor* (u) observed that 'the rules of evidence, as applicable to the allegations of a declaration, depend upon the way in which the facts alleged are introduced; if they be mere matters of inducement, they do not require such strict proof as those allegations which are precisely put in issue between the parties.' And Mr. J. Buller, in *Gwinnet v. Phillips*, (v) laid down that averments which are merely inducement need not be precisely proved. The result of these authorities appears to be, that there is no difference between substantive averments and those which are only inducement, as to the necessity of proving them in some degree; but that the latter do not require such strict proof as the former. (w)

Matters of  
inducement.  
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But any difference in substance between the statements in the indictment and the evidence, as to the offence charged, will be fatal. Thus where an indictment for obtaining money under false pretences stated that the defendant pretended *he had paid a sum of money into the Bank of England*, and it appeared in evidence that he said, generally, *the money had been paid into the Bank of England*, Lord Ellenborough, C. J., held it a fatal variance, and acquitted the defendant. (x) Where the prisoner was indicted on the 15 Geo. 2, c. 34, for stealing a cow, and it appeared in evidence that the animal stolen was a heifer, it was holden a fatal variance by the twelve judges, who were of opinion that, as the statute mentioned both heifer and cow, it must be considered as using one term in contradistinction to the other. (y) Upon the same principle, where two prisoners were tried on the above-mentioned statute, on a charge of stealing five sheep, and upon the evidence they appeared to be lambs, the judges held that the prisoners could not be convicted, as the statute mentioned both sheep and lambs. (z) So where on an indictment under Lord Ellenborough's Act, the prisoner was charged with *cutting* I. S., and the evidence was that the wounds were inflicted by *stabbing*

Instances of  
fatal vari-  
ances.

(s) *Rex v. Mackally*, 9 Rep. 67 b. Fost. 351.

(t) 3 B. & P. 463.

(u) 1 N. R. 210.

(v) 3 T. R. 646. See *Reg. v. Bidwell*, ante, vol. 1, p. 576.

(w) See acc. 1 Phil. Ev. 498. But Mr. Starkie, vol. 1, Ev. 450, note (l), observes that the distinction between the gist, and that which is the inducement, is not always clear. If by *inducement* such averments only be meant as are not material, but which, if struck out, would leave a valid charge behind, there is no question; but if the term include essential and material averments, then proof being necessary, *legal proof* is essential, and that must, it should seem, depend upon the nature of the allegation itself,

and not upon its mere order or connection in point of time, or otherwise, with other material averments. On the other hand, it is certain that whenever an allegation is material and essential, whether it fall within the scope of the term *inducement* or not, or whatever its connection may be in the order of time, or otherwise, with the other essential averments, it must be proved according to the precise and particular, though superfluous, description with which it is encumbered. Ibid.

(x) *Rex v. Plestow*, 1 Campb. 494.

(y) Cook's case, 1 Leach, 105. 2 East, P. C. c. 16, s. 48, p. 616, ante, vol. 2, p. 363.

(z) *Rex v. Loom*, R. & M. C. C. R. 160, ante, vol. 2, p. 363. But see *Reg. v. McCulley*, ante, vol. 2, p. 365.

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and not by cutting, the judges held that as the statute used the alternative '*stab or cut*,' the variance was fatal. (a) If, on an indictment for perjury, the oath is stated to have been taken at the assizes, before justices assigned to take the said assizes, it will be a fatal variance if the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery. (b) In an indictment on the 43 Geo. 3, c. 56, the intent laid was to murder, to disable, or do some grievous bodily harm; the intent found by the jury was to prevent being apprehended; it was held by the judges, on a case reserved, that a conviction could not be supported. (c) Where the prisoner was charged with being at large after an order for his transportation, and the indictment stated that his Majesty extended his mercy to him upon condition of his being transported for life beyond the seas; and it appeared in evidence that the condition upon which he received the royal mercy was not general, as the indictment stated, but specific, that he should be transported to New South Wales or some of the islands adjacent, the judges held the conviction wrong. (d)

Misnomer of party whose existence is essential to the charge.

The name of any party whose existence is essential to the charge must be proved in conformity to that laid in the indictment, (e) for a misnomer of him is usually fatal. (f) And if such person be described as a certain person to the jurors unknown, and it appear in evidence that his name clearly was known, the prisoner cannot be convicted. (g) Where a person is described by name simply, without addition, proof that there are two persons of that name is no variance, for the allegation is still true. Upon an indictment for an assault upon Elizabeth Edwards it appeared that there were two of that name, mother and daughter, and that in fact the assault had been made on the daughter; but the conviction was held to be good. (h) So where an indictment

(a) *Rex v. McDermot*, R. & R. C. C. R. 356. See also *Rex v. Douglas*, *ante*, vol. 2, p. 649.

(b) *Rex v. Lincoln*, R. & R. 421. But in an indictment for perjury alleged to have been committed on the trial of a cause before one of the judges of the King's Bench, without a *prout patet per recordum*, it is no variance that the *postea* alleges the trial to have taken place before the Lord Chief Justice, the cause having, in fact, been tried before the judge specified. *Rex v. Coppard*, M. & M. 118, Lord Tenterden, C. J. So where the indictment alleged that the cause came on to be tried before E. W., one of the judges, &c., and it was stated in the *nisi prius* record in the usual form that the cause was tried before the two judges of assize, one of whom was E. W., it was held no variance. *Rex v. Alford*, 14 East, R. 218.

(c) *Rex v. Duffin*, R. & R. 365.

(d) *Fitzpatrick's case*, R. & R. 512.

(e) *Reg. v. Dent*, 2 Cox, C. C. 354, where there was no proof of any Christian name. *Earl of Cardigan's case*, cited Dears. C. C. 477.

(f) 1 Stark. Ev. 470. See *ante*, p. 307, as to the misnomer of the person stated to

be the owner of the dwelling-house, in burglary, and on an indictment under the Black Act. On an indictment for stealing in a dwelling-house to the value of 5*l.*, the name of the owner of the house must be proved as laid. *Ante*, vol. 2, p. 86. So on an indictment for robbing a dwelling-house in the day-time, some person being therein, the name of some person who was in the house at the time must be correctly stated. *Rex v. Kelly*, Carr. Suppl. 42. The 7 Geo. 4, c. 64, extends only to remedy the misnomer of the *defendants*, when pleaded in abatement.

(g) 1 East, P. C. 651. *Rex v. Robinson*, Holt, N. P. C. 595. *Rex v. Walker*, 3 Campb. 264. *Rex v. Deakin and Smith*, 2 Leach, 863. But if the charge against an accessory is that the principal felony was committed by *persons unknown*, it is no objection that the same grand jury have found a true bill imputing the principal felony to I. S. *Rex v. Bush*, R. & R. 372. See *ante*, vol. 2, p. 296.

(h) *Rex v. Peace*, 3 B. & A. 579. The court said, 'The question here is, not whether the party has been rightly described, but who the party is who is described in the indictment as having been assaulted.' But, generally, if the father

laid the property of a horse in Joshua Jennings, it was held to be supported by proof of property in Joshua Jennings the younger. (i) So where an indictment for perjury alleged a suit to have been between Peacock and R. Miles, and the proceedings stated the suit to have been between Peacock and R. Miles the elder, it was held no variance. (j) So where an indictment for perjury alleged that there was a plaintiff, in which William Withers, the younger, was plaintiff, and the plaintiff was merely 'William Withers, plaintiff,' it was held that this was no variance. (k) The prosecutor may be described by the name he has assumed, though it is not his right name; thus where the goods stolen were laid to be the property of Mary Johnson, and the prosecutrix stated that her original name was Mary Davies, but that she had been called and known by the name of Mary Johnson, and not Mary Davies, for the last five years, and had not taken the name of Johnson for any purpose of concealment or of fraud; the judges, on a case reserved, were of opinion that the time the prosecutrix had been known by the name of Johnson warranted her being called so in the indictment. (l) And so a person is well described by the name by which he is generally known. Thus where a count for offering a bribe to an officer of the customs stated his name as Thomas Dabbs, and he proved that his true name was Thomas Tyrrel Dabbs, but that he generally went by the name of Thomas Dabbs, and signed his name Thomas Dabbs without Tyrrel, it was held that this was no variance. (m) So where an indictment for robbery laid the property in John Hancox, and it appeared that his name was John Walter Hancox, but that he was generally known by the name John Hancox, Parke, J., held that this was sufficient. (n) So where in an indictment a boy was called Edward Dobson, and he stated that his right name was Dobson, but that most persons who knew him called him Peach, and that his mother had married two husbands, the first named Peach and the second Dobson, and that he was told by his mother that he was the son

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Name assumed.

By which a person is generally known.

and son be both named A. B., by A. B. simply the father shall be intended, *Willson v. Stubbs*, Hob. 330. *Lepiot v. Browne*, 1 Salk. 7. *Sweeting v. Fowler*, 1 Stark. N. P. C. 106. *Stebbing v. Spicer*, 8 C. B. 827.

(i) *Hodgson's case*, 1 Lewin, 236, Parke, J. *S. P. Bland's case*, *ibid.* Boland, B.

(j) *Rex v. Bailey*, 7 C. & P. 264, Williams, J., who cited a MS. case where it was alleged that there was an indictment against A. B. and C. D., at a former time, and on the record being produced it appeared that it was an indictment against A. B. and C. D., the younger, and Lawrence, J., held it a fatal variance; on which it was observed that that must have been on the ground that if a person was named simply it meant the elder.

(k) *Reg. v. Withers*, 4 Cox, C. C. 17. Rolfe, B.

(l) *Rex v. Norton*, R. & R. 510.

(m) *Attorney-General v. Hawkes*, 1 Tyrw. 3, and per Alexander, C. B., 'By the aid of an averment of the identity of Thomas Dabbs and Thomas Tyrrel Dabbs,

the defendant might plead an acquittal on this information, by way of *autrefois acquit*, to another information for offering a bribe to Thomas Tyrrel Dabbs on this occasion.'

(n) *Rex v. Berriman*, 5 C. & P. 601. See *Rex v. Sheen*, 2 C. & P. 634. And see *Rex v. —*, 6 C. & P. 408, where an indictment for stealing a whip, the property of Richard Pratt, was held to be sustained by evidence that the prosecutor was generally known by that name, although his proper name was Richard Jeremiah Pratt. And see *Williams v. Bryant*, 5 M. & W. 447, where the defendant executed a bond in the name of William Bryant, being known at that time by that name, his real name being William Francis Bryant, and the court held that the proof was sufficient upon the plea of *non est factum*. In *Reg. v. Lippiatt*, 1 Cox, C. C. 56, the indictment charged an assault on Sarah Bath, who had been christened Sarah Anne Bath, but had been known in the family by the name of Sarah only; and Cole-ridge, J., is reported to have held this a fatal variance. Sed quære.



of the latter, and that she always used to call him Dobson; it was held that the evidence that the boy's mother had always called him Dobson must be taken to be conclusive as to his name, and that, therefore, he was rightly described in the indictment. (o)

Name  
changed at  
confirmation.

On an indictment for administering poison to Patrick Henry Smith, who had been christened by those names, but had been sometimes called Henry and sometimes Patrick, and never Patrick Henry, except by his mother, and had been confirmed eighteen years before by the name of Henry, and had generally been called Henry afterwards, and had signed the name of Henry when he was married; Maule, J., said, 'It appears to me that the prosecutor is misdescribed; he has been commonly known by the name of Henry and of Patrick, but not of Patrick Henry. Then, again, although that is his name by baptism, he has since been confirmed by another, and in *Sir F. Gawdy's case* (p) it is laid down that where a man is confirmed by a different name from his baptismal one, he must be described by the name of confirmation. My brother Coleridge agrees with me that the prisoner must be acquitted.' (q)

Of bastards.

And where on the indictment of Frances Clark for the murder of 'George Lakeman Clark, a base-born infant male child,' it appeared in evidence that the deceased child was a bastard son of the prisoner, and that she murdered it, as charged in the indictment, but that the child was christened George Lakeman, being the names of its reputed father, and that it was called George Lakeman, and not by any other name known to the witnesses, and that the prisoner called it George Lakeman; the judges held that as the child had not obtained his mother's name by reputation, he was improperly called Clark in the indictment, and as there was nothing but the name to identify him in the indictment, the conviction could not be supported. (r)

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Waters' case.

And so where an illegitimate child, three weeks old, had been baptized by the name of 'Eliza,' but no surname was mentioned at the time of baptism, and neither the register, nor any copy of it, was produced at the trial, and an indictment for murder described her as 'Eliza Waters,' Waters being the name of her mother; it was held, upon a case reserved, that the child had not acquired the name of Waters by reputation, and that the conviction was wrong. (s) Where, however, an indictment charged the murder of Emma Evans, and it appeared that the deceased was an illegitimate child born in a workhouse, and baptized on the 9th of September by the name of Emma, and drowned on the 11th of the same month, when about six weeks old, and that up to the time of the baptism she was not called by any name, but that from the 9th to the 11th of September she was called Emma Evans, Evans being the mother's name; it was held that there was sufficient evidence of reputation for the consideration of the jury, and that this case was distinguishable from the last, because there was no evidence there that the child was ever called Waters at all. (t) And where, on an in-

Evans' case.  
Name by re-  
putation.

Smith's case.

(o) *Rex v. Williams*, 7 C. & P. 298, Williams, J., after consulting Alderson, B.

(p) Co. Litt. 3 a.

(q) *Reg. v. Smith*, 1 Cox, C. C. 248. But quære whether the authorities show more than that the name of confirmation

is a good name.

(r) *Rex v. Clark*, R. & R. 358.

(s) *Rex v. Waters*, R. & M. C. C. R. 457, S. C. 7 C. & P. 250.

(t) *Reg. v. Evans*, 8 C. & P. 765, Erskine, J., after consulting Patteson, J.

dictment for the murder of 'a certain female child whose name to the jurors was unknown,' it appeared that the child had not been baptized, but the prisoner had said she should like it to be called 'Mary Ann,' and had called it 'her Mary Ann' at one time, and 'Little Mary' at another; the father was a baptist, and the child was a bastard, and twelve days old; and, upon a case reserved, it was held that the child had not gained a name by reputation, and therefore the indictment was right. (*u*) Where an indictment for larceny laid the goods stolen to be the property of *Victory Baroness Turkheim*, and the prosecutrix proved that Baroness Turkheim was her title only, and no part of her proper name, but that she was not only reputed to possess that title, but did actually possess it in right of an estate inherited from her father, and that she had constantly and uniformly acted in and been known by that appellation, but that her name without her title was Selina Victoria; the judges held the description sufficient. (*v*) So where an information for libel described the prosecutor as 'His Serene Highness Charles Frederick Augustus William, Duke of Brunswick and Luneburg,' but his proper name was Charles Frederick William Augustus d'Este, and he had been formerly reigning Duke of Brunswick and Luneburg, and was still commonly called by that title, but he had in fact ceased to be reigning duke, the Court of Queen's Bench held the description sufficient, as it was that by which he was well known. (*w*)

A transposition of the order in which names are borne causes a variance. Thus it is a variance to describe Henry Jules Steiner as Jules Henry Steiner. (*x*)

Transposition of names.

But if the name proved be *idem sonans* with that in the indictment, and different in spelling only, the variance will be immaterial. Thus Segrave for Seagrave is no variance, (*y*) nor is Benedetto for Beniditto, (*z*) nor is McNicole for McNicoll. (*a*) So on an indictment for committing an offence on one John Whyneard it appeared that his name was spelt Winyard, but it was pronounced Winnyard; and the judges, on a case reserved, held that the prisoner had been rightly convicted. (*b*) But an indictment charging the prisoner with having personated 'Peter Mc'Cann' is not supported by evidence that he personated 'Peter Mc'Carn.' (*c*) So it has been decided that 'Shakespeare' cannot

*Idem sonans.*

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(*u*) *Rex v. Smith*, R. & M. C. C. R. 402, S. C., 6 C. & P. 151. See other cases on this subject, vol. 1, p. 765.

(*v*) *Sulls' case*, 2 Leach, 861. An indictment for a robbery on an unmarried woman in her maiden name is good, although she marry before the indictment is found. *Rex v. Turner*, 1 Leach, 536. Where an indictment charged the prisoner with the manslaughter of Mark Robinson, and a witness stated that the deceased stayed three days and nights at his inn, and that he asked the deceased his name, and that letters came directed in that name, which letters were delivered to the deceased, and received by him; Patteson, J., held that the witness might be asked what name the deceased told him, as it was evidence to show the name by which he usually went. *Rex v. Timmins*, 7 C. &

P. 499.

(*w*) *Reg. v. Gregory*, 8 Q. B. 508. *Rex v. Sulls*, 2 Leach, 861, was considered by the court as decisive on the point. This report omits the name Augustus among the proper names, but the marginal note shows this was a mere mistake, and the names are all given in 2 Sess. C. 229.

(*x*) *Reg. v. James*, 2 Cox, C. C. 227. Pollock, C. B.

(*y*) *Williams v. Ogle*, 2 Stra. 889.

(*z*) *Abitbol v. Beniditto*, 2 Taunt. 401. In *Reg. v. Withers*, 4 Cox, C. C. 17, Rolfe, B., is reported to have amended an indictment by substituting 'harniss' (harness) for 'harnis'; but the amendment seems to have been unnecessary.

(*a*) *Reg. v. Wilson*, 1 Den. C. C. 284.

(*b*) *Rex v. Foster*, R. & R. 412.

(*c*) *Rex v. Tannet*, R. & R. 351.

be considered as *idem sonans* with 'Shakepear.' (*d*) Whether two names sound alike is a question for the jury, and not for the court. (*e*)

Evidence of name.

Upon an indictment for robbing Thomas Bent, it was proved by a witness that he knew Lieutenant Bent, and saw him sign his name twice—once to the charge of the robbery, and once to the deposition in support of the charge, and from those signatures he knew his name to be Thomas Bent; but, except so far as he knew the fact from having seen Lieutenant Bent sign his name on those occasions, he knew nothing about his Christian name. So much only of the complaint and deposition as showed that they had been signed by Lieutenant Bent in the presence of the witness was then read; and, upon a case reserved, it was held that, although the evidence was open to observation to the jury, yet that there was no doubt that it was admissible as evidence of the Christian name of Lieutenant Bent. (*f*) So where an information for libel alleged that a certain person had murdered E. Grimwood, and the coroner proved that on the inquest on a female she was called by the witnesses E. Grimwood, and he produced an inquisition on paper purporting to be taken on the body of E. Grimwood, it was held that this was evidence that the deceased went by that name. (*g*)

Variance between writings, &c., stated in indictment and produced in evidence.

Many fatal variances have arisen in cases where it is necessary to state a record, deed, or other writing in the indictment, between such statement, and the record, deed, or writing, when produced in evidence. (*h*) Where the matter of a written instrument is introduced in pleading by the words 'according to the tenor following,' or 'of the tenor following,' or 'in the words and figures following,' or 'the words and matters following,' or in fact any words which imply that a correct recital is intended, any the slightest variance between the instrument set out and that produced in evidence was fatal. (*i*) But a most salutary statute, 9 Geo. 4, c. 15, was passed to provide against variances of this description, in cases of misdemeanors, which, after reciting that 'great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time,' enacts that 'it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on

9 Geo. 4, c. 15, for amending variances between matters in writing or print and the record in cases of misdemeanor.

(*d*) *Rex v. Shakespeare*, 10 East, 83. So *Tarbart* for *Tabart* is a fatal variance in a bail piece. *Bingham v. Dickie*, 5 Tamt. 14.

(*e*) *Reg. v. Davis*, 2 Den. C. C. 231. In this case the indictment laid stolen property in *Darius*, C., and he said that his name was *Trius*, and the sessions held that the names were *idem sonantia*, as *Darius* (as pronounced in the Dorset dialect, *D'rius*) and *Trius* sounded alike;

and it was held that it was a question of fact for the jury, and not of law for the court; and the judges could not affirm as matter of law that the two names sounded alike.

(*f*) *Reg. v. Toole*, D. & B. 194.

(*g*) *Reg. v. Gregory*, 8 Q. B. 508.

(*h*) See the cases collected in 1 Stark. Ev. 431, *et seq.*

(*i*) 2 East, P. C. 976. Arch. Cr. Pl. 46 & 99.



which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanour, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party as such judge or court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at nisi prius, the order for the amendment shall be indorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued shall be amended accordingly.'

It was held in two cases that amendments ought to be made very sparingly under this statute, and it seems they ought not to be made where the variance might have been avoided by ordinary care in comparing the indictment and the instrument. (*j*) In the first case the indictment alleged that a judgment was entered up in or as of Trinity Term, in the 5 Wm. 4,' and in the margin of the copy of the record when produced was entered 'June the 26th, 5 Wm. 4,' pursuant to the Rule H. T., 4 Will. 4, s. 3, and it was held that the judgment was not properly stated, and an amendment refused. (*k*) And in the second the indictment, in stating a commission to examine witnesses on interrogatories, alleged that the commissioners were commanded to examine the witnesses, and the commission commanded the commissioners, or any three or two of them, to examine the witnesses, and the variance was held fatal, and an amendment refused. (*l*) But where an indictment for perjury alleged that the defendant produced an affidavit entitled in the Court of Chancery, and in the suit therein at the suit of E. J. Christian, and in the suit therein at the suit of the Commissioners of Charitable Donations and Bequests in Ireland, and the affidavit when produced was entitled 'In Chancery between the Commissioner of Charitable Donations and Bequests in Ireland,' &c., Lord Denman, C. J., ordered the record to be amended by striking out the word 'entitled.' (*m*) And where an

Amendments under this statute were sparingly made in criminal cases.  
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(*j*) In *Jelf v. Oriel*, 4 C. & P. 22, Lord Tenterden, C. J., refused to amend the declaration, on the ground that the mistake arose from want of common care in drawing it; but in many instances it has been the want of common care that caused the mistake, and to prevent the failure of justice through such carelessness or ignorance was one of the objects of the legislature in passing the Act. 1 Phil. Ev. 518.

(*k*) *Rex v. Cooke*, 7 C. & P. 559, Patteson, J., and Littledale, J.

(*l*) *Reg. v. Hewins*, 9 C. & P. 786, Coleridge, J.

(*m*) *Reg. v. Christian*, C. & M. 388. Where in a civil suit the declaration stated as matter of inducement a judgment recovered in the Queen's Bench, and the examined copy of the judgment being produced turned out to be a judgment in the Common Pleas, Lord Tenterden, C. J., allowed the record to be amended, as the Act allows the amendment where any

variance appears between any matter in writing produced in evidence and the recital or setting forth thereof on the record, and the examined copy of the judgment was a matter in writing so produced, and the statute therefore authorized the amendment. *Briant v. Eicke*, M. & M. 359. So an amendment in the date of a bill of exchange has been allowed. *Bentzing v. Scott*, 4 C. & P. 24, Parke, J. And where a declaration stated that the plaintiff caused to be left with the defendant a copy of a writ of *subpoena*, and it appeared that the original writ was directed to the defendant and two others, while the copy was directed to him and John Doe, the latter name not appearing in the original subpoena at all; Lord Tenterden, C. J., allowed the allegation to be altered into 'a copy of so much of the said writ of subpoena as related to the said defendant;' and the Court of Common Pleas held the amendment was properly made. Master-

indictment for perjury stated that the defendant made an affidavit, in which (amongst other things) he swore that an officer, who had arrested him, was appointed 'at the special instance and *part* of the said plaintiff,' and the affidavit itself stated that the officer was appointed 'at the special instance and *peril* of the said plaintiff,' it was held that the indictment might be amended, no assignment of perjury being made upon that averment. (*n*) The same indictment set out another part of the affidavit (on which also there was no assignment of perjury) thus: the officer 'went round to the door of the back kitchen of the deponent's said dwelling-house, which is the *only outer door* of the same,' and in the affidavit itself the words were 'the *only other outer door*,' and it was held that this variance might be amended. (*o*)

Courts of  
oyer and ter-  
miner may  
cause indict-  
ments for any  
offence to be  
amended in  
certain cases.

The 11 & 12 Vict. c. 46, s. 4, recites that 'a failure of justice frequently takes place in criminal trials by reason of variances between writings produced in evidence and the recital or setting forth thereof in the indictment or information, and the same cannot now be amended at the trial, except in cases of misdemeanor,' and enacts 'that it shall and may be lawful for any court of oyer and terminer and general gaol delivery, if such court shall see fit so to do, to cause the indictment or information for any offence whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court, and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared.'

Amendment  
of indictments  
by the  
sessions.

By the 12 & 13 Vict. c. 45, s. 10, 'every court of general or quarter sessions of the peace, on the trial of any offence within its jurisdiction, whenever any variance or variances shall appear between any matter in writing or in print produced in evidence, and

man *v.* Judson, 8 Bing. R. 224. And upon the authority of this case the Court of King's Bench held that a statement of a contract in the declaration might be amended so as to agree with the written contract produced at the trial, as to the time for the performance of it, though it did not appear in the declaration whether the contract was in writing or not. *Laney v. Bishop*, 4 B. & Ad. 479, and per Taunton, J. 'If the plaintiff had declared upon a contract in writing the Act would apply; then it is absurd to say that it does not apply, because the plaintiff has omitted the words "by agreement in writing," which in pleading are unnecessary.' This case seems to overrule *Ryder v. Malbon*, 3 C. & P. 594, where Park, J. A. J., held that a statement in an avowry of the terms of the holding could not be amended so as to make them conformable with the lease produced at the trial. In *Smith v. Brandram*, 2 M. & Gr. 244, a material variance in point of legal effect between a contract of guarantee produced in evidence, and

the contract set out in the declaration, was held amendable under this statute. In *Brooks v. Blanchard*, 3 Tyrw. 844, C. & M. 779, which was an action for a libel contained in a letter, the letter having been burnt, the Court of Exchequer held that a variance between the libel as set out in the declaration, and the parol evidence of the contents of the letter, could not be amended, as this Act only applies where the variance is between some matter in writing or in print produced in evidence, and its recital on the record. It may be added that in *Prudhomme v. Fraser*, 1 M. & Rob. 435, Lord Denman, C. J., refused to order superfluous averments and innuendos in a declaration for libel to be struck out at the trial under the 3 & 4 Will. 4, c. 42, s. 23. Mr. Starkie, 1 Ev. 495, treats this as a decision under the 9 Geo. 4, c. 15, but that is an error, and that statute seems clearly not to apply to such a case. C. S. G.

(*n*) *Reg. v. Newton*, 1 C. & K. 469.

(*o*) *Reg. v. Newton*, *supra*.

the recital or setting forth thereof in the indictment, shall have the same power in all respects to cause the indictment to be amended which is given to courts of oyer and terminer and general gaol delivery with regard to offences tried before such last-mentioned courts by virtue of an Act of the twelfth year of Her Majesty's reign, intituled 'An Act for the Removal of Defects in the Administration of Criminal Justice;' and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise as if no such variance or variances had appeared.<sup>7</sup>

11 & 12 Vict.  
c. 46.

The 14 & 15 Vict. c. 100, reciting that 'offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case: and whereas such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence;' enacts, by sec. 1, that 'whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence, or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at nisi prius the order for the amendment shall be endorsed on the postea, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper

The court may amend certain variances not material to the merits of the case, and by which the defendant cannot be prejudiced in his defence, and may either proceed with or postpone the trial to be had before the same or another jury.



Respiteing re-  
cognizances.

officer, and in all other cases the order for the amendment shall either be endorsed on the indictment or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: Provided that in all such cases where the trial shall be so postponed as aforesaid it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: Provided also, that where any such trial shall be to be had before another jury the Crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.'

Challenges.

Verdicts and  
judgments  
valid after  
amendments.

Sec. 2. 'Every verdict and judgment which shall be given after the making of any amendment under the provisions of this Act shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment was made.'

Records to be  
drawn up in  
amended  
form, without  
noticing the  
amendments.

Sec. 3. 'If it shall become necessary at any time, for any purpose whatsoever, to draw up a formal record in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.'

Definition of  
indictment.

By sec. 30, 'the word indictment shall be understood to include "information," "inquisition," and "presentment," as well as indictment, and also any "plea," "replication," or other pleading, and any nisi prius record.'

Comparison of  
the statutes of  
amendment.

On a comparison of these several enactments, it will be seen that the 9 Geo. 4, c. 15, empowered any judge at nisi prius, or any court of oyer and terminer and general gaol delivery, to amend any variance, in cases of *misdemeanor* only, between *any matter in writing or in print* and the recital or setting forth thereof upon the record. The 11 & 12 Vict. c. 46, s. 4, empowered any court of oyer and terminer and general gaol delivery to amend any variance in *any offence whatever* between *any matter in writing or in print* and the recital or setting forth thereof on the record. The 12 & 13 Vict. c. 45, s. 10, gave the same power of amendment to every court of general or quarter sessions, on the trial of any offence within its jurisdiction, as was given by the 11 & 12 Vict. c. 46, to courts of oyer and terminer and general gaol delivery. Lastly, the 14 & 15 Vict. c. 100, empowers every court on the trial of *any felony or misdemeanor* to amend any of the variances therein included, whether there be any writing to amend by or not.

Questions to  
be considered  
as to making  
amendments.

In considering whether a variance should be amended under these statutes the court will have to determine the following questions: 1st, whether the variance be in one of the matters included in these statutes; 2ndly, whether it be 'not material to the merits

of the case;’ and lastly, if it be not material to the merits of the case whether the defendant may be prejudiced by the amendment in his defence on such merits. (*p*)

Under the three earlier statutes the amendment is confined to variances between matters in writing or in print and the statement of them in the indictment.

As to the matters in which amendments may be made.

Under the 14 & 15 Vict. c. 100, the amendment may be made in the following cases:—

1. The name of any county, riding, division, city, borough, town corporate, parish, township or place mentioned or described in the indictment.

2. The name or description of any person or persons, or body politic or corporate, stated in the indictment to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein.

3. The name or description of any person or persons, body politic or corporate, alleged to be injured or damaged, or intended to be injured or damaged, by the commission of the offence charged in the indictment.

4. The Christian name or surname, or both the Christian name and surname, or other description of any person or persons named or described in the indictment.

5. The name or description of any matter or thing whatsoever named or described in the indictment.

6. The ownership of any property named or described in the indictment.

With regard to the ‘merits of the case,’ these terms, as applied to all criminal cases, obviously mean the substantial truth and justice of the case with reference to the guilt or innocence of the prisoner. When we say that a prisoner has been acquitted upon the merits, we mean that the jury have heard and considered all the evidence adduced with reference to the guilt or innocence of the prisoner of the offence charged, and have acquitted him on the ground that the charge was not proved. It would be a perversion of language to say that a prisoner had been acquitted on the merits, when he was acquitted on the ground of some trifling variance or technical objection. It is to be observed also that a matter may well constitute some part of the merits of a case, and yet a variance as to such matter may not be material to the merits of the case within the meaning of this Act. Thus on a trial for stealing an animal, the proof of the animal as described constitutes a part of the merits of the case, and yet the description of it as a ewe instead of a lamb may not be in the least degree material to the merits of the case, as the animal may be of such an age that it may be doubtful whether the one or the other appellation be more correct. (*q*)

Merits of the case.

It is also to be observed that the amendment may be made, As to the

(*p*) The last Act only specifies the 2nd and 3rd particulars, but it is obvious that any court would take them into its consideration in determining whether an amendment ought to be made under the previous statutes.

(*q*) In the *Pacific Steam Navigation Co. v. Lewis*, 16 M. & W. 783, Pollock,

C. B., said, that ‘not material to the merits’ means not material to the *real question between the parties*; Parke, B., ‘By the term “merits of the case,” I understand the *substantial merits of the case*;’ and Rolfe, B., ‘The words “not material to the merits” mean not material to the *real merits of the case*.’

prejudice to  
the defendant.

unless the defendant may be 'prejudiced thereby *in his defence upon such merits.*' A prejudice therefore to the defence is not sufficient: it must be a prejudice to *the defence upon the merits.* Indeed wherever any variance occurs, an amendment may be said to prejudice the defence: for if it were not made, the prisoner would be acquitted. The prejudice, therefore, which is to prevent an amendment, is confined to a prejudice to the defence upon the merits, which clearly means a substantial and not a formal or technical defence to the charge.

The power of  
amendment  
ought to be  
liberally ex-  
ercised.

We have seen that in two cases under the 9 Geo. 4, c. 15, it was held that amendments in criminal cases ought to be sparingly made: (*r*) but it must be remembered that those cases occurred at a time when the power of amendment may be considered as having been on its trial, and the legislature had not then spoken in the clear language in favour of amendments, either in civil or criminal cases, which it has since used, and therefore these cases can no longer be considered as any authority. It has been well laid down by a very learned judge, that a statute like the 14 & 15 Vict. c. 100, should have a wide construction, and should not be interpreted in favour of technical strictness, (*s*) and there are very strong reasons why a liberal construction should be made on such a statute. If a prisoner is acquitted on the ground of a variance, he may be again more correctly indicted; and wherever this course is adopted, the effect of an acquittal on such a variance is to put both the prosecutor and prisoner to additional trouble and expense. And in cases where no fresh indictment is preferred, the result is that the costs of the prosecution are thrown away, and an offender, possibly a very notorious one, escapes the punishment he deserves. In every case where an acquittal takes place in consequence of a variance, the court may order a fresh indictment to be preferred, and the prisoner to be detained in prison or admitted to bail till it is tried; and it may be well for the court, where a variance occurs, to consider whether the prisoner might not fairly be presented with the option either of having the amendment made, or of being indicted anew in a better form.

Variance in  
name.

In one case it has been distinctly laid down that a variance in a name ought to be amended, (*t*) and there is a good reason why this should always be done, as on a subsequent trial the prisoner might prove that the person was as well known by the one name as the other, (*u*) and so escape altogether.

Variance in a  
plea.

Where a variance occurs in a plea to an indictment for the non-repair of a highway, an amendment should always, if possible, be made; for if the verdict be against the defendants on such a plea, they are fixed with the liability to repair, though in truth others were really liable. (*v*)

(*r*) *Ante*, p. 319.

(*s*) Per Byles, J., *Reg. v. Welton*, 9 Cos. C. C. 297, *post*, p. 325. In *St. Losky v. Green*, 9 C. B. (N. S.) 370, Byles, J., said, 'Various statutes have from time to time for more than 500 years been passed, from the 14 Edw. 3, c. 6, downwards, to facilitate amendments, but the strict and almost perverse construction which the judges put upon them rendered them nearly abortive. But now a totally dif-

ferent principle prevails; every amendment is to be made which is necessary for determining the real question in controversy between the parties.'

(*t*) Per Parke, B., *Reg. v. Frost*, Dears. C. C. 474, *post*, p. 328.

(*u*) See *Rex v. Sheen*, 2 C. & P. 634, *ante*, vol. 2, p. 57.

(*v*) See *Rex v. Rockfield*, MSS. C. S.G. *ante*, vol. 1, p. 517.



Where an indictment described a statute as ‘An Act of Parliament made and passed in the seventh and eighth years of the reign of her present Majesty,’ it was held that the court had power under the 14 & 15 Vict. c. 100, s. 1, to amend the indictment by striking out the words here printed in italics. (w) So where the title of an Act of Parliament was inaccurately stated in an indictment, but a petition to the Insolvent Court was alleged to have been presented on a day after the passing of the Act, it was held, on a case reserved, that the reference to the statute might be rejected, as the court were bound to take notice of the day on which the statute passed. (x) And where the title of an Act of Parliament is not accurately stated, but is stated with so much clearness and accuracy as to enable the judges, who are presumed to know the titles of all the Acts that have ever passed, to know the Act referred to, and to leave no possible doubt upon their minds upon the matter, a very strong opinion has been expressed that, notwithstanding the decided cases, a variation so small and insignificant furnishes no ground of objection. (y)

Description of Acts of Parliament.

An indictment alleged that the prisoner committed perjury on the trial of an indictment for setting fire to a certain barn; but the record was of an indictment for setting fire to a certain stack of barley, and it was held that the words stack of corn might be inserted instead of barn, as this was one of the very cases for which the statute was passed. (z)

In stating a trial for arson.

Where goods were laid as the property of M. Archard, who was a carman, and the clerk of the London Dock Company had delivered the goods by mistake to the prisoner, who had been sent by Archard for other goods, it was held that the indictment was properly amended by inserting the London Dock Company for M. Archard. (a) So where the prisoner was charged with throwing Annie Welton into the water with intent to murder her, and there was no proof of the name of the child, it was held that the indictment might be amended by striking out Annie Welton and inserting ‘a certain female child whose name is to the jurors unknown,’ by Byles, J., who said, ‘Here the amendment cannot prejudice the prisoner in her defence, and I consider the variance not material to the merits of the case. A statute of this kind should have a wide construction, and I shall not interpret it in favour of technical strictness.’ (b)

Ownership of goods.

Name of child.

An indictment alleged that a footway led from a turnpike-road into the town of Gravesend, but the highway was a carriage-way from the turnpike-road to the top of Orme House Hill, and from thence to Gravesend it was a footway, and the nuisance alleged was between the top of Orme House Hill and Gravesend; it was held that the indictment might be amended by substituting a description of a footway running from Orme House Hill to

Description of a highway.

(w) Reg. v. Westley, Bell, C. C. 193.  
(x) Reg. v. Westley, *supra*.  
(y) Per Pollock, C. B., Reg. v. Westley, *supra*, who said he believed this to be the opinion of every other member of the court.  
(z) Reg. v. Neville, 6 Cox, C. C. 69, Williams, J.  
(a) Reg. v. Vincent, 2 Den, C. C. 464,

3 C. & K. 246.  
(b) Reg. v. Welton, 9 Cox, C. C. 297. In Pratt v. Hanbury, 14 Q. B. 190, the plea stated that certain goods were stolen by some person unknown, and it was held that the plea was properly amended by substituting ‘John Press’ for a person unknown according to the evidence on the trial.

Gravesend, as this appeared to be the very sort of case for which the legislature meant to provide. (*c*)

Of parties  
liable to repair  
a highway.

Where an indictment for the non-repair of a highway charged the inhabitants of the whole township of Dukinfield with the liability to repair, and it was objected that by the Stalybridge Improvement Act, 9 Geo. 4, c. 26, the inhabitants of that portion of the township which lies within the limits of the town of Stalybridge were exempted from liability to repair highways within the parts of the township not within these limits, except as to a certain road, not the subject of this indictment; Keating, J., whilst expressing a doubt as to his power to amend, decided that the indictment should be taken as amended, so as to comprise only the inhabitants of the parts of the township lying beyond the limits of the town of Stalybridge. (*d*)

In bigamy.

An indictment for bigamy alleged that the prisoner was apprehended in the county of Gloucester, and this not being proved, it was held that it might be amended by alleging that the prisoner was in custody in that county. (*e*)

In gaming.

In a civil case an amendment has been made in a plea by substituting that a promissory note was given for money lost to J. Lowten *and others* at a certain illegal game, to wit, the game of *hazard*, instead of J. Lowten and blind-hookey. (*f*)

Amendment  
after one pri-  
soner has  
pleaded  
guilty.

One count charged Winch with stealing the property of E. Robinson and others; another count charged Chaplin with the substantive felony of receiving the aforesaid goods. Winch pleaded guilty, and on the trial of Chaplin the felonious receiving was proved, but the names of the prosecutors were not proved; and it was held that the count for receiving might be amended by stating the goods to be the property of persons unknown. (*g*)

Not to change  
felony into  
misdemeanor,  
or *vice versâ*.

An amendment will not be made where the effect will be to change the offence charged to another offence. On an indictment for abusing a girl above the age of ten and under the age of twelve years, it was proved that the girl was under ten years of age, and it was held that the indictment could not be amended. (*h*) So where on an indictment for forging an undertaking for the payment of money, the instrument turned out not to be of that character, but, if it were a forgery at all, it was a forgery at common law; it was held that there was no power to amend the indictment by striking out the word feloniously. (*i*) Where a count charged the prisoners with assaulting a gamekeeper who attempted to apprehend them whilst committing an offence against the 9 Geo. 4, c. 69, s. 1, and it turned out that the attempt was to

Assaulting a  
gamekeeper.

(*c*) Reg. v. Sturge, 3 E. & B. 734.

(*d*) Reg. v. Dukinfield, 4 B. & S. 158. There was a conviction, but it was held wrong on the facts; but in the argument it was taken for granted that the variance might be amended.

(*e*) Reg. v. Smith, 1 F. & F. 36. See *ante*, vol. 1, p. 274, that this was an unnecessary amendment.

(*f*) Masters v. Barrets, 2 C. & K. 715, Wilde, C. J.

(*g*) Reg. v. Winch, 6 Cox, C. C. 523, Platt, B. The first count charged Winch with stealing the goods of Robinson and

others, and Chaplin with receiving the said goods so feloniously stolen, and a difficulty was started as to amending the charge against Chaplin, as Winch had admitted the goods to be those of Robinson and others; but this difficulty was avoided by amending the count for the substantive felony.

(*h*) Reg. v. Shott, 3 C. & K. 206, Maule, J.

(*i*) Reg. v. Wright, 2 F. & F. 320, Hill, J. It must be remembered that the challenges and the swearing of the jurors differ in felony and misdemeanor.

take tame pheasants; Pollock, C.B., refused to allow the indictment to be amended by alleging an assault in resisting their apprehension whilst the prisoners were committing an indictable offence. (*j*)

An amendment ought not to be made if the indictment would thereby be liable to be objected to on demurrer, though it would be good after verdict; as the prisoner would be deprived of his right to demur to it. (*k*)

An indictment alleged that the prisoner pretended that he had served a certain order of affiliation on J. Bell; but the evidence was that the prisoner had said that he had left the order with the landlady at the Chesterfield Arms, where Bell lodged, he being out; and it was held that there was a variance; for the allegation in the indictment meant a personal service of the order; and that this variance was not amendable under the 14 & 15 Vict. c. 100, s. 1, as it was not a variance in the name or description of any matter or thing named or described in the indictment. (*l*) But where an indictment alleged that the prisoners pretended that a certain vessel called the Castenet was in Penarth Roads, and the evidence failed to show that the prisoners pretended that the vessel was the Castenet, it was held that the indictment might be amended by striking out those words. (*m*)

Where an indictment alleged that the prisoner endeavoured to conceal the birth of her child by placing it in and among a heap of carrots, and the proof was that the body was placed on the back of the heap, so that the middle of the heap by its height hid the body; it was held that, under the 14 & 15 Vict. c. 100, s. 1, there was no jurisdiction to amend the variance. (*n*)

Where an indictment against two bankrupts alleged that they embezzled a part of their personal estate to the value of £10, to wit, certain bank notes and certain moneys, and it rather seemed that the money converted was foreign money; it was held that the statement under the *videlicet* was material, as the indictment would have been bad without a description of the property, and that 'moneys' meant English moneys; and the court refused to amend the indictment. (*o*)

An indictment alleged that Saunders stole a bushel of a certain mixture consisting of oats and peas, and that Robinson received

Where the amendment would make the indictment bad.

The statement of a false pretence cannot be amended.

Disposal of a dead child.

Foreign instead of English money.

Mixture of grain.

(*j*) Reg. v. Garnham, 8 Cox, C. C. 451. See this case, *ante*, vol. 1, p. 646.

(*k*) Reg. v. Lallement, 6 Cox, C. C. 204, Jervis, C. J., and Alderson, B. In this case the indictment alleged that the prisoner shot at a person unknown with intent to murder him, and the amendment proposed was to insert with intent to murder in the words of the 1 Vict. c. 85, s. 2, but the court thought that it might be a question whether the indictment would not then be demurrable for generality; and that the amendment ought to be made in such a manner as that the indictment should not be in any way defective.

(*l*) Reg. v. Bailey, MSS. C. S. G. S. C. 6 Cox, C. C. 29, Greaves, Q.C., after consulting Platt, B.

(*m*) Reg. v. Baroisie, 5 Cox, C. C. 559,

Wightman, J., who does not appear to have been satisfied that the amendment was properly made; as he left the case to the jury on another count, in order to relieve the case from any difficulty as to the amendment.

(*n*) Anonymous, 6 Cox, C. C. 391, Crompton, J., who gave no reason for the decision.

(*o*) Reg. v. Davison, 7 Cox, C. C. 158, Alderson, B., and Coleridge, J. Alderson, B., is reported to have said, 'Neither my learned brother nor myself think that the statute allowing amendments applies to such a case as this.' But the marginal note is that the averment was 'such as the court in its discretion would decline to amend.' The case seems to be one in which an amendment clearly might have been made.



the goods aforesaid so as aforesaid feloniously stolen, and Saunders proved that he stole pure oats and peas, and then mixed them, and afterwards sold them to Robinson, and it was held that there was a variance, as the one prisoner did not steal a mixture and the other did not receive a mixture which had been stolen, and an amendment was refused. (*p*)

It is in the discretion of the court whether an amendment should be made; but where the defect is the want of proof of a name an amendment ought to be made.

An indictment for night-poaching described the land as in the occupation of George William Frederick Charles, Duke of Cambridge, but none of the witnesses was able to prove all the Christian names of the Duke: one witness, however, swore that George William were two of the Christian names of the Duke, but he believed the Duke had some other Christian names, but he could not say what they were. The sessions refused to amend the indictment by striking out the names Frederick Charles; and, on a case reserved on the question whether the sessions were bound to amend the indictment by striking out the names Frederick Charles, it was held that they were not bound to do so, as it was in their discretion whether they would amend or not. That the sessions were quite right not to make an amendment in the manner they were asked to make it; but they would clearly have been wrong if they had been applied to strike out the Christian names altogether, and leave the prosecutor described by his name of office as the Duke of Cambridge, and had refused to do so. (*q*) And that as no amendment was made the prisoners ought to have been acquitted. (*r*)

By what court.

The amendment must be made by the court before which the trial takes place: (*s*) unless the record has been removed into the Court of Queen's Bench and the trial is at Nisi Prius; and in that case the judge, with the consent of counsel, may reserve for the court above the question whether the amendment ought to have been made, with leave to enter a verdict for the Crown if the amendment ought to have been made. (*t*)

Generally an amendment ought to be made before the prisoner's counsel addresses the jury.

On an indictment against the prisoner for receiving goods knowing them to have been obtained from J. Pollard by false pretences, after the prisoner's counsel had addressed the jury, and contended that there was no evidence that the prisoner knew them to have been obtained by false pretences or from Pollard, it was proposed to strike out the words 'from J. Pollard by false pretences;' Williams, J., 'I shall lay it down as a *general rule* that I will not allow an indictment to be amended after the counsel for the defence has addressed the jury. The proper course is, that when the counsel for the prosecution has given all the evidence that he means to give, he should, if he wishes for an amendment, ask for it before he closes his case, and then if the amendment is allowed, the counsel for the prisoner addresses the jury on the indictment so amended.' (*u*) But where the prisoners were charged

But it may be

(*p*) Reg. v. Robinson, 4 F. & F. 43, Pollock, C. B. The marginal note states that, 'there being no evidence but that of the thief, the judge would not amend;' but the body of the report contains no such point. Pollock, C. B., had refused to take a verdict of guilty, as there was no sufficient corroboration of Saunders. This case must not be taken as any authority against amending the description of stolen property. All it amounts

to is that the judge did not think fit to amend on the uncorroborated evidence of the thief.

(*q*) Per Parke, B.

(*r*) Reg. v. Frost, Dears. C. C. 474.

(*s*) Reg. v. Harris, Dears. C. C. 344. Reg. v. Frost, Dears. C. C. 474.

(*t*) Reg. v. Sturge, 3 E. & B. 734. And see Reg. v. Dukinfield, 4 B. & S. 158, *ante*, p. 326.

(*u*) Reg. v. Rymes, 3 C. & K. 326.

with stealing rabbits, the property of Edward Critchley, and the rabbits turned out to be the property of John Critchley and another, but the mistake was not discovered until the prisoner's counsel had addressed the jury; it was held that, notwithstanding the preceding case, the indictment ought to be amended. (r)

made after the address of the prisoner's counsel.

In one case it was said that 'any amendment that is to be made ought to be made before the case is allowed to go to the jury, it being the business of the jury to give their verdict *secundum allegata et probata*; and their verdict must be pronounced upon the indictment as amended;' (w) but it was said in the same case that 'if an amendment be made at all, it should be made before the verdict.' (x)

When the amendment must be made.

Upon full consideration, it seems that the verdict is the dividing line. Any one familiar with criminal trials must have met with cases where variances have not been discovered until just before the verdict is given, and the only limit to the time for amendment is in the words 'on the trial,' and the trial is clearly continuing until the verdict, and the power to amend is given 'whenever on the trial' 'there shall appear to be any variance.'

It must be made before the verdict.

The jury convicted D. Larkin, on a count which charged him with receiving goods, he the said A. Brooksbank knowing them to have been feloniously stolen; and on an objection in arrest of judgment that the *scienter* was badly laid, the sessions amended the count by substituting D. Larkin for A. Brooksbank; but it was held, on a case reserved, that the indictment was bad on the face of it, in not alleging the *scienter*, and there was clearly no power to amend. (y)

An amendment cannot be made after verdict.

Before making an amendment the court should receive all the evidence bearing upon the point; and as this is a question to be determined by the court, and is not to be left to the jury, the evidence bearing upon it which may be in the possession of the prisoner may be interposed when the point arises in the course of the case for the prosecution; and this is much the best course, as the court is thereby enabled to dispose of the point at once; indeed it is now settled that in all cases, whether civil or criminal, where a question is to be decided by the court, the proper course is for the judge to receive all the evidence on both sides at once, and then to determine the question. (z)

All the evidence on both sides should be received before making an amendment.

Where an indictment has been amended on the trial, the indictment in its original form, before it was amended, cannot be considered on a case reserved. (a)

On the trial of indictments for offences which are not local in their nature, generally speaking, it will be sufficient to show that

[800]  
Proof of place

(v) *Reg. v. Fullarton*, 6 Cox, C. C. 194, Monahan, C. J., and Lefroy, C. J., and a similar amendment was made in like manner on the same day, *Monahan, C. J.*, remarking that *Reg. v. Rymes* was no authority.

(w) Per Parke, B., *Reg. v. Frost*, Dears. C. C. 474.

(x) Per Crompton, J., *ibid.* I had observed in Campbell's Acts, p. 9, that 'the amendment must be made in the course of the trial, and certainly before the jury give their verdict, because the trial is to proceed and the jury are to give their opinion upon the amended record.' See

per Alderson, B., *Brashier v. Jackson*, 6 M. & W. 549.

(y) *Reg. v. Larkin*, Dears. C. C. 365. This was the case of a bad count and not one of variance, and not within this section of the statutes at all; but quære whether it might not have been amended before plea under sec. 25 of the statute.

(z) *Bartlett v. Smith*, 11 M. & W. 483, Major Campbell's case there cited by Parke, B., and an Anonymous case, *ibid.* *Boyle v. Wiseman*, 11 Exch. 360. *Reg. v. Hill*, 2 Den. C. C. 254.

(a) *Reg. v. Pritchard*, L. & C. 34, *Reg. v. Webster*, L. & C. 77.



laid, where the offence is not local.

the offence was committed in some place within the county or other division; and a mistake of the place in which an offence is laid will not be material upon the evidence on the plea of not guilty, if the fact be proved at some other place in the same county. (*b*) Although the offence must be proved to have been committed in the county where the prisoner is tried, yet, after such proof, the acts of the prisoner in any other county, tending to establish the charge against him, are properly admissible in evidence. (*c*) This has been determined to be the rule in cases of high treason, and must equally apply to cases of conspiracy and felony. (*d*) Upon the trial of an indictment for a transitory felony the prosecutor need not prove affirmatively that there is such a parish as that laid in the indictment. An indictment for highway robbery laid the offence in the parish of St. Thomas, Pensford, in the county of Somerset, and it was objected by the counsel for the prisoner that there was no proof that there was any such parish in the county, all the witnesses swearing to the parish of Pensford, and not St. Thomas, Pensford; Littledale, J., said the objection was not valid, and that he once reserved a case from the Oxford Circuit on that ground, and a great majority of the judges held that it was not necessary to prove affirmatively, in the case for the prosecution, that such a parish as that laid in the indictment exists within the county, and they expressed a doubt how they should hold, even where it was proved negatively for the prisoner that there was no such parish. (*e*)

Nor is it any defence on not guilty that there is no such parish.

And it is no objection in the case of a transitory felony on the plea of not guilty that there is no such place in the county as that in which the offence is stated to have been committed. An indictment stated that the prisoner at the parish of Normanton in the Woulds, in the county of N., maliciously set fire to a stack of beans; on not guilty pleaded it appeared that there was no such parish, and two points were saved for the consideration of the judges; one, whether the offence was local; the other, whether there being no such parish was an objection on not guilty; and the judges were unanimous that the offence had nothing of locality in it, and that there being no such place in the county could only be taken advantage of on a plea of abatement. (*f*) So where an indictment for larceny laid the stealing 'at the parish of Hales Owen in the county of Worcester,' and it appeared that that parish was situate partly in Worcestershire and partly in Shropshire, it was held sufficient. (*g*)

But since the 14 & 15 Viet. c. 100, s. 23, it is not necessary to state any venue in the body of an indictment, unless a local description be required. (*h*)

Exceptions as to proof of place laid.

To the above rule, as to the parish and place being immaterial, there are some exceptions; as, if the statute upon which the indictment is framed give the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish laid in the indictment. (*i*)

(*b*) 2 Hawk. P. C. c. 25, s. 84.

(*c*) 1 Phill. Ev. 206, 6th ed.

(*d*) Ibid.

(*e*) Rex v. Dowling, R. & M. N. P. R. 433.

(*f*) Rex v. Woodward, MS. Bayley, J. 2 Burn. J. D. & Wms. 384. S. C. R. &

M. C. C. R. 323, ante, vol. 2, p. 1054.

(*g*) Rex v. Perkins, 4 C. & P. 363, Park, J. A. J.

(*h*) See the section, ante, vol. 2, p. 323.

(*i*) Archb. Cr. Pl. 43. See Rex v. Glossop, 4 B. & A. 616.



But if the offence be in its nature local, and there be no such place as that laid in the indictment, the prisoner must be acquitted of such local offence; if, however, the indictment contain a charge of a transitory offence, as larceny, the prisoner may be convicted of such transitory offence, although he is acquitted of the local offence. The indictment stated that the prisoners, 'late of the parish of St. Peter the Great in the county of W.,' on, &c., 'at the parish aforesaid, in the county aforesaid, the warehouse of H. Webb there situate,' feloniously did break and enter and stole certain goods therein, and it appeared that the parish of St. Peter the Great was partly in the county of W., and partly in the county of the city of W., but that the warehouse was in that part of the parish which was in the county of W.; and Patteson, J., held that this was a local description of the place where the warehouse was situate, and that the indictment was not supported as to the breaking and entering the warehouse, but that the prisoners might be convicted of the simple larceny. (j) So the offence of stealing in the dwelling-house to the value of five pounds is local, and, therefore, if the house be stated to be situate in a parish and county, it must be proved that the whole of such parish is in such county, and if it be not so proved the prisoner cannot be convicted of stealing in the dwelling-house to the value of five pounds, but he may be of the simple larceny. The indictment charged that the prisoner, 'late of the parish of St. Catherine, in the county of Gloucester,' stole divers articles to the value of five pounds in the dwelling-house of M. D. G. Muirhead, 'there situate,' and it was proved that the parish of St. Catherine was partly in the county of Gloucester and partly in the county of the city of Gloucester, but that the house was situate in that part which was in the county of Gloucester; and Cresswell, J., on the authority of the preceding case, held that the prisoner could not be convicted of stealing in the dwelling-house, but that he might be convicted of simple larceny. (k)

So on an indictment against a parish for not repairing a highway, the part of the road out of repair must be proved to be within the parish. (l) So it has been held that where an injury is partly local and partly transitory, and a precise local description is given, a variance in proof of the place is fatal to the whole, for the whole being one entire fact, the local description becomes descriptive of the transitory injury. (m)

Proof that the place is usually and commonly known by the Evidence that

(j) Reg. v. Brookes, Worcester Spr. Ass. 1842, MS. C. S. G. S. C. C. & M. 543.

(k) Reg. v. Jackson, Gloucester Spr. Ass. 1842, MS. C.S.G., ante, vol. 2, p. 49.

(l) Ante, vol. 1, p. 511.

(m) 1 Stark. Ev. 466, citing Rex v. Crange, 1 Salk. 385. In this case the indictment stated that the defendant with others riotously assembled, *et quoddam cubiculum cujusdam S.S., in domo mansionali cujusdam David James fregit et intravit*, and thirty yards of stuff took and carried away; it appeared to be the house of David Jameson; and Parker, C. J., held that this did not maintain the indictment, for part is local and part not local; the *cubiculum* is local, the taking

and carrying away is not local; but then all is put together as one entire fact under one description, and you cannot divide them. So if there be an indictment for acting a play and speaking obscene words in such a parish, in a play-house in Lincoln's Inn Fields: if there be no play-house in Lincoln's Inn Fields the defendant must be acquitted; for though the words are not local, yet they are made so. One may make a trespass local that is not so. If the speaking had been alleged in Lincoln's Inn Fields, then it had been laid as venue; but here it is otherwise, for here it is alleged as a description where the play-house stood. Per Parker, C. J., *ibid.*

Where the offence is local the parish must be proved as laid in the indictment.

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the name is usually known suffices.

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description used is sufficient. (*n*) And where premises are described to be situate in a particular parish, it is sufficient to prove that the parish is usually known by the name of description. (*o*) And although there be two parishes of the general name, the general description will be sufficient. (*p*) And where an indictment stated that the prisoner committed a burglary 'at the parish of Woolwich,' and the prosecutor stated that the correct name of the parish was 'St. Mary, Woolwich,' but the parish is called 'the parish of Woolwich' in the Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 2; it was held that this was sufficient, as the statute showed that this parish is known by the name of 'the parish of Woolwich.' (*q*)

Where it is doubtful whether the allegation be merely formal, or whether it be descriptive, the allegation will be referred to venue, rather than to description, even though the action be of a local nature, and the existence of such a parish will be immaterial. (*r*)

An allegation that A. B. was constable of the parish of St. Paul, Covent Garden, is not satisfied by evidence that he was presented as a fit person to serve as constable for that parish, but sworn in for Westminster generally. (*s*)

Amendment.

But now, wherever any variance occurs between any local description and the evidence, the court may amend the record under the 14 & 15 Vict. c. 100, s. 1. (*t*)

Proof of time.

In criminal prosecutions from the highest offence to the lowest, it is unnecessary to prove the time of committing the offence precisely as laid, unless that particular time is material; and the facts may be proved to have occurred on any day previous to the finding of the bill by the grand jury. (*u*) In high treason, evidence may be given of an overt act, either before or after the day specified in the indictment; the particular day is not material in point of proof, and is merely matter of form. (*v*) And where an indictment for a misdemeanor contained several counts, stating several misdemeanors of the same kind, and alleging the same day in each count as the day on which they were committed, the prosecutor was allowed to give evidence of such misdemeanors on different days. (*w*) And now, by the 14 & 15 Vict. c. 100, s. 24, no indictment is insufficient 'for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly,' (*x*) and therefore it

(*n*) 1 Stark. Ev. 468.

(*o*) 1 Stark. Ev. 468, citing *Kirtland v. Pounsett*, 1 Taunt. 570. *Goodtitle v. Walter*, 4 Taunt. 671. Per *Mansfield, C. J.*, in *Vowles v. Miller*, 3 Taunt. 140.

(*p*) 1 Stark. Ev. 469, citing *Doe d. James v. Harris*, 5 M. & S. 326. *Taylor v. Williams*, 3 Bng. R. 449, as where lands are described as situate in Westbury, there being both Westbury-on-Trym and Westbury-on-Severn in the same county. So where an indictment stated that a highway alleged to be out of repair led to the parish of Langwm in the county of Monmouth, and it appeared that there were two parishes in the county, Langwm Isha and Langwm Ucha, and that the highway led to the former; Bo-

sanquet, J., held the description sufficient. *Rex v. Lantrissent*, Monmouth Sum. Ass. 1832. MSS. C. S. G.

(*q*) *Reg. v. St. John*, 9 C. & P. 40, *Parke, B.*, and *Bosanquet, J.*

(*r*) 1 Stark. Ev. 465, citing *Jefferies v. Duncombe*, 11 East. R. 226.

(*s*) *Goodes v. Wheatley*, 1 Campb. R. 231, as stated in 1 Stark. Ev. 470.

(*t*) *Ante*, p. 321.

(*u*) 1 Phill. Ev. 514.

(*v*) *Ibid*.

(*w*) *Rex v. Levy*, 2 Stark. R. 458. *Abbott, C. J.*

(*x*) Nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never

seems clear that the particular time need only be proved where time is of the essence of the offence. (*y*)

It is immaterial, in general, whether the value ascribed to property in the indictment be proved or not. Where value is essential to constitute an offence, as where a bankrupt was indicted for concealing property to the amount of 20*l.*, and the value was ascribed to many articles collectively, the offence must be made out as to every one of those articles; the grand jury having ascribed that value to those articles collectively. (*z*) And now, by the 14 & 15 Vict. c. 100, s. 24, no indictment is insufficient 'for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value, or price, or the amount of damage, injury, or spoil is not of the essence of the offence;' (*a*) and, therefore, it seems clear that the value, price, or amount need only be proved where it is of the essence of the offence.

Proof of value.

It has been considered a rule, that the want of a *videlicet* will in some cases make an averment material that would not otherwise be so; as, if a thing which is not material is positively averred without a *videlicet*, though it was not necessary to be so, yet it is thereby made material, and must be proved; and that, therefore, where a party does not mean to be concluded by a precise sum, or day stated, he ought to plead it under a *videlicet*, for if he do not he will be bound to prove the exact sum or day laid, it being a settled distinction that where any thing which is not material is laid under a *videlicet*, the party is not concluded by it, but he is where there is no *videlicet*. (*b*) But it is by no means generally true that the omission of a *videlicet* will make it necessary to prove the particular sum or day, &c., strictly, as laid, (*c*) for the want of a *videlicet* will never do harm where, from the nature of the case, the precise sum, date, magnitude, or extent is immaterial. (*d*)

[803]  
Videlicet.

Although the question, whether a writing or other matter be the same as has been previously in the possession of a party, is a question of fact, yet it often happens that the court has to decide whether the evidence be sufficient to be left to the jury. Where in an action for a libel contained in a pamphlet, a witness proved that the defendant had given her a pamphlet, and, on a copy being put in her hand, she said, 'This is my handwriting. I believe this to be the pamphlet; it was like it and in this form. I read different portions of it, and lent it to several persons; it was returned to me, and I then wrote this upon it. The defendant has given me different tracts at different times. I cannot swear that this is the same pamphlet he gave me. It is an exact copy, if it is

Identity.

happened. See the section, *ante*, vol. 2, p. 326.

(*y*) And a case might occur where time was of the essence of the offence, and yet it might not be essential to prove the precise time; as, for instance, if a statute made the doing of an act in certain months of the year an offence, it would suffice to prove that the act was done between such a day and such another day in those months, though the particular day could not be proved. See *Rex v.*

*Chandler*, 1 *Ld. Raym.* 581, and *Reg. v. Simpson*, 10 *Mod. R.* 248, in note (*r*), *ante*, p. 103.

(*z*) *Rex v. Forsyth*, *Russ. & Ry. C. C. R.* 274.

(*a*) See the section, *ante*, vol. 2, p. 326.

(*b*) 2 *Saund.* 291 *c.* in note (1) to *Dakin's case*.

(*c*) 1 *Phill. Ev.* 213 (*n*), 7th ed.

(*d*) *Ibid.* 1 *Stark. Ev.* 454. *Rex v. Gillham*, 6 *T. R.* 265.



not the same. It is the one I wrote upon. I cannot say I got back the same copy I lent. I only say it is exactly like it. If that is not the copy the defendant gave me, I do not know what has become of it: it was held that there was some evidence to go to the jury that the copy was the same as the defendant had given to the witness. (e)

Identity of  
offences.

A question frequently arises in cases where the prisoner pleads that he has been previously acquitted, whether the acquittal has been of the same offence for which he is indicted. Thus where the prisoners, having been acquitted of a rape on Mary Lee, pleaded that acquittal to another indictment for a rape on Mary Lee at the same time and place as was alleged in the other indictment, and issue was taken on the identity of the rapes charged in the two indictments, the prisoners' counsel only put in the record of the previous acquittal, and the commitment of the magistrates for a rape on Mary Lee; and Bolland, B., told the jury that it did not appear to him that there was any evidence of the identity of the rapes charged in the two indictments. (f)

(e) *Fryer v. Gathercole*, 4 Exch. R. 262. Alderson, B., said, 'If I give a shilling to a person to take up stairs and to put away, and he hands me one back as the same, it would be a question for the jury to say whether it is the same, and there is nothing unreasonable if they find that it is.' Alderson, B., also said, 'Suppose I pass my hand across my eyes for an instant, so as to lose sight of the coin for a moment, cannot I prove the identity?' Pollock, C. B., treated the question as one of degree. The evidence would be weaker or stronger in proportion as the numbers of the work were more or less, and the probability of the copy being the same would be greater or less according as there had been more or less lendings of it.

(f) *Rex v. Parry*, 7 C. & P. 836, S. C. *Rex v. Lea*, 2 M. C. C. R. 9. The jury, however, found a verdict for the prisoners, and it was held that this verdict could not be disturbed. Bolland, B., was strongly of opinion that the commitment was not admissible. In *Reg. v. Martin*, 8 A. & E. 481, Lord Denman, C. J., asked, 'Have you any authority for saying that identity is shown *prima facie* by collation of the indictments? A defendant may have stolen the goods of the same party twenty times;' and on *Rex v. Parry* being cited, Lord Denman, C. J., said, 'The point as to the sufficiency of the proof was not decided by the fourteen judges.' But there is no doubt that there was no evidence whatever of identity in that case.

## CHAPTER THE THIRD.

## OF WRITTEN EVIDENCE.

*Of the Proof and Effect of.*—1. *Public Documents.*—2. *Private Documents.*

1ST. OF the proof and effect of public documents. Acts of Parliament are either public or private. The printed statute book is evidence of a public statute, not as an authentic copy of the record itself, but as hints of that which is supposed to be lodged in every man's mind already. (a) A private Act of Parliament was usually proved formerly by a copy examined with the Parliament roll. (b) But now, by the 8 & 9 Vict. c. 113, s. 3, 'all copies of private, or local and personal Acts of Parliament not public Acts, if purporting to be printed by the Queen's printers, shall be admitted in evidence thereof by all courts, judges, justices and others, without any proof being given that such copies were so printed.'

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Public documents.

Statutes.

Copies of private Acts printed by the Queen's printer.

By the 13 & 14 Vict. c. 21, s. 7, 'Every Act made after (A.D. 1850) shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such Act.' A private Act may contain clauses of a public nature, and then the Act, as far as those are concerned, is to be regarded as a public Act. Thus a clause relating to a public highway, occurring in a private Enclosure Act, has been holden provable in the same way as a public Act. (c) In some Acts of Parliament not relating to the kingdom at large, a special clause is often inserted declaring them to be public Acts, and that they shall be taken notice of as such, without being specially pleaded; in which case they are to be proved in the same manner as public Acts; it is not necessary to prove them by an examined copy, or to show that the printed copy was printed by the Queen's printer. (d) The clause referred to was intended for the facility of proof; it will not give the Act the effect of a public Act for other purposes, as with regard to the recital of facts contained in it. (e) A clause was often formerly inserted in private Acts, providing that they shall be printed by the King's printer, and that a copy so printed shall be admitted as evidence of

All acts to be deemed public Acts.

(a) Gilb. Ev. 10. 2 Phill. Ev. 127, 1 Stark. Ev. 274.

(b) Bull. N. P. 225.

(c) Rex v. Utterby, 2 Phill. Ev. 128, per Holroyd, J. And see Hob. 227.

(d) 2 Phill. Ev. 128, citing Beaumont

v. Mountain, 10 Bingh. R. 404. 4 M. & Sc. 177. Woodward v. Cotton, 1 C. M. & R. 44. 4 Tyrw. 689. 1 Stark. Ev. 275.

(e) 2 Phill. Ev. 129, citing Brett v. Beales, M. & M. 421.

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the Act. In such cases, a copy, purporting to be printed by the King's printer, will be admissible in evidence: it is not necessary to prove that the Act was purchased at the King's printer. (*f*) By the 41 Geo. 3, c. 90, s. 9, copies of the statutes of Great Britain and Ireland prior to the union, printed by the printer duly authorized, shall be received as conclusive evidence of the several statutes in the courts of either kingdom.

Preamble  
proof of facts  
recited.

The preamble of an Act of Parliament, reciting that certain outrages had been committed in particular parts of the kingdom, was adjudged by the Court of King's Bench to be admissible in evidence, for the purpose of proving an introductory averment in an information for a libel, that outrages of that description had existed. (*g*)

Journals of  
the Houses of  
Parliament.

The journals of the House of Lords or of the House of Commons are evidence in criminal cases as well as in civil, and may be proved by examined copies; but the printed journals were not formerly evidence. (*h*) But now, by the 8 & 9 Vict. c. 113, s. 3, 'all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed.' An unstamped copy of the minutes of the reversal of a judgment in the House of Lords, without more of the proceedings, is evidence of the reversal. (*i*)

Gazette.

The public Acts of Government, and Acts by the King in his political capacity, are commonly announced in the Gazette, published by the authority of the Crown; and of such Acts announced to the public in the Gazette, the Gazette is admitted in courts of justice to be good evidence. (*j*) A proclamation for reprisals, published in the Gazette, is evidence of an existing war. (*k*) Proclamations for a public peace, or for the performance of a quarantine, and any acts done by or to the King in his regal character,

Proclamation.

Articles of  
war.

may be proved in this manner, or by printed copies under the 8 & 9 Vict. c. 113, s. 3; (*l*) and upon the same principle, articles of war, purporting to be printed by the King's printer, are allowed to be evidence of such articles. (*m*) A gazette, in which it was stated that certain addresses had been presented to the King, has been adjudged to be proper evidence to prove an averment of that fact in an information for a libel; (*n*) for they are addresses, said Lord Kenyon, C. J., of different bodies of the King's subjects, received by the King in his public capacity, and they thus

(*f*) 2 Phill. Ev. 129, Lincoln Sum. Ass. 1832, by Park, J. A. J. Where the copy of an Act is incorrect, the court will be governed by the Parliament roll. *Rex v. Jeffries*, 1 Str. 446. *Spring v. Eve*, 2 Mod. 240, and 2 Phill. Ev. 129, and the cases cited there in note (5).

(*g*) *Rex v. Sutton*, 4 M. & S. 532.

(*h*) Lord Melville's case, 24 How. St. Tr. 683. *Chubb v. Solomon*, 3 C. & K. 75.

(*i*) *Jones v. Randall Cowp.* 17. But a resolution of either House is not evidence of the truth of the facts there affirmed; and therefore, in the case of Titus Oates, who was charged with having committed

perjury on the trial of persons suspected of the Popish Plot, a resolution in the journals of the House of Commons, asserting the existence of the plot, was not allowed to be evidence of that fact. 4 St. Tr. 39. 1 Phill. Ev. 406, 7th ed.; but see 2 Phill. Ev. 106, last ed.

(*j*) 2 Phill. Ev. 107, 108. 1 Stark. Ev. 279.

(*k*) Ibid.

(*l*) See this clause, *ante*, p. 335.

(*m*) 2 Phill. Ev. 108, 109. See the 27 & 28 Vict. c. 119, as to the articles of war for the Navy.

(*n*) *Rex v. Holt*, 5 T. R. 436. S. C. 2 Leach, 593.



become acts of state. And in *Rex v. Forsyth*, (o) the twelve judges seemed to think that the production of the Gazette would be sufficient, without proof of its being bought of the Gazette printer, or where it came from. In *Rex v. Sutton*, (p) the Court of King's Bench determined that the King's proclamation (which recited that it had been represented that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of offenders) was admissible in evidence, as proof of an introductory averment in an information for a libel, that acts of outrage of that particular description had been committed in those parts of the country.

Recital in proclamation proof of facts recited.

By the 8 & 9 Vict. c. 113, s. 1, 'whenever by any Act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.'

Certain documents to be received in evidence without proof of seal or signature, &c., of person signing the same.

Sec. 2. 'All courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers shall henceforth take judicial notice of the signature of any of the equity or common law judges of the Superior Courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document.'

Courts, &c., to take judicial notice of signature of equity or common law judges, &c.

Records are proved either by producing the record itself, or by an exemplification, or by a copy. (q) When *nul tiel* record is pleaded, the record, if a record of the same court, is produced and inspected by the court; if a record of an inferior court, it is proved by the tenor of the record certified under a writ of *certiorari* issued by the Superior Court; if a record of a concurrent superior court, it is proved by the tenor certified under a writ of *certiorari*, issued out of chancery, and transmitted thence by writ of *mittimus*. (r) The issue of *nul tiel* record seldom occurs in criminal cases, except in the instance of a plea of *autrefois acquit*, &c. (s)

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Proof of records.  
On an issue of *nul tiel* record.

(o) R. & R. 274. *Ante*, vol. 2, p. 526.

(p) 4 M. & S. 532.

(q) 1 Stark. Ev. 388.

(r) Tidd. 801, 804. Rosc. Ev. 73.

Where a record of a court of quarter sessions is pleaded in a court of oyer and terminer, or the converse, it ought, in strictness, to be proved as above stated: but the practice, it is said, is to apply simply to the clerk of the peace, or clerk of assize, who will make it out for you

without writ, or will attend with the record itself at the trial. Arch. Cr. Pl. 124.

(s) Upon this plea, the proof of the issue lies on the defendant, and he will have to prove the record of acquittal: and also, it has been said, the averments of identity in his plea. 1 Arch. Cr. Pl. 89. But this seems doubtful, for if the replication is *nul tiel* record, it should seem to admit the identity. The principal deci-

Where it is necessary to prove indictments.

Wherever it was necessary to prove the finding or the trial of an indictment, the record must formerly have been regularly drawn up, and either produced, or an examined copy of it produced and proved. Where, therefore, an indictment for a conspiracy alleged that at a Court of Quarter Sessions an indictment was preferred against A. B., and found by the grand jury, the Court of King's Bench held that the indictment indorsed a true bill, but without any caption to it, and the minutes made by the clerk of the peace containing the style of the sessions, and the minutes of the business done at it, were not sufficient evidence of the finding of the bill, and that the record itself or an examined copy was the only legitimate evidence to prove it. (t) And so it has been held that a plea of *autrefois convict* cannot be supported by the indictment with the finding of the grand jury upon it. (u) So where the prisoner was in fact confined in Abingdon gaol, and the governor of that gaol proved that he was present in court when the prisoner was tried for housebreaking, and heard sentence passed upon him, and he produced the calendar of the sentences passed at those assizes signed by the clerk of assize, and stated that there was not any other authority for carrying into execution the sentences of the court at the assizes, even in cases of murder; Maule, J., held that this was not evidence of the prisoner being in lawful custody, as the sentence of the court at the assizes could only be proved by the record. (x) Where on an indictment for the non-repair of certain highways, upon the trial of which the question was, whether a parish was bound to repair all the highways in it as a parish, or the several townships the highways situate in each of them, in order to prove the conviction of the parish upon a similar indictment in 1806, a witness proved that he went to the house of the clerk of assize for the Oxford circuit, in London, and there saw him and his son, and asked for the record, and received a written paper, which he produced, which he and the son of the clerk of assize compared with a document then produced as the record, and which the witness stated he thought was on paper, but he was not sure whether it was on paper or parchment, but it was much torn, and the son of the clerk of assize stated that he could not recollect the particular transaction; but the practice was, when a record was required, to make it out from the minutes and the indictment on an original parchment roll, which was signed by the clerk of assize, and a copy was then made on paper and compared with the roll, and stamped with the Oxford circuit stamp, which copy was given to the party applying for it, and that, as far as his own experience went, the roll was drawn up from the indictment and minutes, without any paper draft in the first instance being made, and that he never knew of a paper-copy having been kept; and that the paper produced was signed by

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sions regarding the plea of *autrefois convict*, belonging rather to the law of criminal pleading than of evidence, will be found vol. 2, p. 52, *et seq.*

(t) *Rex v. Smith*, 8 B. & C. 341.

(u) *Rex v. Bowman*, 6 C. & P. 101. See the cases collected in note (c), vol. 2, p. 61, and *Porter v. Cooper*, 6 C. & P. 354, and *Rex v. Thring*, 5 C. & P. 507.

where Gurney, B., held that the minute book of the Court of Quarter Sessions was not admissible in evidence on an indictment for perjury to prove the trial on which the perjury was alleged to have been committed; and *Rex v. Bellamy*, R. & M. N. P. R. 171.

(v) *Reg. v. Bourdon*, 2 C. & K. 366.

his father and stamped with the circuit stamp; Coleridge, J., held that the paper was admissible as an examined copy of the record. (*w*)

The minutes of a court of oyer and terminer may be received, where the matter to be proved by the minutes has occurred before the same court sitting under the same commission; as upon the trial of Horne Tooke, where the minutes of the court were received as proof of the trial of Hardy. (*x*) So the indictment with the officer's note upon it of a verdict of not guilty is sufficient evidence during the same assizes, upon a plea of *autrefois acquit*, that the prisoner was acquitted upon such indictment. (*y*) And so the caption of the general gaol delivery of the Central Criminal Court, the indictment with the note of the prisoner's plea, the verdict and the sentence entered thereon, together with the minutes of the trial entered by the officer of the court in the minute book, are sufficient evidence at a subsequent session of the Central Criminal Court. (*z*)

Minutes admissible during the same assizes

But although it was once held, on the trial of an indictment for perjury alleged to have been committed on the trial of an appeal against an order of removal, that the sessions book produced by the clerk of the peace was not sufficient to prove the trial of the appeal; (*a*) yet where on an appeal against an order of removal the book containing the proceedings at the sessions was proved to be the original sessions book, regularly made up and recorded after each sessions by the clerk of the peace, from minutes taken by him in court, and the minutes of each sessions were headed by an entry containing the style and date of the sessions, and the names of the justices in the usual form of a caption, and no other record was kept of the proceedings of the sessions than the said sessions book, and it had always been received in evidence in the Court of Quarter Sessions, for the purpose of proving them; the Court of Queen's Bench held, that such book was properly received in order to prove the quashing of an order of removal on the trial of a former appeal between the same parishes. (*b*)

Trials of appeals.

When *nul tiel* record is not pleaded, but it is necessary to prove a record in support of some allegation in the pleadings, the record may be proved either by an exemplification or a copy. Exemplifications are either under the great seal or under the seal of the court in which the record is produced, and are admissible without proof of the genuineness of the seal. (*c*) A record may also be proved by an examined copy, except upon the issue of *nul tiel* record. The copy must be proved by some witness who has examined it line for line with the original, or who has examined the copy while another read the original. (*d*) It ought to appear that

In other cases.

(*w*) Reg. v. The Inhabitants of Pembridge, C. & M. 157.

(*x*) 2 Phill. Ev. 135, citing 25 St. Tr. 446.

(*y*) Rex v. Parry, 7 C. & P. 836, Bolland, B.

(*z*) Reg. v. Newman, 2 Den. C. C. 390, ante, p. 96.

(*a*) Rex v. Ward, 6 C. & P. 366, Park, J. A. J. The clerk of the peace stated that he should have drawn up a record on parchment, if he had been applied to so to do, and the case does not state what

the form of the entry in the book was. See the observations of the court on this case in Reg. v. Yeovely, 8 A. & E. 806, *infra*.

(*b*) Reg. v. Yeovely, 8 A. & E. 806, and see per Patteson, J., in Rex v. Nottingham Old Water Works Company, 6 A. & E. 355.

(*c*) Tooker v. Duke of Beaufort, Sayer, 297.

(*d*) Reid v. Margison, 1 Campb. 469. It is not necessary for the persons examining to exchange papers, and read them



[808] the record from which the copy was taken was seen in the hands of the proper officer, or in the proper place for the custody of such records. (e) So an office copy in the same court, in the same cause, is equivalent to a record; but in another court, or in another cause in the same court, the copy must be proved. (f) In order to prove a verdict, a copy of the whole record, including the judgment, is necessary, for otherwise it would not appear but that the judgment had been arrested, and a new trial granted. (g) Where an indictment for perjury alleged that Burraston was convicted upon an indictment for perjury, upon the trial of which the perjury in question was alleged to have been committed, and it appeared by the record when produced that Burraston had been convicted, but the judgment against him reversed upon error after the finding of the present indictment, it was held that the record produced supported the allegation in the indictment. (h)

Where necessary to prove conviction or acquittal of any person, the record may be certified under hand of clerk of court.

By the 14 & 15 Vict. c. 99, s. 13, 'whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.' And see the 14 & 15 Vict. c. 100, s. 22. (hh)

Copies of records in the Record Office.

By the 1 & 2 Vict. c. 94, ss. 12, 13, every copy of a record in the custody of the master of the rolls certified as a true and authentic copy by the deputy keeper of the records, or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the record office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either House, without any further or other proof thereof, in every case in which the original record could have been received there in evidence.

Effect of records in evidence.

Records properly produced in evidence are conclusive against those who are parties to them;—thus a record of conviction of a parish for not repairing a road, is for ever afterwards evidence of their liability to repair; (i) but it is not conclusive as against other parties, except as to the fact that the persons charged have been convicted; (j) therefore an accessory may not only controvert the guilt of his principal, notwithstanding the record of his

alternately. *Gyles v. Hill*, *ibid. n.* As to the examination of the whole of the rolls of a benefit society enrolled at the office of the clerk of the peace. See *Reg. v. Boynes*, 1 C. & K. 65, *ante*, p. 101.

(e) *Adamthwaite v. Synge*, 1 Stark. 183. 4 Campb. 372. S. C.

(f) *Ross v. Ew. 75.* *Bernard v. Nerot*, 1 C. & P. 578.

(g) *Bull. N. P. 234.* But the *nisi prius* record, with the *postea* indorsed, is sufficient evidence that the cause came on to be tried. *Pigott v. Walter*, 1 Str. 162.

(h) *Reg. v. Meek*, 9 C. & P. 513, *Williams, J., ante*, p. 21.

(hh) *Ante*, p. 40.

(i) *Rex v. St. Pancras, Peake*, N. P. C. 219; but see 2 Saund. 160. *Ante*, vol. 1, p. 519.

(j) See *Rex v. Shaw*, R. & R. 526, where, upon an indictment for delivering instruments to a prisoner to facilitate his escape from gaol, it was held that the record of his conviction being produced by the proper officer, no evidence was admissible to dispute what it stated.

conviction, (*k*) but the record of the conviction of the principal upon a plea of guilty is not admissible where such principal might be called as a witness, (*l*) and it seems extremely doubtful whether such record be admissible against the accessory in any case. (*m*)

The several statutes which afford facilities for proving a previous conviction by means of a certificate of the clerk of assize, or clerk of the peace, are made for the more easy proof of such convictions, and do not prevent the proof of the previous conviction by an examined copy of the record. (*n*) In order to give evidence of a writ, if it is the gist of the proceeding, it must be proved by a copy of the record after its return; but where the writ is only inducement, the fact of taking out the writ may be proved without a copy, because possibly the writ has not been returned, and then it is no record. (*o*) An answer in chancery is proved by the production of the bill and answer, or of examined copies of them; (*p*) but on proof by the proper officer that the bill has been searched for in the office, and not found, the answer may be read without the bill. (*q*) Depositions in a suit in chancery are not in general admissible without proof of the bill and answer, unless so ancient that no bill or answer can be found; (*r*) but an examined copy is admissible for the purpose of contradicting the testimony of the deponent when produced afterwards as a witness. (*s*) The 12 & 13 Vict. c. 109, s. 11, enacts that a seal shall be provided for the High Court of Chancery, to be called the Chancery Common Law Seal, and that 'all courts, tribunals, judges, justices, officers, and other persons shall take notice of the said seal, and receive impressions thereof in evidence, in like manner as impressions of the Great Seal are received in evidence, and shall also take notice of and receive in evidence, without further proof, all and every of such writs, proceedings, instruments, documents, and writings which shall purport or appear to be sealed or stamped with the said Chancery Common Law Seal, in like manner as if the same had been sealed with the Great Seal.' And by sec. 13, every office copy issued from the Petty Bag Office shall be sealed with

Statutory  
proof is cu-  
mulative.

Proof of writ.

Proceedings  
in chancery.  
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Documents  
sealed with  
the Chancery  
Common Law  
Seal.

(*k*) *Rex v. Smith*, 1 Leach, 288.

(*l*) *Rex v. Turner*, R. & M. C. C. R. 347, *ante*, vol. 1, p. 77. In *Keable v. Paine*, 8 A. & E. 555, Patteson, J., said, 'On an indictment for receiving goods feloniously taken, the felony must be proved, and neither a judgment against the felon, nor his admission, would be evidence against the receiver.'

(*m*) *Ibid*.

(*n*) *Rex v. Henry Saunders*, Gloucester Spr. Ass. 1829, MSS. C. S. G. The prisoner was indicted under the 15 Geo. 2, c. 28, s. 2, for uttering base coin after a previous conviction, and Parke, J., held that an examined copy of the record of the previous conviction was sufficient evidence thereof; for the statute, by giving an easier means of proof under sec. 9, did not exclude the proof by means of an examined copy. See also *Reg. v. Carter*, 1 Den. C. C. 65. *Northam v. Latouche*, 4 C. & P. 140. *Edwards v.*

*Buchanan*, 3 B. & Ad. 788, *Reg. v. Manwaring*, D. & B. 132.

(*o*) 2 Phill. Ev. 150.

(*p*) 2 Phill. Ev. 139. The recital in the jurat of the place where the answer purports to be sworn, is sufficient proof that the oath was administered at that place. *Rex v. Spencer*, R. & M. N. P. C. 97.

(*q*) Gilb. Ev. 49. See as to the proof of the identity of the parties, *ante*, p. 92. An answer offered in evidence merely as an admission of the party on oath, is sufficiently proved by an examined copy, without proof of a decree, or the party's handwriting. *Lady Dartmouth v. Roberts*, 16 East, 334. See also *Ewer v. Ambrose*, 4 B. & C. 25.

(*r*) Bull. N. P. 240. Gilb. Ev. 62. *Rosc. Ev.* 79. 2 Phill. Ev. 149.

(*s*) *Highfield v. Peake*, Mood. & Malk. N. P. C. 109.

Proceedings  
in the ecclesi-  
astical courts.

Proof of will.

Proof of ad-  
ministration.

Judgments of  
inferior courts.

Foreign judg-  
ment.

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the said Common Law Seal, and every document sealed with such seal, and purporting to be a copy of any record or other document of any description, shall be deemed to be a true copy of such record or other document, and shall, without further proof, be received in evidence before either House of Parliament, and any committee thereof, and also by all courts, tribunals, judges, justices, officers, and other persons, in like manner and to the same extent as the original record or other document would be received if tendered in evidence, for the purpose of proving the contents of such record or other document. (*t*) The proceedings in the ecclesiastical courts are proved in the same way at common law as those in equity: and their sentences are received in the temporal courts as conclusive evidence of the fact adjudged, upon questions within their jurisdiction: but in a suit of jactitation of marriage a sentence against the marriage is not conclusive, as it decides not directly, but only collaterally, on the validity of the marriage. (*u*)

When it is necessary to show a title to personality under a will, or that a particular person is executor, the will cannot be read in evidence without some indorsement for the purpose of authentication: but the probate must be produced. (*x*) The seal of the ecclesiastical court on the probate proves itself. (*w*) Generally speaking, a probate unrepealed is conclusive evidence of the validity of the will: but on an indictment for forging a will, probate of that will unrepealed is not conclusive evidence of its validity, so as to be a bar to the prosecution. (*x*) To prove a probate revoked, an entry of the revocation in the book of the ecclesiastical court, called the 'assignment book,' in which all causes are officially entered, is good evidence. (*y*) Administration is proved by the production of the letters of administration, or a certificate or exemplification thereof, granted by the ecclesiastical court, (*z*) or by the original book of Acts, directing the grant of letters, or an examined copy of it. (*a*)

Judgments in a court-baron, county court, or other inferior court, may be proved by the production of the book containing the proceedings of the court from the proper custody, and if not made up in form, the minutes of the proceedings will be evidence, or an examined copy of such proceedings or minutes will be evidence. (*b*) The judgment of a foreign court must formerly have been proved by evidence of the handwriting of the judge of the court who subscribed it, and the authenticity of the seal affixed. In the case of *Henry v. Adey*, where the plaintiff, who sued here on a judgment obtained in the Island of Grenada, was nonsuited, because he could not prove the seal affixed to be the seal of the island, the court said, they could not take official notice that the seal affixed was the seal of the Island, which was

(*t*) See ss. 17, 18, and 19, as to the seal for the enrolment office, the certificates of enrolment, and sealed copies of enrolments being evidence.

(*u*) *Duchess of Kingston's case*, 11 St. Tr. 262. *Ante*, vol. 1, p. 273.

(*v*) *Rex v. Barnes*, 1 Stark. N. P. C. 213.

(*w*) *Kempton v. Cross*, Cas. Temp. Hardw. 108.

(*x*) *Rex v. Buttery*, R. & R. 342.

(*y*) *Rex v. Ramsbottom*, 1 Leach, 25, in note to Rhodes's case.

(*z*) *Kempton v. Cross*, Cas. Temp. Hardw. 108.

(*a*) *Elden v. Keddel*, 8 East, 187. *Davis v. Williams*, 13 East, 232.

(*b*) *Rex v. Hains*, per Holt, Comb. 337. 12 Vin. Ab. Ev. A. b. 26, p. 99. Rosc. Ev. 80.



necessary to be shown in order to prove the judgment, which it purported to authenticate; and that proving the judge's handwriting could not advance the proof of the seal, unless by considering him in the nature of a witness to it, which was not pretended. (c) If a colonial court possess a seal, it ought to be used for the purpose of authenticating its judgments, although it may be so much worn as no longer to make any impression. (d) If it is clearly proved that the court has not any seal, so that the document cannot be clothed with the form of a legal exemplification, it must be shown to possess some other requisite to entitle it to credit; as by proving the signature of the judge upon the judgment. (e) An exemplification of a foreign judgment, that is, a copy authenticated under the seal of the court, is evidence of the judgment in the courts of this country: (f) but a document, purporting to be a copy of a judgment made by the officer of the court, is not admissible. (g)

But now by the 14 & 15 Vict. c. 99, s. 7, 'all proclamations, treaties, and other Acts of State of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other Act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court,

Foreign and colonial Acts of State, judgments, &c., provable by certified copies, without proof of seal or signature, or judicial character of person signing the same.

(c) 3 East, 221. 2 Phill. Ev. 143. See also *Buchanan v. Buckner*, 1 Campb. 63. *Flindt v. Atkins*, 3 Campb. 215, in a note. The 6 Geo. 4, c. 133, s. 7, enacting that the common seal of the society of apothecaries of the city of London shall be received as sufficient proof of the authenticity of the certificate, to which such seal is affixed, did not make such certificate evidence without proof that the seal affixed is the genuine seal of the society. *Chadwick v. Bunning*, R. & M. N. P. C. 306. But the 14 & 15 Vict. c. 99, s. 8, makes the proof of the seal or of the authenticity of the certificate unnecessary. Where a sheriff's officer produced the warrant under which he had acted, which concluded 'given under the seal of my office,' and there was a small piece of paper wafered to it, and stamped

with a wafer stamp; and the officer proved that he did not know this to be the seal of the sheriff or of his officer, but he had received the warrant from the person who had acted as under-sheriff, and it was precisely similar to all the other warrants under which he had acted; *Parke, B.*, held that this was sufficient proof of the seal. *Bunbury v. Matthews*, 1 C. & K. 380.

(d) *Cavan v. Stewart*, 1 Stark. N. P. C. 525.

(e) *Alves v. Bunbury*, 4 Campb. 28. 2 Phill. Ev. 143.

(f) *Black v. Lord Braybrook*, 2 Stark. N. P. C. 11, 12.

(g) *Appleton v. Lord Braybrook*, 2 Stark. N. P. C. 6, 7. 6 M. & S. 34. 2 Phill. Ev. 143.

and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.'

Proof of  
foreign laws.

The written law of a foreign state must be proved by a copy duly authenticated. (*h*) Thus where to prove the law of France as to marriage, the French vice-consul produced a book, which he said contained the code of laws upon which he acted at his office; that it was printed at the office for the printing of the laws of France; and that it would have been acted upon in any of the French courts; it was ruled by Abbott, C. J., to be sufficient proof of the law. (*i*) The unwritten law of a foreign state may be proved by the parol evidence of witnesses possessing professional skill. (*j*) And the proper course to prove the law of a foreign country is to call a witness expert in it, and to ask him, on his responsibility, what that law is, and not to read any fragments of a code. (*k*) So a person of experience in the profession of the law of another country may state his opinion what, according to the law of that country, would be the legal effect of the facts previously spoken to by the witnesses, taking the facts to be accurate. Thus a gentleman at the Scotch bar has been allowed to state his opinion, whether a marriage, as proved by the witnesses, would be valid according to the Scotch law. (*l*) And where, on an indictment for bigamy, it was proved that the prisoner had been married to a soldier of the name of Dent, and afterwards to one Wall, and the defence was that Dent had been legally married in Scotland, previous to his marriage with the prisoner, and a witness proved that Dent being with his regiment in Scotland, the witness, Dent, a female, and several others, went to a house, to which they were directed after inquiring for the house of the clergyman of the place, where a gentleman performed a ceremony somewhat similar to the marriage service of the church of England, between Dent and the female, and that they afterwards lived together as man and wife; Wightman, J., held that a gentleman, who had lived in Scotland until he was twenty, and who had frequently been there since, and who was possessed of very considerable literary attainments, and stated that he was well acquainted with the law of marriage in Scotland, although he was not a lawyer, was competent to prove that the marriage in question was a valid marriage according to that law. (*m*) But this case was expressly overruled in the *Sussex Peerage case*, (*n*) where

Dent's case.

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Sussex  
Peerage case.

(*h*) *Clegg v. Levy*, 3 Campb. 166. Rose. Ev. 82. But see Baron de Bode's case, *infra* (p. 1).

(*i*) *Lacon v. Higgins*, 3 Stark. 178.

(*j*) Per Gibbs, C. J., *Miller v. Kenrick*, 4 Campb. 155.

(*k*) *Cocks v. Purday*, 2 C. & K. 209,

*Erle, J. The Sussex Peerage case*, 11 Cl. & F. 85, *infra*.

(*l*) *Rex v. Wakefield*, Murray ed. p. 238.

(*m*) *Reg. v. Dent*, Monmouth Spring Ass. 1843, MSS. C. S. G. 1 C. & K. 97.

(*n*) 11 Cl. & F. 85.

it was held that the person, who proves a foreign law, must be *peritus virtute officii vel professionis*; and that though the witness may refresh his memory, or correct or confirm his opinion, by foreign law books, yet the law itself must be taken from his evidence. (*o*) Where, therefore, evidence having been given to show the state of the law of inheritance in Alsace at a particular time, a witness was called, who stated himself to be a French advocate practising at Strasbourg, in the department of Bas Rhin, and that the feudal law had been put an end to in Alsace by the torrent of the French revolution *de facto* in 1789, and by the treaty of Luneville *de jure*; and upon being asked whether there was not a decree to that effect, he added that there was such a decree of the 4th of August, 1789, of the national assembly, and that he had learned this in the course of his legal studies, it being part of the history of the law which he learned while studying the law; it was objected that this evidence could not be received, unless the decree itself were proved and put in; but the majority of the Court of Queen's Bench held that it might; for the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men, and is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of law resulting from it. If an English court were to attempt to expound the written law of a foreign country, it would be liable to the most serious errors. The question is not what the language of the written law is, but what the law is altogether, as shown by exposition, interpretation, and adjudication. (*p*)

Baron de  
Bode's case.

Where a witness was a German juriconsult, and had studied the German law at the University of Leipsic in Saxony, but had not transacted business at Cologne, and had no knowledge of the laws of Cologne but from books; Alderson, B., held that he could not give evidence of the law of Cologne, as he had not had any practice at Cologne. (*q*) But where a native of Belgium stated that he had formerly carried on the business of a merchant and commissioner in stocks and bills of exchange at Brussels, but was now an hotel keeper in London, and that he was well acquainted with the Belgian law upon the subject of bills and notes; it was held that he was competent to prove that by the law of Belgium it is not necessary, even though a bill or note is made payable at a particular place, that it should be presented there for payment; for inasmuch as he had been carrying on a business which made it his interest to take cognizance of the foreign law, he fell within the description of an expert. (*r*)

The know-  
ledge must be  
acquired by  
practice.

Mercantile  
law.

(*o*) In this case it was held that a Roman Catholic Bishop, holding the office of coadjutor to a vicar apostolic in this country, was, in virtue of that office, to be considered as a person skilled in the matrimonial law of Rome, and therefore competent to prove that law. In *Reg. v. Povey*, Dears. C. C. 32, *ante*, vol. 1, p. 310, Jervis, C. J., said that the point as to who is admissible as *peritus* might be considered as settled by the Sussex Peerage

case, or as to what kind the witnesses called should be.

(*p*) Baron de Bode's case, 8 Q. B. 203, 246. Patteson, J., *dissentiente*.

(*q*) *Bristow v. De Seequeville*, 3 C. & K. 64; and this ruling was held correct by the full court. 5 Exch. R. 275.

(*r*) *Vander Donckt v. Thellusson*, 8 C. B. 812. But in *Reg. v. Povey*, 6 Cox, C. C. 83, on this case being cited,



Irish judgment.

Documents admissible without proof of seal, &c., in England or Wales equally admissible in Ireland.

Documents admissible without proof of seal, &c., in Ireland equally admissible in England or Wales.

Mode of ascertaining the law in different parts of the Queen's dominions.

A judgment obtained in one of the superior courts in Ireland, since the Union, is not a record in England. (*s*) But now by the 14 & 15 Vict. c. 99, s. 9, 'every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in Ireland, or before any person having in Ireland by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.'

Sec. 10. 'Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.' (*t*)

By the 22 & 23 Vict. c. 63, in any judicial proceeding instituted in any court, civil, criminal, or ecclesiastical, within Her Majesty's dominions, if the court deem it necessary for the proper disposal of such proceeding to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions, the court in which the proceeding is pending may direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, &c., and the court shall settle the question of law arising out of the same, and remit the case to the superior court, whose opinion is desired in such other part of Her Majesty's dominions. The Act then prescribes the mode of obtaining the opinion of the court, and of remitting it to the court by which the opinion was required, which court is thereupon to apply such opinion to such facts in the same manner as if the same had been pronounced by such court itself upon a case reserved, or upon a special verdict: or the court may, if the opinion has been obtained before the trial, order it to be submitted to the jury with the other facts of the case as evidence, or conclusive evidence, of the foreign law therein stated.

Jervis, C. J., said, 'There it was rather a question of the custom of merchants than a question of law. On that subject a merchant would perhaps be the best authority.' And this appears to be the true ground on which the decision rests, and thus it is clearly in no way inconsistent with the *Sussex Peerage* case. And the dictum of Maule, J., that 'all persons who practise a business or profession

which requires them to possess a certain knowledge of the matter in hand are experts, so far as expertness is required,' is quite in accordance with this view of the case.

(*s*) *Harris v. Saunders*, 4 B. & C. 411.

(*t*) By sec. 11, documents admissible without proof of seal, &c., in England, Wales, or Ireland, are equally admissible in the colonies.

The 24 & 25 Vict. c. 11, contains similar provisions for the purpose of enabling any superior court in Her Majesty's dominions to obtain the opinion of any court of any foreign state, with which Her Majesty may have made a convention for that purpose, as to the law of such state. In foreign countries.

Convictions before justices of the peace are either produced in court, and the handwriting of the magistrates to them proved, (*u*) or they may be proved by examined copies, which the clerk of the peace of the proper county will make out, upon an application for that purpose, (*v*) or they may be proved in certain cases by copies or certificates under the provisions of sundry statutes. (*w*) But a conviction cannot be proved by the notes in the minute book of the justices before whom it took place, or by oral evidence. (*x*) In many instances, public books are admitted in evidence to prove the facts recorded in them. The muster-book in the navy office has been admitted in evidence to prove the death of a sailor; (*y*) the book from the master's office in the Court of King's Bench, to prove a person one of the attorneys of that court; (*z*) and the log-book of a man-of-war, which conveyed a fleet to prove the time of the convoy's sailing. (*a*) Bank-books are good evidence to prove the transfer of stock; (*b*) and on a prosecution for a libel published concerning a person in his office of treasurer of a parish, an entry in a vestry-book, stating that he was elected at a vestry duly held in pursuance of notice, has been considered sufficient evidence to support an allegation in the indictment that he was duly elected treasurer. (*c*) The day-book of a public prison, containing a narrative of the transactions of the prison, has been received upon the same principle, as proof of the time of a prisoner's commitment or discharge; (*d*) but it would not be admissible to prove the cause of his commitment. (*e*) So on an indictment for forging a seaman's will, an entry in a book called the assignation-book, in which all causes are officially entered, was admitted to prove the probate revoked. (*f*) So the poll-books taken at an election for members of parliament, or at an election of a mayor, are evidence. (*g*) The registers of christenings, marriages, and burials, preserved in churches, are good evidence; (*h*) and in order to prove the register of a marriage, it is not necessary to call the attesting witnesses; but as the register affords no proof of the identity of the parties, some evidence of that fact must be Convictions before justices of the peace.  
Public books.  
Registers.

(*u*) *Massey v. Johnson*, 12 East, 67.  
*Gray v. Cookson*, 16 East, 13. *Mason v. Barker*, Gloucester Spr. Ass. 1843, Erskine, J. MSS. C. S. G.

(*v*) Arch. Cr. P. 213.

(*w*) Sec 24 & 25 Vict. c. 96, ss. 112, 116, 24 & 25 Vict. c. 97, s. 70, and the 24 & 25 Vict. c. 96, s. 110, and 24 & 25 Vict. c. 97, s. 68, provide that, when any conviction is quashed on appeal, a memorandum thereof is to be made on the conviction, and a copy thereof is to be added to any copy or certificate of the conviction, and is to be sufficient evidence that the conviction has been quashed.

(*x*) *Giles v. Siney*, 11 Law T. 310.

(*y*) Bull. N. P. 249. *Rhodes's case*, 1 Leach, 24.

(*z*) *Rex v. Cropley*, 2 Esp. N. P. C. 524.

(*a*) *D'Israeli v. Jowett*, 1 Esp. N. P. C. 427.

(*b*) *Breton v. Cope, Peake*, N. P. C. 30. *Marsh v. Colnet*, 2 Esp. N. P. C. 665.

(*c*) *Rex v. Martin*, 2 Campb. 100.

(*d*) *Rex v. Aickles*, 1 Leach, 391.

(*e*) *Salte v. Thomas*, 3 B. & P. 188. 2 Phill. Ev. 164.

(*f*) *Ramsbottom's case*, 1 Leach, 25, in note. It would have been no bar to the conviction had the probate been unrepealed. *Rex v. Buttery, R. & P. 342.*

(*g*) *Mead v. Robinson, Willes*, 224.

(*h*) Bull. N. P. 247.

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given, as by calling the minister, clerk, or attesting witnesses, if they were acquainted with the parties; or the bell-ringers may be called to prove that they rung the bells, and came immediately after the marriage, and were paid by the parties; or the handwriting of the parties may be proved, even where the register is not produced; (*i*) or persons may be called who were present at the wedding dinner, &c. (*j*) Registers are, however, in the nature of records, and need not be produced or proved by subscribing witnesses. (*k*) They, therefore, may be proved either by an examined copy or by a copy certified under the 14 & 15 Vict. c. 99, s. 14. (*l*)

Registration  
Acts.

The proof of the registration of many matters has been facilitated by the provisions of divers recent statutes; but most of these are little likely to be useful in a criminal case, and therefore they are not noticed in this place. It may be well, however, to observe that the 6 & 7 Will. 4, c. 86, 'An Act for registering Births, Deaths, and Marriages in England,' by sec. 38 enacts that 'all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry.' (*m*)

Non-parochial  
registers.

The 3 & 4 Vict. c. 92, which relates to registers or records of births or baptisms, deaths or burials, and marriages lawfully solemnized, kept in England and Wales, other than the parochial registers and the copies thereof deposited with the diocesan registrars, enacts that all registers and records deposited in the general register office by virtue of that Act (except the registers and records of baptisms and marriages at the Fleet and King's Bench prisons, at May Fair, at the Mint in Southwark, and elsewhere, which were deposited in the registry of the Bishop of London in 1821), shall be deemed to be in legal custody, and shall be receivable in evidence subject to the provisions of that Act. By sec. 17, 'in all criminal cases in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the court the original register or record.' (*n*)

Proof of pub-  
lic books by  
examined  
copies.

Whenever an original is of a public nature, and admissible in evidence, an examined copy is also admissible. (*o*) Thus examined copies of the entries in the council-book, or of a license preserved in the secretary of state's office, (*p*) of entries in the bank-books, (*q*) of entries in the books of the East India Company, (*r*) or in the books of the commissioners of the land tax, (*s*) or of excise, (*t*) are allowed to be read in evidence. So an examined copy of a parish register is evidence: (*u*) but not an examined copy of the register

(*i*) *Sayer v. Glossop*, 2 Exch. R. 409.

(*j*) *Birt v. Barlow*, Dougl. 171.

(*k*) Per Lord Mansfield, *Birt v. Barlow*, 1 Dougl. R. 171.

(*l*) *Fest*, p. 849.

(*m*) The Marriage Act, 6 & 7 Will. 4, c. 85, s. 44, incorporates that Act with the 6 & 7 Will. 4, c. 86.

(*n*) In civil cases, sec. 9 makes extracts stamped with the seal of the office admissible in evidence. The 21 & 22 Vict.

c. 25, extends the provisions of the 3 & 4 Vict. c. 92, to other registers of a similar description.

(*o*) *Lynch v. Clerke*, 3 Salk. 154.

(*p*) *Eyre v. Palsgrave*, 2 Campb. 606.

(*q*) *Marsh v. Colnett*, 2 Esp. 665.

(*r*) Dougl. 593, *n*.

(*s*) *Rex v. King*, 2 T. R. 234.

(*t*) *Fuller v. Fotch*, Carth. 346.

(*u*) Bull. N. P. 247.



of a marriage in the Swedish ambassador's chapel in Paris. (v) It seems, however, that the books of the King's Bench or Fleet prisons, which, as it has been just mentioned, are evidence of the time of a prisoner's discharge, are not such public documents, that a copy of them may be given in evidence. (w)

And now by the 14 & 15 Vict. c. 99, s. 14, 'whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding four pence for every folio of ninety words.' (x)

Examined or certified copies of documents admissible in evidence.

An unstamped copy of the Act-book of the Ecclesiastical Court is rendered admissible by the preceding section for the purpose of proving that a certain person was the executor named in a will; for the Act-book itself is a book of such a public nature as to be admissible in evidence on its mere production from the proper custody. (y)

The judicial records of the King's Courts are safely kept for public convenience, that any subject may have access to them for his necessary use and benefit; which was the ancient law of England, and is so declared by an Act of Parliament in the 46th year of Edward III. (z) But in the case of an acquittal on a prosecution for felony, a copy of the indictment cannot be regularly obtained without an order from the court. (a) This rule

Inspection of records.

Copy of indictment after acquittal, how obtained.

(v) *Leader v. Barry*, 1 Esp. 353.

(w) *Salte v. Thomas*, 3 B. & P. 190. 2 Ph. Ev. 164.

(x) The provisions in this section are only cumulative, and do not restrict the proof to the mode pointed out by this section. *Reg. v. Manwaring*, D. & B. 132, where Williams, J., said, 'I must protest against it being supposed that I agree in the notion that when a document of a public nature cannot be produced the parties are tied down to any particular mode of secondary proof.'

(y) *Dorrett v. Meux*, 15 C. B. 142, and see *Reg. v. Manwaring*, D. & B. 132, *ante*, vol. 1, p. 307, as to a certificate of a superintendent registrar of the registration of a chapel.

(z) 2 Phill. Ev. 174.

(a) This practice originated with an order made in the 16 Car. 2, by Hyde, Chief Justice of the King's Bench; Bridgman, Chief Justice of the Common Pleas; Twisden, J., Tyril, J., and Kelyng, J., 'to be observed by the justices of the peace and others at the sessions in the Old Bailey,' as follows:—'That no copies

of any indictment for felony be given without special order, upon motion made in open court, at the general gaol delivery upon motion, for the late frequency of actions against prosecutors (which cannot be without copies of the indictments) deterreth people from prosecuting for the King upon great occasions.' Kel. 3. The jurisdiction of these judges to make this order appears extremely questionable, and has been frequently doubted. See *Browne v. Cumming*, 10 B. & C. 70, and the authorities there referred to. In *Rex v. Brangan*, 1 Leach, 27, the prisoner, having been acquitted, applied for a copy of the indictment; but Willes, C. J., admitting that the prosecution bore the strongest marks of being malicious, refused the application, because it was not necessary that he should grant it, declaring that by the laws of this realm every prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for any use he might think fit to make of it, &c.; and that after a demand of it had been made the proper officer might be punished for

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In case of  
felonies.

In cases of  
misdemeanor.

Inspection of  
depositions.

6 & 7 Will. 4,  
c. 114, s. 3.

Copies of de-  
positions to be  
allowed to  
prisoners.

proceeds from an anxiety to protect prosecutors from being harassed by unfounded actions for malicious prosecutions, which actions cannot be maintained without proving the fact of the prosecution by the record or an examined copy of it; and it is therefore not usual to grant a copy of the record of acquittal, where there is any the least probable cause for the prosecution. (*b*) But the copy is admissible without proof of the order of the court allowing a copy of the record: for though it be the duty of the officer charged with the custody of the records of the court not to produce a record, or give a copy of it but upon competent authority, yet if the officer, in neglect of his duty, shall have given a copy, or produces the original, the evidence in itself is unobjectionable, and must be received. (*c*) The rule is confined to cases of felony; in prosecutions for misdemeanors the defendant is entitled to a copy of the record, as a matter of right, without a previous application to the court. (*d*) Formerly a defendant on a criminal charge was not entitled to an inspection of the grounds upon which the prosecution was instituted; (*e*) and, therefore, neither in cases of treason nor of felony had he any right to a copy of the depositions of the witnesses who were to appear against him. (*f*)

But now the 6 & 7 Will. 4, c. 114, 'An Act for enabling persons indicted of felony to make their defence by counsel or attorney,' by sec. 3 enacts 'that all persons who after the passing of this Act shall be held to bail or committed to prison for any offence against the law, shall be entitled to require and have, on demand (from the

refusing to make it out. In *Browne v. Cumming*, the court expressed no opinion as to the authority of the judges to make the order, but refused to restrain the plaintiff from using a copy of an indictment alleged to have been improperly obtained, on the ground that, taking all the facts together, they did not think there had been a mistake or misrepresentation of such a nature as to call upon the court to interfere. The order in question, if not expressly overruled, is much shaken by *Rex v. The Justices of Middlesex*, 5 B. & Ad. 1119. In that case Bowman had been tried and convicted of larceny at the Clerkenwell sessions, after those sessions had lapsed for want of an adjournment, and being indicted for the same offence afterwards, at the Old Bailey, he proposed to plead *autrefois acquit*, and the court adjourned the case to give time for an application for a copy of the record; *Rex v. Bowman*, 6 C. & P. 101; and an application was afterwards made to the clerk of the peace for a copy of the record, which was refused. And the Court of Queen's Bench granted a mandamus to make up the record of the proceedings against Bowman, on the ground that 'the prisoner had a right to have the record of the proceedings which passed at the sessions correctly made up, and to make any use of it he could.' The report in *Rex v. The Justices of Middlesex* erroneously states the application for the mandamus to have been after the prisoner

had pleaded his former conviction. See *Rex v. Bowman*, 6 C. & P. 101, and 337. This case seems to overrule *Rex v. Vandercornb*, 2 Leach, 708, and *Rex v. Parry*, 7 C. & P. 836, where the court refused to grant the prisoners copies of their indictments, in order to enable them to plead *autrefois acquit*, and seems to establish the position that the prisoner is entitled, *as of right*, to a copy of the indictment for such a purpose; and, if for such a purpose, it is difficult to see why he should not have the same right for the purpose of instituting a civil suit to seek reparation for the injury which he has sustained by the malicious conduct of the prosecutor. C. S. G.

(*b*) Tidd. 647.

(*c*) *Legatt v. Tollervay*, 14 East, 302.

(*d*) *Morrison v. Kelly*, 1 Black. Rep. 385. *Evans v. Phillips*, MS. Sci. N. P. 952. 2 Phill. Ev. 176.

(*e*) 2 Phill. Ev. 178.

(*f*) 2 Phill. Ev. 178. In some species of treason the prisoner is entitled to a copy of the indictment, *ibid.* *Rex v. Holland*, 4 T. R. 691. In that case an information had been filed against an officer of the East India Company, on charges of delinquency founded upon a report of a board of inquiry in India: and the Court of King's Bench were of opinion that he had no right to have an inspection of that report, and that the court had no discretionary power to grant it.

person who shall have the lawful custody thereof, and who is hereby required to deliver the same) copies of the *examinations of the witnesses* respectively upon whose *depositions* they have been so held to bail, or committed to prison, on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words: provided always, that if such demand shall not be made before the day appointed for the commencement of the assize or sessions at which the trial of the person on whose behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person so to preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged.'

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Sec. 4. 'All persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had.' (g)

Prisoners entitled to inspect depositions on trial.

(g) Sec. 1 reciting that 'it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them,' enacts that 'all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law, or by attorney in courts where attorneys practise as counsel.' Sec. 2 providing that in all cases of summary conviction persons accused shall be admitted to make their full answer, &c., is repealed by the 11 & 12 Vict. c. 42, but re-enacted by sec. 12. As to the practice which has prevailed since this statute passed, it has been held that a prisoner's counsel cannot be permitted to tell the jury any facts which he has heard from the prisoner, but which he is not in a condition to prove. *Reg. v. Butcher*, 2 M. & Rob. 228, *Coleridge, J.* If the prisoner does not employ counsel, he is at liberty to make a statement for himself, and tell his own story, which is to have such weight with the jury as, all circumstances considered, it is entitled to; but if he employs counsel he must submit to the rules which have been established with respect to the conducting cases by counsel. *Reg. v. Beard*, 8 C. & P. 142, *Coleridge, J.* And the same learned judge held that after the prisoner's counsel had addressed the jury for him, the prisoner himself was not at liberty also to address them. *Reg. v. Boucher*, 8 C. & P. 141. But where on an indictment for maliciously wounding the prosecutor when no other person was present, the prisoner had made a statement before the magistrate, which was not put in by the counsel for the prose-

cution; *Alderson, B.*, permitted the prisoner to make a statement before his counsel addressed the jury, and then his counsel addressed the jury and commented on the prisoner's statement as according with the evidence, and only supplying what was otherwise deficient in it. The learned Baron said, 'I think it is right that a person should have an opportunity of stating such facts as he may think material, and that his counsel should be allowed to comment on that statement, as one of the circumstances of the case. On trials for high treason the prisoner is always allowed to make his own statement after his counsel has addressed the jury. It is true that the prisoner's statement may often defeat the defence intended by his counsel, but if so the ends of justice will be furthered; besides, it is often the genuine defence of the party, and not a mere imaginary case invented by the ingenuity of counsel.' *Reg. v. Malings*, 8 C. & P. 242. And at the same assizes *Gurney, B.*, after conferring with *Alderson, B.*, allowed a similar course to be adopted, but said that he thought it ought not to be drawn into a precedent; and the prisoner read a written statement. *Reg. v. Walking*, 8 C. & P. 243. The report does not state what the particular facts were in this case. *Alderson, B.*, allowed the same course in *Reg. v. Dyer*, 1 Cox, C. C. 113, and *Reg. v. Williams*, 1 Cox, C. C. 363; and in *Reg. v. Manzano*, 2 F. & F. 64, *Martin, B.*, after consulting *Channell, B.*, allowed the same course, as there was a precedent for it in 8 C. & P., although he was entirely opposed to the practice. But where on an indictment for child-murder the two previous cases in 8 C. & P. were cited, and permission asked



After examinations are completed, defendant entitled to copies of the depositions.

Persons against whom coroner's jury have found verdicts of manslaughter to be supplied with depositions.

The 11 & 12 Viet. c. 42, s. 34, repealed this Act so far 'as relates to the right of parties charged with offences to have copies of the depositions or examinations against them,' and by sec. 27 enacts that 'at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions or other first sitting of the court at which any person so committed to prison or admitted to bail as aforesaid is to be tried, such person may require, and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three halfpence for each folio of ninety words.'

The 22 & 23 Vict. c. 33, which authorizes coroners to admit to bail any person against whom a verdict of manslaughter has been found, by sec. 3 enacts that 'at any time after all the depositions of witnesses shall have been taken, every person against whom any coroner's jury may have found a verdict of manslaughter shall be entitled to have from the person having custody thereof copies of the depositions on which such verdict shall have been found, on payment of a reasonable sum for the same, not exceeding the rate of three halfpence for every folio of ninety words.' (h)

for the prisoner to make a statement, Paterson, J., said, 'The general rule certainly ought to be that a prisoner defended by counsel should be entirely in the hands of his counsel, and that rule should not be infringed on, except in very special cases indeed. If the prisoner were allowed to make a statement, and stated as a fact anything which could not be proved by evidence, the jury should dismiss that statement from their minds; but if what the prisoner states is merely a comment on what is already in evidence, his counsel can do that much better than he can.' The prisoner did not make any statement. *Reg. v. Rider*, 8 C. & P. 539. And where on an indictment for a misdemeanor in uttering base coin, a prisoner wished to make a statement of facts to the jury before his counsel addressed them, and it was said that Lord Denman, C. J., had allowed it to be done; Bosanquet, J., refused to permit it, and observed that he was not informed of the circumstances of the cases decided on this Act, which he thought could only be meant to put prisoners in the same situation in felonies as they were in before in misdemeanors, and in those cases certainly a defendant could not be allowed the privilege of two statements, one by himself, and one by his counsel. *Reg. v. Burrows*, 2 M. & Rob. 124. And so where *Reg. v. Dyer*, *supra*, and *Reg. v. Malings*, *supra*, were cited, Byles, J., refused to allow the prisoner to state his defence before his counsel addressed the jury, but gave the prisoner the option of either speaking himself or having his counsel speak for him. No facts are stated in this case, which was a *Mint* prosecution. *Reg. v. Taylor*, 1 F. & F. 535. Soon after the passing of

this statute Parke, B., desired it to be understood that wherever there was counsel for the prisoner the case should always be opened. *Rex v. Gascoine*, 7 C. & P. 772. S.P. *Reg. v. Morgan*, 6 Cox, C.C. 116, per Talfourd, J. The practice, however, has been since the statute, as before, only to open the case where the facts have some peculiarity in them, or the nature of the charge itself is such as to require an opening in order to direct the jury's attention to the particular points for their consideration; and as the case in which the learned Baron is said to have made the observation was one of stealing and receiving stolen hay, he may, perhaps, have thought that the latter charge required some explanation, under the circumstances of the case, before the evidence was adduced. C. S. G.

(h) This section is as clearly confined to cases of manslaughter as the previous sections as to bail in cases of manslaughter. Two questions arise respecting the 6 & 7 Will. 4, c. 114, s. 3: 1st, Did that section apply to depositions before a coroner? In *Reg. v. White*, 5 Cox, C. C. 562, Platt, B., held that it did; and this ruling seems to be correct; for the paramount intent of the Act to give the prisoner copies of the depositions in all cases is so clear, and the absurdity of holding that a person committed for murder is not entitled to copies of the depositions before the coroner, though he is to those before magistrates, is so great, that the reasonable construction of the clause is that the prisoner is entitled to copies in both cases alike; though Mr. Archbold Jerv., Acts, 84, 2nd ed., has expressed a strong doubt on the point. The next question is, how far is the section repealed by the 11 & 12

At a meeting of the judges after the passing of the 6 & 7 Will. 4, c. 114, for the purpose of choosing the Spring Circuits of 1837 (Littledale, J., Bosanquet, J., and Coleridge, J., being absent from indisposition), a discussion took place as to some points which were thought likely to occur at the assizes, in consequence of the recent Act for allowing prisoners indicted for felony to make full defence by counsel; and the following seemed to be the course of practice which the judges present thought it would be most advisable to adopt.

1. That where a witness for the Crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein, and that such deposition must be read as part of the evidence of the cross-examining counsel. (*i*)

2. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

3. That the witness cannot, in cross-examination, be compelled to answer, whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination: and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such statement the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

Vict. c. 42, s. 34? That clause was not referred to in *Reg. v. White*, which was decided after that Act passed. That case, therefore, can hardly be treated as an authority that the clause is not repealed as to depositions before a coroner; but, although the terms of the repeal are wide, it should seem that they may reasonably be limited so as only to repeal the clause as to depositions before magistrates; for a verdict of murder or manslaughter may be found by a coroner's jury against a person who is not present at the inquest, and it can hardly be correctly said that any person is charged with an offence before a coroner, or that the depositions are taken against any one on the holding of an inquest. If this reasoning be correct,

the 22 & 23 Vict. c. 33, s. 3, was unnecessary, and the difficulty arising from that clause being confined to manslaughter is immaterial.

The 6 & 7 Will. 4, c. 114, gave the prisoner no right to copies of the depositions after the commencement of the assizes or sessions, unless the court were of opinion that the copies might be made without inconvenience; and this part of the section does not appear to be affected by the repeal, as the repeal only extends to 'the right of parties charged with offences to have copies.'

(*i*) See the 28 & 29 Vict. c. 18, *post*, in the section, 'How the credit of witnesses may be impeached.'

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Rules as to  
the practice  
after the pass-  
ing of this  
statute.

4. If the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do. (*j*)

5. In cases of public prosecutions for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, are, in strictness, entitled to the reply, although no evidence is produced on the part of the prisoner. (*k*)

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A prisoner is  
not entitled to  
a copy of his  
examination.

A prisoner is not entitled under the Act to a copy of his own examination, taken before the committing magistrate, which has been returned with the depositions, but only to a copy of the depositions of the witnesses against him. (*l*) This decision, observes Mr. Phillpotts, (*m*) is founded on the express language of the Act, which speaks of depositions of witnesses, and says nothing of the examinations of prisoners. Yet it may in some cases be as necessary for the full defence of the prisoner that he should be furnished with a copy of his own statement taken in writing before the magistrate, as it is to have a copy of the depositions, especially where a part of the case for the prosecution consists of evidence intended to disprove or contradict the prisoner's state-

(*j*) *S. & M.*, p. 293. Where one witness to character was called, Alderson, B., held that the right to reply was general, and that counsel should exercise their full discretion whether, under the circumstances, they will resort to it or not. *Reg. v. Corfell*, 1 Cox, C. C. 123. In this case the only ground for the reply was, that the prisoner's counsel had used 'some fallacious arguments.' But the judges have since uniformly disapproved any reply when witnesses to character alone are called.

(*k*) 7 C. & P. 676. In *Rex v. Marsden*, M. & M. 439, an indictment for publishing a libel on the Duke of Wellington, the Attorney-General, instructed by the Solicitor for the Treasury, conducted the prosecution, and stated, in answer to an objection that he was not entitled to reply, that he appeared in his official capacity; Lord Tenterden, C. J., said, 'There is no doubt of the rule; wherever the King's counsel appears officially, he is entitled to reply.' But on the same day in *Rex v. Bell*, *ibid.* 440, a criminal information for a libel on the Lord Chancellor, the Attorney-General stated that he appeared as the counsel and private friend of the Lord Chancellor, and, no evidence being offered in defence, he did not reply. In *Reg. v. Gardner*, 1 C. & P. 629, an indictment for stealing money out of a post letter, Whately, Q. C., claimed the reply, as he represented the Attorney-General; but it was urged that this was like a prosecution by any other of the public departments, Pollock, C. B., 'It is like a prosecution by the Attorney-General, those who represent him, though not usually counsel for the Crown, have the right to reply, as in the Mint cases

at the Old Bailey.' [On the Oxford circuit I never knew the right to reply claimed in a Mint case. I was myself counsel for the Mint at Hereford, Monmouth, and Gloucester for many years, and never claimed, or had it suggested to me that I should claim, the reply where no evidence was given for the prisoner.] And in *Reg. v. Taylor*, 1 F. & F. 535, which was a Mint prosecution on circuit, Byles, J., would not admit the right of reply. In *Reg. v. Beckwith*, 7 Cox, C. C. 505, an indictment for forging voting papers at an election of guardians of the poor, the prosecution had been directed by the Poor Law Board, and Bliss, Q. C., stated that he appeared for the Attorney-General and claimed the reply; citing *Reg. v. Gardner*; but Byles, J., said, 'I am of opinion that the right to reply where the prisoner calls no witnesses ought to be limited to the Attorney-General when prosecuting in person, and if I could do so, I would not allow it even in that case. I certainly cannot permit it under any other circumstances,' and refused to allow a reply. In *Reg. v. Christie*, 7 Cox, C. C. 506, an indictment for murder on the sea, Bliss, Q. C., at the close of the case for the prosecution, claimed the reply under any circumstances, as he appeared *ex officio* as Attorney-General of the County Palatine of Lancaster; Martin, B., 'I cannot admit your claim; the right is a very objectionable one; I shall limit it wherever possible, and I wish I could prevent even the Attorney-General of England from exercising it.'

(*l*) *Reg. v. Aylott*, 8 C. & P. 669, Littledale, J., and Parke, B.

(*m*) 2 Phill. Ev. 181.



ment. In such a case, if it were necessary for the ends of justice the judge, by virtue of his judicial authority, might allow the prisoner to inspect his written examination. (*n*)

It was held that a prisoner was not entitled, under the 6 & 7 Will. 4, c. 114, s. 3, to copies of the depositions until he was finally committed or held to bail for the purpose of trial, and therefore he was not so entitled on being committed for further examination, (*o*) and it has also been held that a prisoner is not entitled, under the 11 & 12 Vict. c. 43, s. 27, to such copies, unless he has either been committed to prison to take his trial at a particular time, or has been admitted to bail to make his appearance at a certain time, for the purpose of being tried; and therefore a person committed till the next sessions for want of sureties to keep the peace, and then to do what should be enjoined him by the court, is not entitled to copies of the depositions taken against him. (*p*)

Where additional evidence has been obtained after the commitment, but no depositions containing such evidence taken, the court has no authority to order a copy of such evidence. (*q*)

Where the prisoner was committed for receiving iron, knowing it to have been stolen, and a person, who had been committed as having stolen the iron, was admitted as a witness for the Crown, Patteson, J., allowed the prisoner's counsel to inspect the depositions which had been returned against the person charged as the thief. (*r*)

Where a true bill was found against a prisoner for the murder of a person, on the investigation of whose death the coroner's jury returned a verdict of 'Wilful murder against some person or persons unknown,' and the depositions taken before the coroner were in the possession of the officer of the court before whom the prisoner was to be tried; it was held that, although the coroner could not have been compelled to return the depositions under the 7 Geo. 4, c. 64, s. 4, yet the judges had power by their general authority as a court of justice, if they thought it essential to the interests of justice, to order a copy of them to be given to the prisoner. (*s*)

Where a prisoner was indicted for obtaining money by falsely pretending that a parcel contained a number of letters, and those letters had been seized under a search-warrant, and were in the possession of the prosecutrix, who had written and sent them to the prisoner, an order was made by the Central Criminal Court for an inspection of the letters, but not for copies. (*t*)

A prisoner must be held to bail or committed for trial to be entitled to a copy of the depositions.

Additional evidence.

Depositions against another.

Before a coroner.

Letters.

(*n*) See per Coleridge, J., in *Ex parte Greenacre*, note (*s*), *infra*.

(*o*) *Reg. v. Mayor of London*, 5 Q. B. 555.

(*p*) *Ex parte Humphrys*, 4 Sess. C. 179, Coleridge, J., who seemed also clearly of opinion that a prisoner would have no right to a copy of the depositions after he had been tried.

(*q*) *Reg. v. Connor*, 1 Cox, C. C. 233, Patteson, J.

(*r*) *Reg. v. Walford*, 8 C. & P. 767.

The report does not state whether these depositions were taken in the presence or

absence of the prisoner.

(*s*) *Ex parte Greenacre*, 8 C. & P. 32, Littledale, J., and Coleridge, J., and per Coleridge, J., 'Supposing these depositions had been against some other person tried a year ago for an offence with which this particular prisoner had nothing to do, yet if we had them, have we not authority as a court of justice, if we think it essential to the interests of justice, to order a copy of them to be given to him? I think that we have.'

(*t*) *Reg. v. Colucci*, 3 F. & F. 103. *Quare* whether these letters were not the

Inspection of public books. Never granted in criminal cases.

Where civil rights are depending, a party has a right to inspect, and take copies of such books, &c., as are of a *public* nature, wherein he has an interest; (*u*) but a rule for inspecting a public writing is never granted, where the party who has them in his custody would, by producing them for inspection, disclose any evidence of a criminal nature, or expose himself to a criminal prosecution; for it is a constant and invariable principle that in *criminal cases* the party shall never be compelled to furnish evidence against himself. (*v*)

2. Of the proof of private documents.

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2ndly. Of the proof of private documents. The execution of all written instruments which were attested, whether under seal or not, must have been proved by the subscribing witness, if he could be produced, and was capable of being examined. Thus, not only bonds and other deeds, but attested notices to quit, (*w*) attested warrants to distrain, (*x*) attested bills of exchange, or promissory notes, must have been proved by the attesting witness. (*y*) And so strictly was this rule observed that the testimony of the attesting witness could not be dispensed with, though an acknowledgment of the obligor himself were proved, admitting that he executed the bond, (*z*) or the defendant had admitted the execution in his answer to a bill in chancery; (*a*) for though the party might acknowledge the bond, yet he might not know every circumstance attending the execution; 'a fact may be known to the subscribing witness, not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction.' (*b*) And although it was once held that if an attesting witness had become blind, he need not be called, but it was sufficient to prove his handwriting; (*c*) and this course was adopted in another case. (*d*) Yet it was afterwards held that a bond could not be proved without calling the attesting witness, although he was blind, as he might, from his recollection of the transaction, give most important evidence respecting it. (*e*) But where the attesting witness was dead, (*f*) or insane, (*g*) or absent in a foreign country, or not amenable to the process of the superior courts, (*h*) as where he was in Ireland, (*i*) or where he could not be found after diligent inquiry, (*k*) evidence of the witness's handwriting was admissible. (*l*) In these cases the proof of the subscribing witness's handwriting was evidence of the execution of the instrument by the party therein named, whose signature the instrument purports to bear; and for the purpose of proving the execution, that is,

property of the prisoner; and *queré* the right to issue a search-warrant for them.

(*u*) Tidd. 647.

(*v*) Tidd. 649.

(*w*) *Dox v. Darnford*, 2 M. & S. 62. And it makes no difference that the party, upon whom the notice was served, read it and made no objection. *Ibid*.

(*x*) *Higgs v. Dixon*, 2 Stark. N. P. C. 180.

(*y*) 2 Phill. Ev. 202.

(*z*) *Abbot v. Plumbo*, 1 Dougl. 216.

*Whymen v. Ganth*, 5 Exch. R. 803.

(*a*) *Call v. Dunning*, 4 East, 53.

(*b*) *By Le Blanc, J.*, 4 East, 53.

(*c*) *Wood v. Drury*, 1 Lord Raym.

734, Holt, C. J., at Warwick Assizes.

(*d*) *Pedler v. Paige*, 1 M. & Rob. 258, Park, J. A. J.

(*e*) *Cronk v. Frith*, 9 C. & P. 197, Lord Abinger, C. B., 2 M. & Rob. 262.

(*f*) *Anon*, 12 Mod. 607. See Reg. v. St. Giles, 1 E. & B. 642.

(*g*) *Currie v. Child*, 3 Campb. 283.

(*h*) *Prince v. Blackburn*, 2 East, 250.

(*i*) *Hodnett v. Ferman*, 1 Stark. N.P.C. 90.

(*k*) *Cunliffe v. Sefton*, 2 East, 183.

(*l*) 2 Phill. Ev. 210, *et seq.* See also what will be considered a diligent inquiry so as to let in such evidence, *ibid*. 212, *et seq.*

that the instrument was executed by the party so named, it was not necessary to prove the handwriting of the party. (*m*) And so also formerly where the witness was infamous, (*n*) or interested, (*o*) proof of his handwriting was admissible, because he was not competent.

But now by the 28 & 29 Vict. c. 18, s. 7, 'it shall not be necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness.'

Where proof by attesting witness is unnecessary.

Where an instrument is lost and the attesting witness is unknown, the execution by the parties may be proved; (*p*) and it seems doubtful whether in any case where the attesting witness to a lost instrument is dead, it is necessary to prove his handwriting. (*q*) An instrument signed by one prisoner and attested by another prisoner is admissible against both upon proof of their signatures. (*r*) But with a view to establish the identity of the party, and to show that the person who executed the instrument is the party to the suit, or the party charged, proof of the party's handwriting may be important and most satisfactory evidence. (*m*) And it seems to be settled that where a written instrument is attested by a subscribing witness, who is dead, or abroad, or out of the reach of the process of the court at the time of the trial, or cannot be found, it is requisite to give some evidence that the party who signed the instrument is the defendant sought to be charged under it, as well as to prove the handwriting of the subscribing witness. Where, therefore, the attesting witness to a promissory note was in Canada, and his handwriting was proved by his nephew, who did not know where either the defendant or the plaintiff lived, or anything about the defendant, or about his making his mark to the note, the Court of Exchequer held that this was insufficient; for although proof of the attestation would be evidence of everything on the face of the instrument, viz. of everything he as attesting witness asserted, yet by his attestation he does not assert that *this defendant* signed the note; but that *some* F. M. did; that F. M. is left unidentified and unconnected with the person sued; but the issue to be proved is that this F. M. executed. (*s*) So where an attesting witness to a promissory note proved that the signature Hugh Jones was written on the note in his presence by a Hugh Jones who kept a public-house at a particular place in Anglesea, but he had not seen him since the date of the note, and the name was a very common one in Anglesea; it was held, on the authority of the preceding case, that there was no sufficient evidence to go to the

Lost instrument.

Identity of the prisoner.

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(*m*) 2 Phill. Ev. 214.

(*n*) Jones v. Mason, 2 Stra. 833.

(*o*) Godfrey v. Norris, 1 Stra. 34.

(*p*) Keeling v. Ball, Peake, Ev. App. xxxii.

(*q*) Reg. v. St. Giles, 1 E. & B. 642, ante. p. 241.

(*r*) Reg. v. Marsh, 1 Den. C. C. 505. This was an indictment against Marsh and Lord for attempting to obtain money from an Insurance Company by a false claim in writing for a loss of a horse, which was signed by Marsh and attested by

Lord; and Wightman, J., held that the document was admissible on proof of the handwriting of the prisoners without calling Lord as a witness. The point was reserved, but the case went off on an objection to the indictment, see ante, vol. 2, p. 698, and this point was not noticed. It should be noticed that in this case the instrument was put in evidence as part of the fraud charged against both prisoners.

(*s*) Whitelock v. Musgrave, 3 Tyrw. 541. C. & M. 521.



jury of the identity of the person who had signed the note with the defendant, against whom the action was brought upon the note. (f) But where a bill of exchange was directed to 'Charles Banner Crawford, East India House,' and a witness proved that the handwriting of the acceptance, 'C. B. Crawford,' was that of a clerk of that name in the East India House, who had left it five years ago, but he did not know whether he was the defendant in the action: it was held that there was sufficient evidence of the identity. (u) So where three bills of exchange were accepted in the name of Henry Thomas Ryde, and made payable at the Regent Street branch of the London and Westminster Bank, and the cashier of that bank proved that he knew the handwriting of Henry Thomas Ryde, and that the acceptances were in his writing, that he had kept an account at the Regent Street branch, but his only means of knowledge as to the handwriting consisted in his having as cashier paid cheques drawn in the name of Henry Thomas Ryde, whom he did not know and had never seen write; it was held that there was sufficient evidence of identity of the person who had accepted the bills with Henry Thomas Ryde, the defendant in an action brought upon those bills. (c) So where a witness proved that he saw a person of the name of William Seal Evans write a letter about five years ago, which letter was produced, and established a case against the defendant, William Seal Evans, for goods sold and delivered, if the identity of the writer and the defendant were shown, but the witness had not seen the person since, and did not know whether he was the defendant; it was held that there was sufficient evidence of the identity. (w) Evidence that the defend-

(f) *Jones v. Jones*, 9 M. & W. 75. Parke, B., 'The plaintiff might have called the defendant's attorney to say whether the person who employed him was the Hugh Jones who kept the public house.' Lord Abinger, C.B., said, 'The argument for the plaintiff might be correct, if the case had not introduced the existence of many Hugh Joneses in the neighbourhood where the note was made.'

(u) *Greenhields v. Crawford*, 9 M. & W. 314.

(c) *Roden v. Ryde*, 4 Q. B. 626.

(w) *Swell v. Evans*, 4 Q. B. 626. This and the preceding case were decided at the same time. The grounds of the decision seem to have been, that where no particular circumstance tends to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn. If the name were one of very frequent occurrence, there might not be much ground for drawing the conclusion; but where a name is not so common, the inference would be different. The supposition that the right man has been used is reasonable, because, if not, he might as easily prove that he was not the person, and on account of the danger a party would incur if he served process on a wrong party continually. In *Logan v. Alder*, 3 Tyr. 347, note (e), Bolland, B., said,

'The rule of law is the same in civil as in criminal proceedings. Now suppose a person to be tried for forging the signature of W. R. Alder of H. House to a bond, and that the subscribing witness said, "I saw that bond signed at the inn I keep, but I never saw the party executing before or since," could that prisoner's case be left to the jury?' and on this dictum being cited in *Roden v. Ryde*, *supra*, Pattison, J., said, 'There must be some distinction in the modes of proof according to circumstances. In a civil case the action may be against the executors of the party who signed. I do not understand this doctrine of Bolland, B. In a criminal case the prisoner would be in court, and the witness would be asked whether that was the man who signed the bond.' And Lord Denman, C.J., said, that the dictum of Bolland, B., had been answered by this remark. But it may be doubted whether the answer is satisfactory. Suppose the witness said, 'I cannot tell whether the prisoner is the person I saw sign the bond,' then the case would rest entirely on the identity of the name; and that is plainly the point Bolland, B., meant to put; and it can hardly be doubted that no judge would leave the case to the jury on such evidence. Perhaps a better illustration may be put in a case in the Divorce Court. Suppose the

ant was present when the instrument was prepared, (*x*) or that he had made acknowledgments respecting it, (*y*) would be sufficient to connect him with the instrument. And if an instrument describes a party on the face of it by name, place of abode, and trade (as *E. M. of R.* in the county of *Y.* carpenter), the cases establish that proof of the handwriting of the subscribing witness would be sufficient to show that it was signed by a person truly described as being of that name and place; but still the plaintiff must show that the defendant corresponds with that description. (*z*) So where in an action against *James Roberts*, as a petitioning creditor, it appeared from the proceedings in the Bankruptcy that the petitioning creditor was *James Roberts*; it was held that this was sufficient *prima facie* evidence of identity. (*a*) So where a genuine license was proved under the seal of the Apothecaries' Company, which granted a right to practise and dispense medicines as an apothecary to a person of the same Christian and surname as the plaintiff, who had acted as an apothecary, prescribing and dispensing medicines to his patients; it was held that there was ample evidence to go to the jury of the identity of the plaintiff with the person named in the license. (*b*) So where in an action against a pilot for negligence in the management of a vessel, it was objected that no evidence had been given that the defendant was the pilot, whereon the plaintiff's counsel called out *Mr. Henderson*, intending to call the defendant's son as a witness to prove that fact, when a person answered him, and said, 'I am the pilot;' he was not sworn, but was proved to have been acting as pilot at the time of the accident; it was held that there was some evidence of identity, as the name and calling resembled those of the defendant. (*c*) The handwriting of a party may be proved by a witness who has seen him write; and if a witness states that he has only seen him write once, but thinks the signature is his handwriting, it is evidence to go to the jury, although he says that he can form no belief on the subject. (*d*) A written correspondence with the party, although the witness has never seen him

Handwriting,  
how proved.

co-respondent had half a dozen strange Christian names, and a letter was found in the wife's possession signed in all these names, could it be contended that that letter was admissible in evidence against the co-respondent without any further proof of identity? Or suppose a man were indicted for sending a threatening letter, can it be doubted that there must be some evidence beyond identity of name to warrant the case being left to the jury? In *Reg. v. Ellen Murtagh*, 6 Cox, C. C. 447, the prisoner was indicted for making a false declaration, and it was proved that the declaration was made by a woman describing herself as *Ellen Murtagh*, and that she affixed her mark to it, but the witnesses were unable to identify the prisoner as that woman, and a statement of the prisoner having been held inadmissible, she was acquitted, and it was not even suggested that there was any evidence to go to the jury. *Pennecfather, B., and Moore, J.*

(*x*) *Nelson v. Whittall*, 1 B. & A. 19.

(*y*) *Whitelock v. Musgrave*, *supra* (*xs*).

(*z*) *Whitelock v. Musgrave*, *supra*, per *Bayley, J.*

(*a*) *Hamber v. Roberts*, 7 C. B. 861.

(*b*) *Simpson v. Dismore*, 9 M. & W. 47; and see *Russell v. Smyth*, 9 M. & W. 810, where the same Christian and surname, profession, residence, and age of a person named in a suit as those of the defendant were held sufficient evidence of identity of the party named in the suit with the defendant.

(*c*) *Smith v. Henderson*, 9 M. & W. 978.

(*d*) *Garrels v. Alexander*, 4 Esp. 37. The signature of a person may be proved by a witness who has seen him write his surname only. *Lewis v. Sapio*, M. & Malk. N. P. C. 39, by *Abbott, C. J.*, overruling *Powell v. Ford*, 2 Stark. R. 164, 2 Phill. Ev. 249. A witness may prove the identity of a mark then having seen the person make it on several occasions. *George v. Surrey*, M. & M. 516.

write, will be sufficient to enable him to speak to the handwriting; for when letters are sent directed to a particular person, and on particular business, and an answer is received in due course, a fair inference arises, that the answer was sent by the person whose handwriting it purports to be. (*e*) So where a witness who had never seen the defendant, but had corresponded with a person of defendant's name, living at Plymouth Dock, where the defendant resided, and where, according to other evidence, there was no other person of the same name, stated that the handwriting in question was the handwriting of the person with whom he corresponded, the evidence was held sufficient. (*f*) So where on an information for a libel, in order to show that certain letters were in the handwriting of the defendant, a witness proved that he had never seen the defendant write, but he had seen a number of letters, which purported to have come from him on the subject of a cause in which he was engaged on one side, and the witness on the other side, and the witness had acted upon those letters in the course of the cause; Lord Tenterden, C. J., held that the witness was competent to prove the defendant's handwriting. (*g*) But where an attorney for three defendants stated that he did not know the handwriting of one of the defendants, but before undertaking to defend the action he had required a retainer signed by all three defendants, and had received a retainer purporting to be signed by all the defendants, upon which he had acted; it was held that the attorney was not competent to prove the handwriting of the one defendant; for the other two defendants might have signed the retainer for him with his assent. (*h*)

Knowledge of writing acquired by inspection of documents for the purpose of the case.

Questions have several times arisen whether a witness may speak to handwriting, not from direct comparison, but from a standard in his own mind, where that standard has been obtained by the inspection of papers which have been shown to him purposely with a view to a particular cause. (*i*) Where a witness had seen the alleged writer of a disputed signature write several times for the purpose of showing the witness his manner of writing; Lord Kenyon, C. J., rejected the evidence, as the defendant might write differently from his common writing through design. (*j*) So where after suspicion had been raised that the prisoner had sent a threatening letter, a policeman was sent to pay the prisoner some money, and to procure a receipt from him for it, that he might see him write and be able to speak to his handwriting, and he obtained a receipt accordingly, but he had no previous knowledge of the prisoner's handwriting; Maule, J., held that knowledge so obtained for such a specific purpose, and under such a bias, was not such as to make a man admissible as a *quasi* expert witness, and rejected his evidence. (*k*) So where the prisoner was tried for uttering a forged cheque, on which he was alleged to have written a certain indorsement at the time he uttered the cheque, and he afterwards wrote his name and the same words as were in the

(*e*) Per Lord Kenyon, *Cary v. Pitt*, Peake Ev. App. 85.

(*f*) *Harrington v. Fry*, 1 Ry. & Mood. 90.

(*g*) *Rex v. Stacey*, 5 C. & P. 213.

(*h*) *Drew v. Prior*, 5 M. & G. 261.

(*i*) 2 Phill. Ev. 259.

(*j*) *Stranger v. Searle*, 1 Esp. 14.

(*k*) *Reg. v. Crouch*, 4 Cox, C. C. 163. See also *Reg. v. Barber*, 1 C. & K. 434, *ante*, p. 247.



indorsement, at the request of a person, on another piece of paper, it was held that this paper was not admissible for the purpose of comparison. (*l*) But where on a trial in a county court the defendant swore that he had not signed a memorandum, and the judge directed him to write his name in pencil on a piece of paper, which he did, and he was indicted for perjury in the evidence he gave on that occasion; Wightman, J., thought the jury might compare the signatures, as the signing the name by the defendant during his examination formed part of the transaction out of which the charge arose. (*m*) So where a witness had observed a name signed to an affidavit, which had been used by the plaintiff's counsel in answer to an application to postpone the cause, and in the affidavit it was sworn that the party signing it was the plaintiff's wife; Park, J. A. J., held that the witness might speak to that person's name as the attesting witness to an agreement purporting to be signed by the plaintiff. (*n*)

It was an established rule, that handwriting could not be proved by comparing the paper with any other papers acknowledged to be genuine. (*o*) Thus where on a trial for forging a bill of exchange, an artist and lithographic printer who declared himself able to form a judgment whether documents were in the same or in different handwritings was asked, 'whether from his knowledge and experience on such subjects he could say whether the names of the drawer, acceptor, and indorsee of the forged bill were written by the same person?' Cresswell, J., held that the question could not be put, for, however it might be argued, it eventually came to a mere comparison of handwriting. (*p*) So a threatening letter, and another writing proved to be the prisoner's, could not be put in a witness's hand in order that he might compare them and say whether he was of opinion that they were written by the same person. (*q*) But upon a question respecting the identity of handwriting, the jury may be allowed to take other papers, which have been proved to be the writing of the party whose handwriting is disputed—provided they are part of the proofs in the cause—and may compare them with the disputed writing, for the purpose of forming their opinion whether the disputed writing is genuine. (*r*) But it was an established qualification of this rule that documents, irrelevant to the issues on the record, were not to be received in evidence at the trial in order to enable a jury to institute such a comparison. (*s*) Upon an indictment for sending a threatening letter, there being no proof that the prisoner sent it, except from its being supposed

Comparison  
of handwriting.

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(*l*) Reg. v. Aldridge, 3 F. & F. 781.

(*m*) Reg. v. Taylor, 6 Cox, C. C. 58, ante, p. 102.

(*n*) Smith v. Sainsbury, 5 C. & P. 196. But see Greaves v. Hunter, 2 C. & P. 477.

(*o*) Reg. v. Wilton, 1 F. & F. 391, Bramwell, B. *Ante*, vol. 2, p. 819, 2 Phill. Ev. 251.

(*p*) Reg. v. Coleman, 6 Cox, C. C. 163. (*q*) Reg. v. Shepherd, 1 Cox, C. C. 237, Erle, J.

(*r*) 2 Phill. Ev. 256. Griffith v. Williams, 1 Cr. & J. 47. Doe d. Perry v.

Newton, 5 A. & E. 514. 1 Nev. & P. 4. Solita v. Yarrow, 1 M. & Rob. 133. Eaton v. Jervis, 8 C. & P. 273.

(*s*) 2 Phill. Ev. 256. Bromage v. Rice, 7 C. & P. 548, Littledale, J., and Patteson, J. Griffith v. Williams, *supra*. Doe d. Perry v. Newton, *supra*. Reg. v. Shepherd, 1 Cox, C. C. 237, where Erle, J., held that a book containing entries written by the prisoner could not be handed to the jury to compare them with the threatening letter, for sending which the prisoner was indicted.

to be in his handwriting, and the evidence of handwriting being very slight: Bolland, B., held that the counsel for the prosecution could not put in a document undoubtedly written by the prisoner, but unconnected with the charge in the indictment, that the jury might inspect it, and compare it with the letter in question. (1) And it could not be permitted to introduce writings, irrelevant to the matters in issue, in order to enable a witness to institute such a comparison. (a)

Cross-examination as to other documents.

And it was once held that a witness could not be cross-examined as to other documents which were not in evidence in the case. In an action on a bill of exchange against the acceptor, the defendant's witnesses swore that they believed that the acceptance was not in his handwriting, and it was held that a paper purporting to be signed by the defendant could not be laid before each of the defendant's witnesses in cross-examination, in order to ask them whether they believed the signature to be that of the defendant, for the purpose of testing their knowledge of his handwriting by the agreement or disagreement of their testimony on this point. (v) But where in an action against the acceptor of a bill of exchange, the question was whether the words 'Accepted, Robert Honner,' appearing on the bill as the acceptance were the handwriting of the defendant, and a witness for him swore he believed the signature not to be the writing of the defendant, and assigned as a reason for that belief that the defendant always signed his name 'R. W. Honner;' in cross-examination a document was put into his hand purporting to be signed 'Robert Honner,' and he was asked whether he believed it to be the genuine signature of the defendant, and, on his answering in the affirmative, he was asked whether the document was not signed 'Robert Honner,' and whether, after seeing that document, he would persevere in saying that the defendant always signed his name 'R. W. Honner.' The document was not in any manner relevant to the present issue. It was objected that this course of cross-examination was not allowable, and that it was merely instituting a comparison of handwriting: but Alderson, B. (after consulting the other barons) said the court was unanimously of opinion that the cross-examination, as far as it had been pursued, was regular, and that the question objected to might be properly put. The court could not subscribe to the decision in *Griffiths v. Ivery*, but the inconvenience there suggested, viz., that the jury would have to try various collateral issues, did not arise here, for the witness had himself admitted the document put into his hands to be genuine; and surely if the peculiarity existed in it, which he relied upon as disproving the genuineness of the signature now in dispute, that must be a circumstance by which to test the value of his belief on the subject. But if the witness had denied the genuineness of the signature to the document, he should not have allowed any issue to be raised on the point. (w)

(1) *Rees v. Morgan*, 1 M. & Rob. 134, note.

(a) 2 Phill. Ev. 751.

(v) *Griffiths v. Ivery*, 14 A. & E. 322, 3 P. & D. 179. And Lord Denman was of opinion that the objection would not be removed by independent proof that

the paper was in fact written by the defendant. In *Hughes v. Rogers*, 8 M. & W. 122, Parke, B., stated that he had acted in conformity with this decision in a case at Stafford.

(w) *Young v. Honner*, 2 M. & Rob. 326, 1 C. & K. 51.

Where a defendant in an ejectment produced a will, and one day of the trial called an attesting witness, who swore that the attestation was his, and on his cross-examination two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures, were shown to him (none of these being in evidence for any other purpose of the cause), and he stated that he believed them to be his, and on the following day the plaintiff tendered a witness to prove the attestation not to be genuine; the witness was an inspector at the Bank of England, and had no knowledge of the handwriting of the supposed attesting witness, except from having, previously to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in court; the Court of Queen's Bench were equally divided, Lord Denman, C. J., and Williams, J., holding that the evidence of the witness was receivable, and Patteson, J., and Coleridge, J., that it was not. (*x*) And where the plaintiff called the son of an attesting witness to a bond, who stated that the signature was not his father's handwriting, and the counsel for the plaintiff then put into his hands another paper not in evidence in the cause, and asked him if that was in his father's handwriting, to which he replied in the negative; it was held that witnesses could not be called on the part of the plaintiff to prove that this second paper had been actually signed by the father in their presence, on the ground that their evidence, if received, would have had the effect of raising a collateral issue. (*y*)

*Doe v. Suckermore.*

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*Hughes v. Rogers.*

But now by the 28 & 29 Vict. c. 18, s. 8, 'comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.' (*z*)

Comparison of handwriting now allowable.

If a person has been in the habit of spelling a word in an unusual manner, that is some evidence that a writing containing that word so spelled was written by that person, the value of such evidence depending on the degree of peculiarity in the mode of spelling and the number of occasions on which the person has used it; and the proof of such habit is not confined to the evidence of a witness who is acquainted with it from having seen the person write or correspond with him, but one or more specimens written by him with that peculiar orthography (*a*) will be admissible; for the object is not to show similarity of the form of the letters and mode of writing of a particular word or words, but to prove a particular mode of spelling a word, which may be evidenced by

Peculiar spelling of words.

(*z*) *Doe d. Mudd v. Suckermore*, 3 A. & E. 703. 2 Nev. & P. 16. See 2 Phill. Ev. 260, *et seq.*, where the learned author considers this case with much ability, and contends for the admissibility of the evidence.

(*y*) *Hughes v. Rogers*, 8 M. & W. 123. Alderson, B., said, 'This case is very different from that where a party denies one document to be in his handwriting, and admits others put into his hands; there it has been made a question whether those documents may not be looked at

by the jury in order to see whether they have really been written by the same person; on that point there has been some difference of opinion, but the real question there is, does it enable the jury to appreciate the testimony given by the witness?'

(*z*) This clause extends by sec. 1, 'to all courts of judicature, as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence.'

(*a*) *Quare* 'cacography.'



the person having orally spelt it in a different way, or written it in that way once or oftener in any sort of characters, the more frequently the greater the value of the evidence. Letters, therefore, written by a plaintiff, in which the defendant's name was improperly spelled Titchborne instead of Tichborne, are admissible in evidence, in order to show that a libel in which the name was spelt in the same erroneous manner was in fact written by the plaintiff. (*b*)

Unstamped documents are admissible in criminal cases.

Formerly a written instrument, which required a stamp, was inadmissible, as a general rule, in criminal as well as civil cases, unless it were duly stamped, and no parol evidence could be received of its contents. But now by the 17 & 18 Vict. c. 83, s. 27, 'every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not have the stamp required by law impressed thereon or affixed thereto.'

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As to other points respecting the proof and effect of public and private documents, since they are of rare occurrence in criminal proceedings, it is thought more advisable to refer the reader to the general Treatises on the Law of Evidence, than to encumber this work with any notice of them.

(*b*) *Brookes v. Tichborne*, 5 Exch. R. 929.

## CHAPTER THE FOURTH.

OF CONFESSIONS AND ADMISSIONS—OF EXAMINATIONS BEFORE  
MAGISTRATES—AND OF DEPOSITIONS.

## SEC. I.

*Of Confessions and Admissions.*

A FREE and voluntary confession of guilt made by a prisoner, whether in the course of conversation with private individuals, or under examination before a magistrate, is admissible in evidence as the highest and most satisfactory proof, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true. (a) And the highest

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Confessions  
sufficient for  
conviction  
without proof  
aliunde.

(a) Gilb. Ev. 123. Lambe's case, 2 Leach, 552, 4th edition. Mr. J. Blackstone, and Mr. J. Foster, entertained a different opinion. (See Fost. 243.) The former in the fourth volume of his Commentaries, p. 357, says, in speaking of confessions made to persons not in authority as magistrates: 'Even in cases of felony at common law, they are the weakest and most suspicious of all testimony, very liable to be obtained by artifice, false hopes, promises of favour, or menaces, seldom remembered accurately, or reported with precision, and incapable in their nature of being disproved by other negative evidence.' A distinction may be properly made in the weight to be attached to confessions. If a confession be reduced into writing, either by the prisoner, or by some one else, and read over to him, and it be clearly shown that the confession was the spontaneous and voluntary act of the prisoner, such a confession would be entitled to great consideration. But if a confession were proved by a witness, and rested upon his capability of understanding what was said by the prisoner, his competency to remember the very words used, and his fidelity and accuracy in relating them to the jury, it ought to be received with very great caution. 'For,' as has been well observed (Greenleaf's Evid. 247), 'besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope

or fear to make an untrue confession. The zeal, too, which so generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition in the persons engaged in pursuit of evidence to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of persons necessarily called as witnesses in cases of secret and atrocious crime, all tend to impair the value of this kind of evidence, and sometimes lead to its rejection where in civil actions it would have been received. The weighty observation of Mr. J. Foster is also to be kept in mind, that 'this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted.' Fost. 243. Mr. B. Parke has on several occasions observed that 'too great weight ought not to be attached to evidence of what a party has been supposed to have said; as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say.' Earle v. Picken, 5 C. & P. 542, note. So where one of two witnesses called to prove the same statement of the prisoner to his wife, said that the words were, 'keep yourself to yourself, and don't marry again;' and the other, 'keep yourself to yourself, and keep your own counsel.' Alderson, B., said, 'One of these expressions is widely different from the other. It shows how little reliance ought to be placed on such

[225] authorities have now established, that a confession, if duly made, and satisfactorily proved, is sufficient alone to warrant a conviction, without any corroborating evidence *aliunde*. (b)

evidence.' *Rex v. Simons*, 6 C. & P. 540.

(b) *Wheeling's case*, in note, 1 Leach, 311. *Rex v. Eldridge*, R. & R. C. C. R. 440. *Rex v. Falkner*, *ibid.* 481. In *Greenleaf's Evid.* 251, it is observed, 'In each of the English cases usually cited in favour of the sufficiency of this evidence, there was some corroborating circumstance. *Wheeling's case* seems to be an exception, but it is too briefly reported to be relied on. In the United States the prisoner's confession when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law,' citing *Guild's case*, 5 Halst. 163, 185. *Long's case*, 1 Hayw. 524 (455). 2 Hawk. P. C. c. 46, s. 36. The statement in 1 Leach, 311, is that in *Rex v. Fisher*, 'the facts of Mr. Ward's house having been broken open in the night-time, and the goods mentioned in the indictment stolen therefrom, were clearly proved; but there was no other evidence to fix those facts on the prisoner than his confession made before the committing magistrate; and there being no evidence that this confession was not reduced to writing, *vivâ voce testimony of it was rejected*. But in the case of *Wheeling* it was determined that a prisoner may be convicted on his own confession, when proved by legal testimony, although it is totally uncorroborated by any other evidence.' This statement may mean that where the commission of a felony is proved by independent evidence, a prisoner may be convicted on his confession, though there be nothing to corroborate that confession as to his being the party who committed such felony; and the manner in which *Wheeling's case* is introduced plainly shows that that is the meaning of the statement. In *Rex v. Eldridge*, on an indictment for stealing a mare, it appeared that the mare was seen on the 9th of October in the afternoon in the possession of one of the prosecutor's servants, who was taking it towards one of his fields, but neither that servant nor the prosecutor were called as witnesses. The mare was not found in the prosecutor's possession on the 11th of October. The prisoner had the mare in his possession on the 11th, and sold her under her value. A full confession before a magistrate was proved, and the prisoner convicted. The judges held 'that there was sufficient evidence to confirm the confession.' It is to be observed, that

independently of the confession the case was complete, with the exception of proving that the mare was put in the prosecutor's field by his servant. See *Rex v. Yend*, 6 C. & P. 176, *ante*, vol. 2, p. 337, and *Rex v. Fellows*, *ibid.* In *Rex v. Falkner* and *Bond*, on an indictment for robbing one *Halliday*, he was called on his recognizances but did not appear, and the prisoner, *Falkner*, had been desirous to send a message to *Halliday* to keep him from appearing. The only other evidence was that *Bond* had confessed the offence to the constable who apprehended him, and that both the prisoners, on hearing the depositions read over to them, which contained the charge, had admitted that they were guilty; the depositions charged the prisoners with robbing *Halliday* of certain quantities of copper. The prisoners were found guilty, and the judges held the conviction right, but no reason is stated for the decision. It is clear that the depositions were read in evidence *at the trial*, for their contents are stated in the case; and they were admissible, 1st, as showing the charge of which the prisoners admitted that they were guilty; 2nd, if there were, as there seems to have been, evidence that the prosecutor was kept away by means of the prisoners. In *Rex v. White and Langdon*, R. & R. 508, on an indictment for stealing oats, the prosecutor proved that he had sometimes more, sometimes less than 300 quarters of oats in his granary, the door of which had been fastened with a padlock, and was found by the prosecutor unlinged and drawn back, on the 24th of December. At half-past two o'clock that morning, two men were seen by a witness coming from the prosecutor's yard, each of them having a sack on his back, but the witness did not say that the men were the prisoners. *White* on the same day was in possession of some bags of black Irish kiln-dried oats, of the same kind as those in the granary of the prosecutor, who could not, however, swear that he had lost any of his oats; each prisoner made an explicit confession of the offence, which was proved, and the prisoners found guilty; and the judges held the conviction right. In *Rex v. Tippet*, R. & R. 509, which was an indictment for stealing oats from the same prosecutor, the same evidence was given as in the preceding case, with the addition that the prisoner was under-ostler in the prosecutor's stables, and a confession by the prisoner of his having stolen the oats in company with the prisoners in the preceding case was put in, and the prisoner convicted; and seven of the learned judges (all who met on the occasion) were of opinion that the conviction was



But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by *any sort* of threats or violence, nor obtained by *any* direct or implied promises, however slight, nor by the exertion of any improper influence, *(c)* because under such circumstances the party may have been influenced to say what is not true, and the supposed confession cannot safely be acted upon. *(d)*

The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed. *(e)* In determining, therefore, whether a confession be admissible or not, 'the only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one.' *(f)*

right, 'as there was not only the confession but the evidence of the prosecutor also, which made it probable that oats had been stolen, as it appeared from such evidence that the door of the granary had been broken open, and most of the learned judges thought that, without the owner's evidence, the prisoner's confession was evidence upon which the jury might have convicted.' See *Reg. v. Burton*, Dears. C. C. 262, *ante*, vol. 2, p. 343, and the dictum of Maule, J. In *Rex v. Tuffs*, 5 C. & P. 167, the prisoner was indicted for stealing two heifers, which were not missed by the prosecutor or any person in his service, and the only evidence against the prisoner was his own statement, when questioned on the subject, that he had driven away two heifers from his uncle's premises, 'The World's End Dolver;' the prosecutor and another person proved that the prosecutor's farm was called by that name, but they could not undertake to say that there was not any other of that name; Lord Lyndhurst, upon this, told the jury that under the circumstances there was not any evidence of a stealing as to the heifers of the prosecutor; though if it had been proved that his was the only 'World's End Dolver,' it would have been sufficient. It does not, therefore, appear that it has ever been expressly decided that the mere confession of a prisoner *alone*, and without any other evidence, is sufficient to warrant a conviction. In *Rex v. Edgar*, Monmouth Spr. Ass. 1831, MSS. C. S. G., the prisoner was indicted for obtaining money of a friendly society by false pretences; the rules of the society had not been enrolled, but the prisoner, who was a member of the society, had acted under them, and it was contended that he had thereby admitted their validity, and the position in the text was cited as a stronger decision; on which Patteson, J., said, 'Could a man be convicted of murder on his confession alone, without any proof of the person being killed? I doubt whether he could.' In *Reg. v. Sutcliffe*, 4 Cox, C. C. 270, where a robbery had

been committed on a moonlight night, Cresswell, J., left the case to the jury on confessions of the prisoner, though the prosecutor swore the prisoner was not one of the men who robbed him. The remark on this case is that the prosecutor *might* be in error; the prisoner *must* know whether he was guilty or not.

*(c)* It is a mistaken notion that evidence of confessions obtained by promises or threats are to be rejected from regard to public faith. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving the highest credit, because it is presumed to flow from the strongest sense of guilt; and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected. Warickshall's case, Eyre and Nares, BB., 1 Leach, 263. Three men were tried and convicted for the murder of Mr. Harrison, of Campden, in Gloucestershire. One of them, under a promise of pardon, confessed himself guilty of the fact. The confession, therefore, was not given in evidence against him, and a few years afterwards it appeared that Mr. Harrison was alive. *Ibid.* note *(a)*.

*(d)* Per Lord Campbell, C. J., *Reg. v. Scott*, D. & B. 47.

*(e)* Per Littledale, J., in *Rex v. Court*, 7 C. & P. 486, *post*, p. 396. But in *Reg. v. Baldry*, 2 Den. C. C. 430, Lord Campbell, C. J., said, 'The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury.' But see Lord Campbell's dictum, *Reg. v. Scott*, *supra*.

*(f)* Per Coleridge, J., in *Rex v. Thomas*, 7 C. & P. 345, *post*, p. 395.

[826]  
Must be free  
and voluntary.

A confession can never be received in evidence, where the prisoner has been influenced by *any* threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and, therefore, excludes the declaration, if *any* degree of influence has been exerted. (*g*) It is a question for the court, and not for the jury, to decide whether, under the particular circumstances of the case, the confession be admissible. (*h*)

[827]

The general principle on which the decisions on this subject seem to have proceeded seems to be this: that if, under the circumstances, there be reasonable ground for presuming that the disclosure was made under the influence of any promise or threat of a temporal nature, the evidence ought not to be received. (*i*)

Promises and inducements.

As to what shall be considered as a promise or inducement, saying to the prisoner that it would be better for him if he did confess is sufficient to exclude the confession. (*j*) So a confession induced by saying, 'I am in great distress about my irons; if you

Jones' case.

will tell me where they are, I will be favourable to you,' cannot be given in evidence. (*k*) Where the prosecutor asked the prisoner, on finding him, for the money he, the prisoner, had taken out of the prosecutor's pack, but before the money was produced said, 'he only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;' upon which the prisoner took 11s. 6½*d.* out of his pocket, and said it was all he had left of it; a majority of the judges held that the evidence was inadmissible. (*l*) Where also an attorney, who was endeavouring to discover some burglars for the purpose of prosecution, said to the prisoner, who had gone to him for the purpose of making some statements relating to the burglary, 'I dare say you had a hand in it; you may as well tell me all about it;' it was held that this excluded a statement then made. (*m*) So where a prisoner being in custody said to the officer who had the charge of him, 'If you will give me a glass of gin I will tell you all about it,' and two glasses of gin were given to him, and he made a confession of his guilt; Best, J., considered it as very improperly obtained, and inadmissible in evidence. (*n*) But where a prisoner

Confession by prisoner when drunk.

(*g*) 2 Stark. Ev. 36.

(*h*) *Rex v. Nute*, *post*, p. 378. In *Reg. v. Garner*, 1 Den. C. C. 329, Erle, J., said, 'In every case it is for the judge to decide whether the words were used in such a manner, and under such circumstances, as to induce the prisoner to make a confession of guilt, whether such confession were true or no.' It is submitted, however, that it is a question for the jury whether they believe the witness gives a true account of what the prisoner said, and also whether the prisoner made the statement voluntarily, or was prevailed upon to make it by any inducement used by the witness, although the witness may have denied that he used any inducement whatever. The Editor has known these questions left to the jury on several occasions, and it is conceived that it is the proper course, as they alone are the judges of the credibility of the witnesses. C. S. G.

(*i*) 2 Stark. Ev. 36.

(*j*) 2 East, P. C. c. 16, s. 94, p. 659.

(*k*) *Cass's case*, 1 Leach, 293, note (*a*).

(*l*) *Jones's case*, R. & R. 152, but see *Rex v. Griffin*, *ibid.* 151, *post*, p. 421.

(*m*) *Reg. v. Croydon*, 2 Cox, C. C. 67. Rogers, Q.C., after consulting Platt, B.

(*n*) *Rex v. Sexton*, MS. Chetw. Burn. tit. *Confession*, p. 1086, Doyl. & Wms. The authority of this case has been questioned in several books. Deac. Cr. Law, 424, Rose. Cr. Evid. 37, Joy, 17, and it seems very justly. In the first place the offer to confess was volunteered on the part of the prisoner; secondly, there was no promise or threat at all used by the constable, nor was the prisoner in any way led to believe that by confessing he would escape from the charge, or be let out of custody; thirdly, there was no inducement to state anything but the truth. In 1 Burn's J. Doyl. & Wms. 1081, note (*a*), it is said, 'The authority

made a statement to a constable in whose custody he was, but he was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so, and it was objected that what the prisoner said under such circumstances was not admissible; Coleridge, J., said; 'I am of opinion, that a statement being made by a prisoner while he was drunk, is not, therefore, inadmissible against him, and that, to render a confession inadmissible, it must either be obtained by hope or fear. This is matter of observation from me, upon the weight that ought to attach to this statement, when it is considered by the jury.' (o)

Where, on an indictment for robbery, a witness stated that he had said to one of the prisoners, 'You had better split, and not suffer for all of them,' the statement of the prisoner was rejected. (p) So where a person said to the prisoner in the police barracks, 'If any other person had to do in the case, it is better you should tell;' the statement there made by the prisoner was rejected. (q) So where on an indictment for larceny, a witness proved that he said to the prisoner, 'It would have been better if you had told at first;' the statement of the prisoner was rejected; Gurney, B., saying, 'That is an inducement. It amounts to this, that if it would have been better then, it would be better now. I think it hardly safe to admit the evidence after that.' (r)

[828]  
Promises and  
inducements.

Where a constable, whilst he had a prisoner in custody on a charge of larceny, asked him whether he had committed the felony, which he denied, and then said, 'It is of no use for you to deny it, for there is the man and boy who will swear that they saw you do it;' Gurney, B., held that this was an inducement to say something, and, therefore, what the prisoner said was not admissible. (s) So where on an indictment for administering arsenic, it appeared that the surgeon who was called in saw the prisoner, and said to her, 'You are under a suspicion of this, and you had better tell all you know,' it was held that a statement made after this to the

Mills' case.

Kingston's  
case.

of this decision seems doubtful; for it is not every hope of favour held out to a prisoner that will render a confession afterwards made inadmissible; the promise must have some reference to his escape from the charge.

(o) *Rex v. Spilsbury*, 7 C. & P. 187. In a note to this case, 1 Phill. Ev. 465, it is observed, 'The facts of the case as reported do not warrant the marginal note, which is as follows:—"Semble, if a constable give him (the prisoner) liquor to make him drunk, in the hope of his saying something, that will not render the statement inadmissible, but it will be matter of observation for the judge in his summing up." It is not to be inferred from the case that a confession—so immorally, not to say criminally, extorted—would be received.' The principle, however, on which the decision turned would seem to warrant the marginal note, as the mere giving liquor without any inducement in words could not operate as an inducement either by exciting hope of escape or fear of punishment. It is to be observed, also, that in all the cases

where confessions have been excluded there has been an anticipation of benefit or injury *after* the confessing or non-confessing. Where liquor is given the benefit (if it can be called any) is received already, and nothing further is in expectation. C. S. G.

(p) *Rex v. Thomas*, 6 C. & P. 353, Patteson, J. By such a statement as that made by the witness the prisoner *might* be induced to suppose that he would be more mercifully dealt with if he confessed, and that he might therefore be induced to confess himself guilty of an offence he never committed. See the Reporters' note, *ibid*.

(q) *Moody's case*, 2 Crawf. & D. C. C. Joy, 12.

(r) *Rex v. Walkley*, 6 C. & P. 175.

(s) *Rex v. Mills*, 6 C. & P. 146, and MSS. C. S. G. 'These words seem to have been construed by the learned judge as the same in effect as if the constable had said, it will be better for you to confess it, for we can prove it whether you do or not.' Joy, 7.



Partridge's  
case.

surgeon was inadmissible. (*t*) So where it appeared, on an indictment for larceny, that the prisoner, being in the custody of a constable, the latter said to the prosecutor, 'You must not use any threat or promise to the prisoner;' and immediately after this, the prosecutor said to the prisoner, 'I should be obliged to you if you would tell us what you know about it; if you will not, we, of course, can do nothing: I shall be glad if you will.' The confession was held inadmissible: Patteson, J., saying, 'I think this is a distinct promise: what could the prosecutor mean by saying, that if the prisoner would not tell, they could do nothing, but that if the prisoner did tell, they would do something for him?' (*u*)

[829]  
Inducement to  
implicate  
another pri-  
soner.

If an inducement be held out to one prisoner to make a statement, which implicates another prisoner, such statement is inadmissible: for it can only be used as evidence against the prisoner who made it, and then it is evidence obtained by an inducement. Upon an indictment for murder against a man and woman, it appeared that a woman who was placed by the constable with the female prisoner, whilst he went to the inquest, to prevent her laying violent hands upon herself, and to prevent her from going away, told her to the effect that 'she had better tell the truth, or it would lie upon her, and the man would go free.' Parke, J. (after consulting Taunton, J.), said, 'As this declaration of the female prisoner can only legitimately be received in evidence to affect her and no one else, we think that it is not receivable, as it was made after an inducement held out by a person who had her in custody. If it were to be used at all, it could only be used to criminate her; and then it would be evidence obtained to criminate her by means of an inducement.' (*x*)

Shepherd's  
case.

Where a constable, who apprehended a prisoner for stealing a brass tap, asked him what he had done with the tap he had stolen from the prosecutor's premises, and said, 'You had better not add a lie to the crime of theft,' and desired him to go with another constable, and show him where he had put the tap; Gaselee, J., after expressing some doubt, refused to receive a confession made to the constable, who had addressed these observations to the prisoner. (*y*)

(*t*) *Rex v. Kingston*, 4 C. & P. 387, Parke, J., after consulting Littledale, J.

(*u*) *Rex v. Partridge*, 7 C. & P. 551. Dr. Greenleaf, Evid. 256, after citing this case, and Guild's case, *post*, p. 385, observes, 'It is extremely difficult to reconcile these and similar cases with the spirit of the rule as expounded by Eyre, C. B., in Warickshall's case, *ante*, p. 367, note (*c*); the difference is between confessions made voluntarily, and those "forced from the mind by the flattery of hope, or by the torture of fear." If the party has made his own calculation of the advantages to be derived from confessing, and thereupon has confessed the crime, there is no reason to say that it is not a voluntary confession. It seems that in order to exclude a confession, the motive of hope or fear must be directly applied by a third person, and must be sufficient, in the judgment of the court, so far to overcome the mind of the prisoner as to

render the confession unworthy of credit.' In *Rex v. Green*, 6 C. & P. 655, Taunton, J., said, 'I take it no man ever makes a confession without proposing to himself in his own mind some advantage to be derived from it,' *post*, p. 399.

(*v*) *Rex v. Enock*, 5 C. & P. 539. It does not appear to have been noticed either by the counsel or the court that this was an inducement to tell the truth. See *post*, p. 395.

(*w*) *Rex v. Shepherd*, 7 C. & P. 579. Mr. Joy, p. 8, observes, that 'the manner in which these words were used may have been considered by the learned judge, who saw and heard the witness, to be of a threatening nature, and calculated to lead the prisoner *untruly* to confess himself guilty; or the words may have been deemed in effect the same, as if the constable had said, "you have committed a theft, it will be better for you not to deny it—that is, to confess." The words, viewed

It was formerly held that if a prisoner were told that what he said would be used for him or against him at his trial, his statement was inadmissible. A prisoner, when before a magistrate, was told by the magistrate's clerk not to say anything to prejudice himself, 'as what he said would be taken down, and would be used for him or against him at his trial.' Coleridge, J., 'This is an inducement, and it was held out by a person in authority. I am of opinion that the prisoner's statement cannot be given in evidence. I cannot conceive a more direct inducement to a man to make a confession than telling him that what he says may be used in his favour at the trial.' (x) So where the constable who apprehended the prisoner said to him, 'What you are charged with is a very heavy offence, and you must be very careful in making any statement to me or anybody else that may tend to injure you, but anything you can say in your defence we shall be ready to hear, and send to assist you;' a statement thereon made was rejected. (y) So where the constable told the prisoner 'You are apprehended on a serious charge; take care that you do not say anything to injure yourself; but if you can say anything in your defence, we are willing to hear it, and to send to any person to assist you;' a statement thereon made was rejected. (z) So where a policeman told a prisoner that whatever she told him would be used against her on her trial; a statement thereon made was rejected. (a) So where the magistrate's clerk, when the prisoner was being examined, told him that he was at liberty to make any statement, but that 'whatever he said would be taken down and used against him;' a statement thereon made was rejected. (b)

Drew's case, and other cases now overruled.

On the other hand, where a police officer had told a prisoner that whatever he said would be used against him; it was held that a statement thereon made was admissible. (c) So where a police officer told the prisoner, before he made a statement, 'to be careful, it would be used against him on his trial if committed by the magistrates;' it was held that the statement was admissible. (d)

Cases contrary to Drew's case.

These cases were reviewed in the following case, which may be taken to have settled the law on this point. Where, on an indictment for murder, a police constable said, 'I went to the prisoner's house. I saw the prisoner. I told him what he was

Telling a prisoner that what he did say would be taken down

in this light, imply an inducement rather than a threat.' 'This case has been controverted,' Joy, 8, note (a), but it is not stated upon what occasion. It is difficult to see how the observations of the constable could induce the prisoner to state what was false, especially as he desired the prisoner to go and show where he had put the tap; and, therefore, the case seems at variance with *Rex v. Court*, post, p. 396, which seems to have proceeded on the correct principle, namely, that a confession is admissible unless it has been obtained by the prisoner being induced to suppose that it will be better for him to admit himself guilty of an offence which he really never committed. C. S. G.

- (x) *Reg. v. Drew*, 8 C. & P. 140.
- (y) *Reg. v. Morton*, 2 M. & Rob. 514.
- (z) Coleridge, J., approving of *Reg. v. Drew*.
- (a) *Reg. v. Hornbrook*, 1 Cox, C. C.

54, Coleridge, J., approving of *Reg. v. Drew*. This case was not cited in *Reg. v. Baldry*, *infra*.

(a) *Reg. v. Furley*, 1 Cox, 76, Maule, J., on the authority of *Reg. v. Drew*.

(b) *Reg. v. Harris*, 1 Cox, C. C. 106, Maule, J. In *Reg. v. Jones*, MSS. C.S.G. (cited *Reg. v. Attwood*, 5 Cox, C. C. 322) Maule, J., said, 'It has been held that to tell a prisoner what he says will be used for him or against him, is an inducement; and to say that it will be given in evidence against him comes to the same thing; for if he is told that it is to be used at all, it may induce him to say something that he may suppose may make for him.'

(c) *Reg. v. Chambers*, 3 Cox, C. C. 92, Rolfe, B.

(d) *Reg. v. Attwood*, 5 Cox, C. C. 322, Erle, J.

and used  
against him  
will not ex-  
clude a state-  
ment.

charged with. He made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said *he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him.* Objection was made that what the prisoner then said was inadmissible. Lord Campbell, C. J., thought that, although the caution of the constable differed from that directed by the 11 & 12 Vict. c. 42, s. 18, to be given by the justice to the prisoner in the word 'will' instead of 'may,' it did not amount to any promise or threat to induce the prisoner to confess; it could have no tendency to induce him to say anything untrue; and that in spite of it, if he did afterwards confess, the confession must be considered voluntary. His lordship, therefore, allowed the witness to give evidence of what the prisoner then said, which amounted to a confession of his guilt; and upon a case reserved, after argument on behalf of the prisoner, the judges were unanimously of opinion that the confession was properly received. Lord Campbell, C. J., 'I adhere to the opinion which I formed at the trial. The rule is, that *if there be any worldly advantage held out, or any harm threatened, the confession must be excluded.* The reason is, not that the law supposes that the statement will be false, but that the prisoner has made a confession under a bias, and that therefore it would be better not to submit it to the jury.' Pollock, C. B., 'A simple caution to the accused *to tell the truth*, if he says anything, it has been decided not to be sufficient to prevent the statement made being given in evidence; (e) and although it may be put that where a person is told to tell the truth he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but if he says anything, let it be true. But where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable, the objectionable words being that *it would be better* to speak the truth, because they import that it would be better for him to say something. (f) The true distinction between the present case and a case of that kind is, that it is left to the prisoner as a matter of perfect indifference whether he should open his mouth or not.' (g)

But where an inspector of police said to a woman in custody on the charge of having attempted to set fire to a workhouse, 'You are accused of a very serious offence; have you any explanation to give? You are not bound to say anything, but anything you say will be given in evidence against you.' The inspector then asked her, 'Was it she that set fire to the buildings?' It was held that the statement of the prisoner in answer to this question was not admissible. (h)

(e) *Rex v. Court*, 7 C. & P. 486. Reg. v. Holmes, 1 C. & K. 248.

(f) Reg. v. Garner, 1 Den. C. C. 329.

(g) Reg. v. Baldry, 2 Den. C. C. 430. Reg. v. Drew, Reg. v. Morton, Reg. v. Farley, and Reg. v. Harris, were cited and disapproved of in this case, and can no longer be considered authorities, or Reg. v. Hornbrook, either, which was not cited.

(h) Reg. v. Toole, 7 Cox, C. C. 244, A.D.

1856, Pigot, C. B., and Richards, B. Pigot, C. B., so held, on the ground that he was not satisfied that the statement was not the result of some influence, and when the legislature had thought that the prisoner should be protected by such precautions as in the 14 & 15 Vict. c. 93, s. 14 (which corresponds with the 11 & 12 Vict. c. 42, s. 18, except that it emits the proviso), he could never be



A confession made by the prisoner with a view and under the hope of being thereby permitted to turn king's evidence, has been held inadmissible. In a trial for burglary, a witness was called to prove that one prisoner had desired him to apply to the justice to admit him as a witness for the Crown; for that he had not entered the house, but had only stood at the door, while the other prisoners went up stairs to commit the felony; it was objected that as this confession was made with a view and under the hope of being thereby permitted to turn king's evidence, it was not admissible; and Adair, Serjt., being of opinion that this was not a voluntary confession, the evidence was rejected. (i) On an indictment for murder, it appeared that the prisoner was taken into custody on the charge on the 2nd of December, and that on the 11th he made certain statements, which were sought to be given in evidence. To prove one of these statements, a policeman was called, who said that he held out no inducement to the prisoner to make any statement, nor did he know that any one else had done so to the 11th of December, when the statement was made; but on the 6th of December he knew that a reward of £100 had been offered by the government, accompanied by a statement that the Secretary of State would recommend an accomplice, not being the person who actually committed the murder, for a pardon, but the witness could not state that this had come to the knowledge of the prisoner; and Cresswell, J., allowed this statement to be given in evidence. In a later part of the same case a policeman stated, that soon after the prisoner had been taken into custody, and before the 6th of December, the prisoner requested that he would let him know if any reward should be offered, or any papers published concerning the murder, and that he would bring any such papers to him as soon as they were printed. On the 6th of December, it was generally known that the Secretary of State had offered a reward and a promise of free pardon to any of the offenders, except such as had struck the blow, and on the 13th the witness gave the prisoner one of the printed handbills, which offered £100 reward to any person who should give such information as should lead to the discovery and conviction of the murderers, and 'a pardon to an accomplice, not being the person who actually committed the murder, who shall give such information as shall lead to the same result.' Cresswell, J., after consulting Patteson, J., held that a statement made by the prisoner to the witness on the 11th of December was receivable. In a still later

[830]  
Confession with a view to being admitted as a witness, and receiving a pardon.

Boswell's case. Statements made after a reward and pardon offered by the Secretary of State rejected, it appearing that they were produced thereby.

satisfied that the proper caution had been given, depending on the fleeting memory of an individual. Richards, B., was 'rather disposed to think that the evidence ought not to be received,' and was 'considerably influenced by the opinion' of Pigot, C. B. Both judges avoided laying down any abstract rule, and limited the decision to the particular case, which itself is very far from being satisfactory. Reg. v. Baldry, Reg. v. Furley, and Reg. v. Harris, were cited. In a note it is stated that Lefroy, C. J., 'made a similar ruling in Reg. v. Grey, A.D. 1855, having noted as the decision that the custom of

constables interrogating prisoners should be discouraged, and even though caution be given that the evidence should not be admitted.' This case, therefore, seems to have turned on the questioning by the constable; but in Reg. v. Toole no remark was made on that point. See Reg. v. Bodkin, 9 Cox, C. C. 403, *post*.

(i) Hall's case, in note to Lambe's case, 2 Leach, 559. But where a person had been admitted king's evidence, and confessed, and upon the trial of his accomplices refused to give evidence, he was convicted upon his own confession. Rex v. Burley, 2 Stark, Ev. 13.

[§31]

Confession by a prisoner after he had heard of a reward and pardon, and after he had been cautioned, held admissible.

part of the same case, it appeared that on the evening of the 10th of December, the prisoner said that he saw no reason why he should suffer for the crime of another, and as government had offered a free pardon to any one of the parties concerned, who had not struck the blow, he would tell all he knew about the matter. Cresswell, J., 'It now appears, with sufficient clearness, that the prisoner in making the statements ascribed to him was influenced by the hope of pardon held out by authorized parties. I shall, therefore, reject the evidence of all statements made by him after the evening of the 10th of December, and expunge from my notes such as have already been given in evidence.' (j)

Upon an indictment for murder, it appeared that the prisoner sent for the chaplain of the gaol, and said he thought it was very hard that some of the prisoners should have their lives taken away wrongfully, and asked the chaplain if any magistrate would come that day, as he wished to see a magistrate to make a statement respecting the charge; and then said, 'Has any proclamation been made, or any offer of pardon?' The chaplain said proclamation had been made some time, and an offer of pardon. The prisoner then said if any person should make known the circumstances, it would be impossible for him to go back to Pershore. The chaplain said that any person who made such a statement would probably not think of going back to Pershore, and that if he made a statement the chaplain hoped that he would understand that he could offer him no inducement, as it must be his own free and voluntary act. When the prisoner asked if there was a proclamation, there was something said that the reward would enable a person to go elsewhere. A magistrate came in about three-quarters of an hour, and what passed between him and the prisoner, before the latter made a statement, was reduced to writing as follows:— 'The voluntary information and confession,' &c., 'who saith, in answer to questions put by the said magistrate, I wish to make a statement of what I know. I have told the chaplain so, and desired him to send for a magistrate. No person has made any promise or held out any inducement; what I have said to the chaplain, and what I am about now to say, is my own free and voluntary act and desire.' The said magistrate having read over to the said prisoner the foregoing statement, informed him he was at liberty to say anything he might wish, and that it would be the said magistrate's duty as a magistrate to take it down in writing. The said prisoner voluntarily saith as follows [here followed the statement]. It was urged that this statement ought not to be admitted, as it was manifest that the motive which induced the prisoner to make it was the offer of pardon. It was clear he made it to save himself by means of the pardon. Pollock, C. B., 'I collect from the decision in *Reg. v. Boswell*, (k) that before a statement can be excluded on the ground that it was made in the hope of a pardon, it must appear that that motive was operating on the prisoner's mind, and in that case, up to the moment when that was shown, my brothers Patteson and Cresswell held the statements of the prisoner to be receivable, though the prisoner knew of the reward and the promise of a pardon

(j) *Reg. v. Boswell*, C. & M. 584.(k) *Supra*.



having been offered by the Secretary of State; but when it appeared that Boswell had made the communication, stating "he saw no reason why he should suffer for the crime of another, and that, *as* government had offered a free pardon to any of the parties concerned, who had not struck the blow, he would tell all about the matter," it was held that the statement was inadmissible, as it appeared that the prisoner was influenced by the hope of pardon held out by authorized parties. In the present case the chaplain said to the prisoner, after the pardon had been alluded to, that he hoped he would understand that he, the chaplain, could offer him no inducement; it must be his own free and voluntary act, and what the magistrate said to him is very nearly to the same effect. I think that the statement of the prisoner must be received.' (1)

Moore and Blackburn were tried for a murder. The chief constable had received three anonymous letters; No. 1 on the 29th of October, No. 2 on the 3rd of November, and No. 3 on the 8th of that month; on the 12th Moore was examined as a witness against Blackburn before the magistrates; and, on his leaving, the chief constable told him that he was not satisfied with the way he had given his evidence; Moore said that he had more to state, and was desired to put it on paper, and the next day a paper was produced, which Moore said he had written. The chief constable then said, 'I arrest you as the writer of several anonymous letters, showing a guilty knowledge of the murder.' Moore said he had written the letters Nos. 1 and 2, and the chief constable believed No. 3 to be in his handwriting. A large reward had been offered to anyone giving private information of the murder, and a reward and free pardon by government for any accomplice not the actual murderer; and a handbill had been circulated, dated Nov. 4, stating these rewards and pardon. Moore had received a shilling a day by the direction of the chief constable whilst he was a witness, as he stated he was starving. The chief constable told Moore repeatedly, when he was treated as a witness, that he must speak the truth; but he never offered him any inducement to make any statement. It was held that these letters and statements were admissible; they were not confessions, but merely statements made to get others implicated. The governor of the gaol, from notes made at the time, afterwards deposed to a statement made by Moore in the magistrates' room at the gaol, four days after he was charged with the murder; at this time a printed copy of the handbill offering the rewards and pardon was hanging up in the room, and the contents were known to the prisoner, who frequently, both before and after this statement, asked the governor whether he thought he (the prisoner) could give evidence, but he never said that he made the statement in that expectation, or in hope of getting the reward, and the gaoler on all occasions told him, before he said anything, that his statements would be used against him. Talfourd, J., received the statement at the time; but the following morning stated that he had consulted Williams, J., and, upon mature consideration, they considered that all the statements were admissible, with the exception of that

Letters admitted after an offer of a reward and pardon, but a statement rejected; as the latter, but not the former, seemed to have been caused by the reward and pardon.

(1) Reg. v. Dingley, 1 C. & K. 637.



made to the gaoler. As it appeared that at the time it was made the handbill was in the room, and the prisoner had the notion that he would be admitted as a witness for the Crown, they were of opinion, on mature consideration, that this statement was inadmissible, and he should therefore expunge it from his notes. (*m*)

Confession by one prisoner after another had been admitted queen's evidence, and after a caution from a magistrate.

The prisoner, who was indicted with several others for burglary, sent for a magistrate to tell him he had something to communicate to him. The magistrate acted at the interview with great caution, and warned the prisoner not to say anything that would criminate himself, as what he said would be taken down in writing, and made use of against him on his trial. The prisoner replied he did not care, as he knew that the witness knew all. Upon cross-examination, it appeared that the prisoner had been confined, after his arrest, in the same cell with another person, charged with the same crime, who had confessed and been admitted queen's evidence; the prisoner was aware of this, and it was to that he alluded when he said that he knew the witness knew all, and that it was from the statement made by the person who had been admitted queen's evidence that the prisoner was examined, and his confession taken down. It was insisted that, under these circumstances, the confession was not admissible, as the caution given by the magistrate did not appear to have had the effect of removing from the prisoner's mind all the influences which would have invalidated the confession, and that there was a reasonable cause to lead the prisoner to believe that if he made a confession he would be put in the same situation with the other person who had done so. Crampton, J., received the confession, observing that the magistrate stated that, as far as he knew, the prisoner came forward voluntarily; that a mere formal caution from a magistrate would not be sufficient to set up a confession, if it appeared that such confession was made under *the distinct impression of a previous promise or threat*, but that it did not appear that there was any previous inducement whatever. If there were any threats made use of before, or any promises held out, the distinct caution given by the magistrate was sufficient to obviate them. It was in effect telling the prisoner that he would get no benefit from his confession, and that he should consequently dismiss from his mind all expectation of getting any, if any such be had. (*n*)

Threats and menaces.

As to what shall be considered as a threat, saying to a prisoner that it would be worse for him if he did not confess, is sufficient to exclude a confession. (*o*) So a confession induced by saying, 'Unless you give me a more satisfactory account, I will take you before a magistrate,' or (*p*) by saying, 'That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle; you

(*m*) Reg. v. Blackburn, 6 Cox, C. C. 333.

(*n*) Berigan's case, Joy, 27. 1 Ir. Circ. Rep. 177. In this case there were similar confessions made by all the prisoners, under circumstances precisely similar, and they were all admitted. 'It is not improbable,' observes Mr. Joy, 'that in this case the prisoner was in-

duced to make the confession by what his fellow-prisoner had done, and by his having been admitted queen's evidence, but no promise, threat, or inducement was held out by any person in authority calculated to make his confession untrue.' Joy, 28.

(*o*) 2 East, P. C. c. 16, s. 94, p. 659.

(*p*) Thompson's case, 1 Leach, 291.

are a damned villain, and the gallows is painted in your face,' (q) cannot be given in evidence. So where a prosecutrix said to her servant girl, who was in custody on a charge of administering poison to her, 'Jane, now you see the effects of your wickedness; you will be to go from here to-morrow morning to Stourbridge to the magistrates, and not return again.' The girl answered, 'Sooner than I will go from here or any where else, I will tell the truth;' and the prosecutrix said, 'That is what I want,' and the prisoner then made a statement; it was held that the statement was inadmissible, because it was made to prevent her being taken before the magistrates. (r)

Griffiths' case.

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A boy, between eight and nine years old, was thus questioned by a policeman: 'Have you ever been to school?' He said 'Yes.' 'Do you know what will become of you if you tell a falsehood?' 'Yes; I shall go to hell.' 'Do you think God knows everything that is done?' 'Yes.' 'Do you think he knows who set fire to the haystack?' The boy did not answer, but began to cry. The policeman then asked whether he could give any information about the fire, and told him, before he made any statement, he should apprehend him upon a charge of setting fire to Mr. Wright's ricks. After that the boy made a statement. Cresswell, J., after consulting Williams, J., said, 'It seems to us both too hazardous to admit this evidence. It is impossible not to say that what passed may have acted upon the boy's mind as a threat.' (s)

Threatening to apprehend a boy on a charge of arson.

If the words used to a prisoner be such that he might consider them as a threat, a confession is not admissible. The prisoner being in custody on a charge of arson, he was told that 'he ought to tell whatever was the truth, but he must be very careful, as he was sure to be committed,' on which he made a statement. Taunton, J., doubted whether the words used might not be construed as a threat, and having consulted Littledale, J., said, 'We think as the words were so ambiguous that they might be considered by the prisoner as a threat, the evidence ought not to be given.' (t)

Where the words used are ambiguous.

Where a prisoner had been taken into custody by a constable without a warrant, and detained by him in durance for four days, and during his confinement a confession was obtained under certain promises, and on the part of the prosecution it was attempted to be shown that the confession was voluntary, and not made under such promises; Holroyd, J., said, 'Even if that were so, the fact of its having been made while in *unlawful custody* rendered it unavailing;' and there being no sufficient evidence without it, he directed an acquittal. (u)

Under false imprisonment.

Where the prisoner was indicted for sheep-stealing, and, prior to his examination before the magistrate, his wife volunteered a

Wright's case. Words not

(q) *Rex v. Parratt*, 4 C. & P. 570, Alderson, J.

(r) *Rex v. Griffiths*, MSS. C. S. G. Worcester Sum. Ass. 1832, Bosanquet, J. S. C. as *Rex v. Richards*, 5 C. & P. 318. See this case more fully, *post*, p. 384.

(s) *Reg. v. Day*, 2 Cox, C. C. 209. *Rex v. Griffiths*, *supra*, and *Reg. v. Hearn*, C. & M. 109, *post*, p. 395, were cited.

(t) *Rex v. Williams*, Gloucester Spr. Ass. 1832, MSS. C. S. G.

(u) Ackroyd's case, 1 Lew. 49. This decision has been questioned, and it has been observed that 'if the prisoner were to believe the apprehension unlawful, that would make him careful not to disclose anything against himself; if he should suppose it lawful, that also would make him careful not to make his situation worse, nor in any respect to prejudice himself.' 1 Phill. Ev. 407, and see *Rex v. Thornton*, *post*, p. 399.



amounting to  
a menace.

confession of the particulars of the robbery; and on the prisoner being brought up for examination, the magistrate told him that his wife had already confessed the whole, and that there was quite case enough against him to send a bill before a grand jury, and then asked him what he had to say. The prisoner immediately confessed his guilt, and stated several facts, which had been previously deposed to by his wife. It was objected that this confession could not be received, inasmuch as the magistrate's address to the prisoner when he was brought before him to be examined was in the nature of a menace. But Parke, J., overruled the objection, saying he considered it rather as a caution. (c)

Confessions  
made after a  
former one  
unduly ob-  
tained.

If a confession has been obtained from the prisoner by undue means, any statement afterwards made by him under the influence of that confession cannot be admitted as evidence.

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In the case of *Rex v. Nute*, (w) the prisoner was suspected of setting fire to an outhouse; her mistress pressed her to confess, and told her, among other things, if she would repent and confess God would forgive her, but she concealed from her that she would not forgive her herself: she confessed. The next day, another person in her mistress's sight, though out of her hearing, told her her mistress said she had confessed, and drew from her a second confession. Lord Eldon, C. J., allowed the confessions in evidence, and the prisoner was convicted. The jury, on having the confessions put to them, said they thought the first confession made under a hope of favour here, and the second under the influence of having made the first. On a case reserved, the judges held that these points were not for the jury, but if Lord Eldon agreed with the jury, which he did, the confessions were not receivable; but many of them thought the expressions not calculated to raise hope of favour here, and, if not, the confessions were evidence. So in

Sexton's case.

*Rex v. Sexton*, (x) a confession had been improperly obtained by giving the prisoner two glasses of gin: the officer to whom it had been made read it over to the prisoner before the committing magistrate, who told the prisoner the offence imputed to him affected his life, and a confession might do him harm. The prisoner said, that what had been read to him was the truth, and signed the paper. Best, J., considered the second confession, as well as the first, inadmissible: and said, that had the magistrate known the officer had given the prisoner gin, he would, no doubt, have told the prisoner that what he had already said could not be given in evidence against him, and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would be evidence against him; but for want of this information he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate.

After pro-  
mises of  
favour there  
must be ex-  
plicit warn-

Where hopes of favour had been given, and the prisoner refused before the magistrate to confess, except upon conditions, Mr. J. Buller observed, that there must be very strong evidence of an explicit warning by the magistrate not to rely on any expected

(c) Wright's case, 1 Lew. 48.

(w) 1 Burn. J., Doyl. & Wms. 1086.

(x) 1 Burn. J., Doyl. & Wms. 1086.



ing and  
caution.  
Smith's case.

favour on that account, and it ought most clearly to appear that the prisoner thoroughly understood such warning before his subsequent confession could be given in evidence. (y) And where it appeared that, before a prisoner was asked what he had to say, he was particularly cautioned by the magistrate not to say anything that would injure himself, for whatever he said would be taken down, and given in evidence against him; but it also appeared that a constable, who had previously induced the prisoner to make a confession to him by telling him it would be better to confess, had been examined before the magistrate, and in his examination had stated that he had told the prisoner that it would be better to confess, and had also stated all the prisoner had said to him in consequence; all which had been taken down, and read over to the prisoner before he made his statement; Littledale, J., refused to allow the statement to be given in evidence, as the caution given by the magistrate was not sufficient to obviate the effect of the inducement used by the constable. (z) But where a constable proved that he had given the prisoner a handbill, offering a reward to any accomplice who would give information on the subject of the robbery, and the handbill had been read over to the prisoner, who made a statement, which the constable took in writing; (zz) when the prisoner was examined before the magistrate this statement was incorporated into the constable's deposition. The prisoner was then told that anything he said would be taken down, and might be used against him, and the prisoner said that the statement to the constable was quite true. It was objected that the last statement would not make the statement to which it referred evidence. The recognition of an inadmissible statement could not make it admissible. Tindal, C. J., 'The impression made by the constable was afterwards removed by the caution given by the committing magistrate; and then the prisoner adopts his former statement. It is just the same as if the prisoner had repeated it or written it down *de novo* after the caution, and then its admissibility could not have been questioned.' (a) And where the prosecutor, before the prisoner was taken before a magistrate, promised him that if he would tell the truth he would do what he could for him; and when before the magistrate, who was not informed of this promise, he was cautioned not to say anything to criminate himself. Park, J. A. J., thought the confession made before the magistrate scarcely admissible, as there should have been an explicit and express warning against the promise which had been made by the prosecutor. (b) So

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(y) 2 East, P. C. 658.

(z) *Rex v. Smith*, Worcester Spr. Ass. 1830, MSS. C. S. G. It is to be observed, that not only was there no express caution given in this case not to rely on the promise made, but that by receiving the previous confession in evidence the magistrate treated it as if it had been properly obtained, and the prisoner might therefore well conceive that a subsequent confession could do him no injury, and might possibly be better for him; and see the ruling of the same learned judge in *Rex v. Gilham*, *post*, p. 400.

(zz) Tindal, C. J., rejected this statement.

(a) *Reg. v. Horner*, 1 Cox, C. C. 364.

No notice was taken of the statement having been incorporated in the deposition of the constable, and therefore treated by the magistrate as lawfully obtained; and *Rex v. Smith* *supra* was not cited, though a decision directly in point the other way, and resting, be it said (with all deference to that very great judge, C. J. Tindal), on very sound reasons.

(b) *Rex v. Compson*, Worcester Spr. Ass. 1829, MSS. C. S. G. The learned judge left it to the jury to say whether the prisoner had sufficient warning before the justice or not. This course seems to have been erroneous. See *Rex v. Nute*, *ante*, p. 378.

where a confession had been obtained from a prisoner, after his apprehension, by his master and the magistrates, by menaces and promises, and when the prisoner was in gaol the witness, who was also a magistrate, went to him, and the prisoner in his presence signed a written confession; but it did not appear that he was cautioned, nor what length of time had elapsed after the former confession; and the witness stated that he believed that the written confession, taken by him from the prisoner, was given in consequence of the impressions previously made on his mind by his master; the confession was rejected. (c)

Sherrington's case. Where one confession has been obtained by an inducement, there ought to be strong evidence to show that the impression under which it was made was removed before a subsequent confession can be received.

Upon an indictment for murder it appeared that the prisoner worked at a colliery, and some suspicion having fallen upon him, the overlooker charged him with the murder. The prisoner denied having been near the place. Presently the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own; and added, 'There is no doubt thou wilt be found guilty; it will be better for you if you will confess.' A constable then came in, and said to the overlooker, in a tone loud enough for the prisoner to hear, 'Robert, do not make him any promises.' The prisoner then made a confession. Patteson, J., 'That will not do. The constable ought to have done something to remove the impression from the prisoner's mind.' The overlooker, in about ten minutes, delivered the prisoner to the constable of the township. The constable stated, that when he received the prisoner, the overlooker told him (but not in the prisoner's hearing) that the prisoner had confessed. That he took the prisoner to his house, and there said, 'I believe Sherrington has murdered a man in a brutal manner.' That the wife and brother of the prisoner were there, and said to the prisoner, 'What made thee go near the cabin?' That the prisoner in answer made a statement similar in effect to the one he had made before. That he used neither promise nor threat to induce the prisoner to say anything. But that he did not caution him. That it was not more than five minutes after he received the prisoner into his charge that the prisoner made the statement. That he was not aware that the overlooker had held out any inducement. That the overlooker was not present when the statement was made. For the prisoner it was submitted that the second confession must be taken to have been made under the same influence as the first. Patteson, J., 'There ought to be strong evidence to show that the impression under which the first confession was made was afterwards removed, before the second confession can be received. I am of opinion, in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination:' and the statement was rejected. (d)

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Meynell's case. Confession in the afternoon after induce-

And so where the prisoner was indicted for stealing two hams, and the constable, having a search warrant, found the hams in the prisoner's house; and thereupon, in the presence of one of the prosecutors, said to the prisoner, 'You had better tell all about

(c) Bell's case, Joy, 71, M'Nall, Ev. 43.

(d) Sherrington's case, 2 Lew. 123.



it;' the prisoner then made a confession; which it was admitted could not be received in evidence. In the afternoon of the same day another of the prosecutors went to the house of the prisoner and entered into conversation with her about the hams, when she repeated the confession she had made to the constable in the morning, but no promise or menace was on this occasion held out to her. Taunton, J., said, 'I am clearly of opinion that the confession is not receivable; it being impossible to say that it was not induced by the promise which the constable made to her in the morning.' (e)

ment in the morning.

So where the prisoner was indicted for stealing money, the property of Mrs. Cooper, her mistress: the money was stolen on a Monday evening, and the prisoner being suspected, Mrs. Cooper told her on that evening that she would forgive her if she told the truth; on the next day, Tuesday, the prisoner was taken before a magistrate, but Mrs. Cooper not appearing against her, she was discharged and placed under her brother's care; after that she made a statement. Mrs. Cooper did not on the Tuesday tell the prisoner that she would not forgive her, nor that anything she said would be given in evidence against her; and Patteson, J., held that this statement could not be given in evidence. On the Wednesday morning Houlton, a superintendent of police, went with Mrs. Cooper to the Bridewell where the prisoner was, and Houlton told the prisoner, in the presence of Mrs. Cooper, that she was not bound to say anything unless she liked, and that if she had anything to say Mrs. Cooper would hear her. Houlton did not know at this time that Mrs. Cooper had promised to forgive her if she would tell the truth, and he did not tell the prisoner that if she said anything it might be given in evidence against her. Patteson, J., after observing that *Meynell's* case (f) was the nearest to the present, added, 'I think that the statement of the prisoner is not receivable in evidence. If Mrs. Cooper had not been present when the statement was made, it might have been different; but I think that as Mrs. Cooper was present, and the interval of time was only from the Monday to the Wednesday, the impression produced by Mrs. Cooper's promise of forgiveness on the Monday evening must be considered as still operating on the prisoner's mind.' (g) So where the prosecutor in the presence of a constable told the prisoner it would be better for him to tell the truth, as it would save the shame of a search warrant in his house, and he then made a confession. (h) The constable then took the prisoner up stairs, and had some conversation, in the absence of the prosecutor, with the prisoner, and he then made another confession. (h) Half an hour afterwards, on the constable taking the prisoner to the station, he cautioned him, in the absence of the prosecutor, not to say anything against himself, and a confession then made was held inadmissible, as it was not clear that the influence of the inducement was removed. (i) So where one prisoner had said to another in the presence of a constable that he had better speak the truth, and he

Hewett's case. Inducement on the Monday evening, confession on the Wednesday without express caution.

Insufficient cautions after inducements.

(e) *Meynell's* case, 2 Lew. 122.

(f) *Supra*.

(g) *Reg. v. Hewett*, C. & M. 534.

(h) Each of these confessions was re-

jected.

(i) *Reg. v. Collier*, 3 Cox, C. C. 57, Williams, J.



then made a statement, (*j*) and two or three hours afterwards another constable had said to the prisoner who had made the statement, 'You need not say anything unless you like;' Wightman, J., held that a statement then made was inadmissible, as being connected with the same inducement as the former. (*k*)

Improper inducement by a policeman; and a statement to a superintendent afterwards without any caution by him.

Where a policeman said to the prisoner, who was charged with the murder of a bastard child, 'You had better tell all about it; it will save trouble;' and then put questions to her; Erle, J., held that her answers were inadmissible; but a superintendent of police having afterwards, about the same time, gone to the prisoner, and, without cautioning her, put certain questions to her; but it did not appear that he had referred to her statements to the policeman; she had, however, said when she saw him, 'Ah, I expected you:' and the questions related to the number of her children, and especially what had become of the youngest, with whose murder she was charged, and whether she had been at Colchester on a particular day; Erle, J., after consulting Wightman, J., held that the answers were admissible. (*l*)

Cooper's case. Inducement by person in superior authority.

Where a person in superior authority holds out an inducement to a prisoner to confess, a confession made to a person in inferior authority is not admissible, especially if such person do not give the prisoner any caution. Upon an indictment for arson, it appeared that the committing magistrate had told the prisoner that, if he would make a disclosure, he would do all that he could for him. The prisoner, after he was committed, made a statement to the turnkey of the gaol, who had held out no inducement to him to confess, and had not given him any caution not to confess. Parke, J., 'I think I ought not to receive the evidence, after what Mr. Simeon (the committing magistrate) said to the prisoner, more especially as the turnkey did not give any caution to the prisoner.' (*m*)

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Confessions made after the effect of inducements have been done away are admissible.

But although such improper inducements may have been held out to a prisoner as would exclude a confession made under their influence, yet if the court, taking into consideration all the circumstances of the case, should be of opinion that at the time a confession was made such inducements had ceased to operate upon the mind of the prisoner, such confession will be admissible. In determining whether an inducement has ceased to operate, it will be material to consider the nature of such inducement, the time and circumstances under which it was made, the situation of the person making it,

(*j*) This was rejected at the trial.

(*k*) Reg. v. Milen, 3 Cox, C. C. 507. See this case on the other point, *post*, p. 388.

(*l*) Reg. v. Cleverton, 2 F. & F. 833. The prisoner's statement was that the father of the child had written for it, and that she had sent it to him by a woman at the railway station at Colchester. The prisoner was acquitted, or the point would have been reserved; and the point deserves reconsideration.

(*m*) Rex v. Cooper, 5 C. & P. 535. The Reporters observe, 'If a person of inferior authority cautions a prisoner not to confess, after an inducement held out by a person of superior authority, it is important to consider whether a statement

made by a prisoner under such circumstances would be receivable; as it seems to be but a fair conclusion that what was said to the prisoner by the magistrate would be much more likely to operate on his mind than anything subsequently said by a constable.' It may be added, that as the inferior can have no control over the superior, it is difficult to see how any caution by the inferior could do away with the effect of the inducement by the superior, as the prisoner must be aware that the inferior could have no power to prevent the superior from carrying his promise into effect. See the ruling of Littledale, J., in Rex v. Gilham, *post*, p. 400. C. S. G.

the time which has intervened between the inducement and the confession, and whether there has been any caution given, and if so, whether that caution has been given generally, or expressly and specifically with reference to the inducement held out. Thus where it appeared that the prisoner, on being taken into custody, had been told by a person who came to assist the constable that it would be better for him to confess, but that, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances before the magistrate was held to be clearly admissible. (*n*)

When such are admissible.

Where it appeared that a constable told the prisoner he might do himself some good by confessing; and the prisoner afterwards asked the magistrate if it would benefit him to confess; on which the magistrate said he could not say it would, and the prisoner then declined confessing; but afterwards, in his way to prison, he made a confession to another constable; and he confessed again in prison to another magistrate; the judges were unanimous in holding that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. (*o*) Nor is it any objection to a confession made before a magistrate, that the prosecutor who was present first desired the prisoner to speak the truth, and suggested that he had better speak out, provided the magistrate or his clerk immediately checked the prosecutor, desiring the prisoner not to regard him, but to say what he thought proper. (*p*)

Rosier's case.

Where upon an indictment for murder it appeared that the prisoner had sent for the coroner, desiring to make some statement; the coroner told him that any confession that he made would be produced against him on the trial, and that no hope or promise of pardon could be held out to him, either by the government, or by any one else. Previous to this time a magistrate had had an interview with the prisoner, and had told him that if he was not the man that struck the fatal blow he would use all his endeavours to prevent any ill consequences from falling on him, if he would disclose what he knew of the murders, and that there were so many persons concerned in the transaction that it would be made known by some or other of them. The magistrate wrote a letter to the Secretary of State for the Home Department, to which he received an answer, stating that mercy could not be extended to the prisoner, for reasons that were therein mentioned; which answer he communicated to the prisoner: all this occurred before the prisoner sent for the coroner. It was objected that, although the inducement that the magistrate would interest himself with the government had been removed, yet there were two other inducements; first, the hope that would arise from the personal endeavours of the magistrate; and, secondly, the fear that if the prisoner did not confess, some one else would tell before him. *Littledale, J.*, 'I think that this declaration is clearly admissible. I think that the conversation with the magistrate, after he received the Secre-

*Clewes' case.*  
Inducement by a magistrate held removed by a subsequent communication from the same magistrate.

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(*n*) *Rex v. Lingate*, 1 Phill. Ev. 410, Bayley, J.

(*o*) *Rex v. Rosier*, 1 Phill. Ev. 411.

(*p*) *Rex v. Edwards*, 1 Phill. Ev. 411.

Howes' case.

tary of State's letter, and the caution given by the coroner, must be taken to have completely put an end to all the hopes that had been held out.' (q) So where a prisoner, when before a magistrate, stated that he had confessed to two constables, who were then present, and did not deny what the prisoner said, in consequence of their having told him that two others had split, and that he might as well, and that, if he told all, he would be acquitted; and the magistrate told him that he need not say anything before him unless he pleased, and that his confession would do him no good, but that he would be committed to prison to take his trial; it was held that his confession, made before the magistrate, was admissible, as it could not be said to result from the same influence as

Bryan's case.

his confession to the constables. (r) So where a prisoner, when in custody, said to a magistrate that he wished to see his priest, and the priest stated that, observing that the prisoner appeared greatly agitated, he said to him, 'the evidence at the inquest was so clear against you, there can be no doubt you are the guilty man.' The prisoner then stated something to the priest, who thereupon asked the prisoner whether he had any objection to state to the magistrate what he had stated to him? The prisoner said he had not, and the magistrate being called in, the prisoner repeated in his presence what he had stated to the priest. It was objected that this could not be admitted; whereupon the magistrate was recalled, and stated that, on the evening of the day on which he had the said interview with the prisoner, he cautioned him not to say anything to him or to the police to criminate himself. The magistrate was then allowed to state what the prisoner said to him on *this* occasion, which appeared to be in every respect the same as what he had stated in the previous interview. The prisoner was convicted, and eleven of the judges of Ireland held the conviction right. (s)

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Griffiths' case.  
Threat of  
taking before  
a magistrate  
done away by  
actually  
taking thither.

Where a prosecutrix said to her servant-girl, who was in custody of a private person in her house at night, on a charge of administering poison, 'Jane, now you see the effects of your wickedness; you will be to go from here to-morrow morning to Stourbridge, to the magistrates, and not return again;' on which the girl said, 'Sooner than I will go from here, or any where else, I will tell the truth;' to which the prosecutrix answered, 'That is all I want.' A statement then made was held inadmissible. On the following morning a constable came to the house, and while there, without giving her any caution, said to the girl, 'My dear girl, where did you get the stuff from that you put in the tea and coffee?' It was held that what was then said must be considered as being under the influence of what was said the night before, because she was still in the house, and still in the hopes that she might not be taken before the magistrates. The constable afterwards took her to Stourbridge, and while on the way thither she made a statement, without any caution having been given, or any inducement having been held out to her, and this was held admissible, because the only hope was that she should not be taken away

(q) *Rex v. Clewes*, 4 C. & P. 221.(s) *Bryan's case*, Joy, 73. *Jebb's C.*(r) *Rex v. Howes*, 6 C. & P. 404, & P. C. 157.

Lord Denman, C. J.



from the house, and this must have been at an end when she was taken away by the constable. (*t*)

Where prisoners were taken into custody on the 1st of October, and on that day the prosecutor frequently told them it would be better for them to confess. They were taken before a magistrate on the 3rd, when they were told that they were not bound to say anything, but that what they did say would be taken down, and used against them on their trials. They each made a statement. It was contended that, as the prosecutor did not tell them it would be better to confess to him, but, generally, that it would be better to confess, the confessions to the magistrate might be produced by that inducement; *Littledale, J.*, 'It appears to me that the examinations may be read. If I could see that the influence was continuing, I should not allow them to be read, but two days elapsed between the promise and the confession. If the prisoners had gone before the magistrate the same day, I should have thought that the influence was continuing. I think it would make no difference that the promise was made by one person, but the confession to another.' (*u*) And where the prisoner had been induced by promises of favour to make a confession, which was for that cause excluded, but about five months afterwards, and after having been solemnly warned by two magistrates that he must expect death, and prepare to meet it, he again made a full confession, this latter confession was admitted in evidence. (*v*) In this case, upon much consideration the rule was stated to be that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted, if the court believes, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. (*w*) In the absence of any such circumstances the influence of the motives, proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected. (*x*)

With regard to the persons whose inducements will prevent the admission of confessions, it should seem that all who are engaged in the apprehension, prosecution, or examination of a prisoner are considered as persons of such authority that their inducements will exclude any confession thereby obtained. Thus an inducement held out by the prosecutor, (*y*) the prosecutor's wife, (*z*) or his attorney, (*a*) or by a constable or other officer, (*b*)

*Nicholls' case.*  
Effect of inducement done away by lapse of time.

*Guild's case.*

General rule.

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As to the persons whose inducements will exclude confessions.

(*t*) *Rex v. Jane Griffiths*, MSS. C. S. G. S. C., but not so fully reported *Rex v. Richards*, 5 C. & P. 313, *Bosanquet, J.*

(*u*) *Rex v. Nicholls and Edwards*, *Monmouth Spr. Ass.* 1830, MSS. C. S. G.

(*v*) *Guild's case*, 5 Halst. 163, 168, as stated *Greenl. Ev.* 257.

(*w*) *Greenl. Ev.* 257, citing *Guild's case*, 5 Halst. 180.

(*x*) *Greenl. Ev.* 257, citing *Roberts' case*, 1 *Devereux R.* 259, 264.

(*y*) *Thompson's case*, 1 *Leach*, 291, *ante*, p. 376. *Cass's case*, *ibid.* 293, note (*a*), *ante*, p. 368, and many other cases.

(*z*) *Rex v. Upchurch, R. & M. C. C. R.* 465, *post*, p. 389.

(*a*) 1 *Phill. Ev.* 407. *Reg. v. Croydon*, 2 *Cox, C. C.* 67, an attorney endeavouring to discover some burglars for the purpose of prosecution, *ante*, p. 368.

(*b*) *Rex v. Sexton*, 1 *Burn. J., D. & Wms.* 1086.

or some person assisting a constable (*c*) or the prosecutor (*d*) in the apprehension or detention of the prisoner, or by a magistrate acting in the business, (*e*) or other magistrate, (*f*) or magistrate's clerk, (*g*) or by a gaoler (*h*) or chaplain of a gaol, (*i*) or by a person having authority over the prisoner, as by the captain of a vessel to one of his crew, (*j*) or by a master or mistress to a servant, (*k*) or by a person having authority in the matter, (*l*) or by a person in the presence of one in authority with his assent, whether direct or implied, (*m*) will be sufficient to exclude a confession made in consequence of such inducement.

Person accompanying the prosecutor in pursuit.

A person who has accompanied the prosecutor in pursuit of a prisoner is a person in authority, so that his inducement will exclude a confession. The prisoner, when taken into custody, was told by a person who had accompanied the prosecutor in pursuit of the prisoner that it would be better for him to confess; but it was urged that, as he was a person who had no authority to interfere, the confession was admissible. *Littledale, J.*, 'That applies to mere strangers; here the person went with the prosecutor, and was acting with his authority and sanction.' The confession was rejected. (*n*)

Master of a ship.

Where a felony was committed on board a ship by the prisoner, one of the crew, towards another of the crew, and the master of the ship threatened to apprehend the prisoner, it was held that this threat excluded a confession; for the offence being a felony, and a felony having been actually committed, the master had power to apprehend the prisoner on reasonable suspicion that he was guilty. (*o*)

A person having a prisoner in custody.

Where a constable, who had a prisoner in custody on a charge of murder, placed her in the custody of a woman whilst he went to the inquest, to prevent her going away, and the woman held out an inducement to her, it was held that a statement made in consequence was not admissible, as it was made after an inducement held out by a person who had her in custody. (*p*)

Person supposed to possess authority.

It has been argued, that a confession made upon the promises or threats of a person erroneously believed by the prisoner to possess authority, the person assuming to act in the capacity of an officer or magistrate, ought upon the same principle (on which confessions to persons having authority are rejected) to be excluded. The principle itself would seem to include such a case :

(*c*) 1 Phill. Ev. 407.

(*d*) *Rex v. Stacey*, MSS. C. S. G. *infra*, note (*n*).

(*e*) 1 Phill. Ev. 407.

(*f*) *Rex v. Clowes*, 4 C. & P. 221, *ante*, p. 384.

(*g*) *Rex v. Drew*, 8 C. & P. 140, *ante*, p. 371.

(*h*) *Rex v. Gilham*, *post*, p. 400.

(*i*) *Rex v. Gilham*, *supra*.

(*j*) *Rex v. Parratt*, 4 C. & P. 570.

(*k*) *Rex v. Upchurch*, *supra*. *Reg. v. Taylor*, 8 C. & P. 733.

(*l*) 1 Phill. Ev. 407.

(*m*) *Reg. v. Taylor*, *supra*. *Rex v. Pountney*, 7 C. & P. 302. *Reg. v. Garner*, 1 Den. C. C. 329.

(*n*) *Rex v. Stacey*, Monmouth Spr. Ass. 1830, MSS. C. S. G.

(*o*) Anonymous, as stated by Parke, B., in *Reg. v. Moore*, 2 Den. C. C. 522. This seems to be the same case as *Rex v. Parratt*, *supra*, and *ante*, p. 377, except that the threat there was by the captain. The case as stated by Parke, B., fully supports my note (*q*) *infra*.

(*p*) *Rex v. Enock*, 5 C. & P. 539, Parke, J., after consulting Taunton, J. This decision is clearly right, though the last ground of the decision in *Reg. v. Sleeman*, Dears. C. C. 249, is the other way; but see my remarks on that point, *post*, p. 397.

but the point is not known to have received any judicial consideration.' (q)

If a confession be obtained by means of any improper inducement held out by a person who has no authority in the presence of a person having authority, and with his consent, it is not admissible. And it is not necessary that the person having such authority should express his consent in words; for if he be silent he will be presumed, as he did not express his dissent, to have sanctioned the inducement. Where the constable, who took the prisoner into custody, was present, and had the prisoner in custody at an inn, when a confession was procured by inducements held out by the innkeeper, and the constable being present did not caution the prisoner in any way; Alderson, B., said, 'I have a very strong opinion against its admissibility; but as there are opinions which I am bound to respect, opposed to my own, I think I had better receive the evidence; and if it should become necessary, I will reserve the point for the consideration of the judges.' (r)

Upon an indictment for housebreaking, it appeared that the prisoner resided with her husband, and that a constable went to their house and charged her with breaking into the prosecutor's house, which she denied; but her husband coming in shortly

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Inducements  
used in the  
presence and  
with the sanc-  
tion of per-  
sons in  
authority.

Inducement  
by a husband  
in the pre-  
sence of a  
constable.

(q) Greenl. Ev. 258. As the question turns upon the effect produced upon the mind of the prisoner, and as that effect must be the same, whether the party be an officer or not, provided the prisoner believed him to be so, it should seem that a confession under such circumstances ought not to be admitted. See *Reg. v. Frewin*, 6 Cox, C. C. 530, *post*, p. 393. In considering these questions it should be remembered that every person has authority where a felony has been committed to arrest the party who committed it, *ante*, vol. 1, p. 801, *et seq.*; in this respect, therefore, a private individual and a constable stand upon the same footing, and this may be well deserving of consideration in cases where the inducement is held out in the absence of the prosecutor or an officer. If a private person after a felony had been committed were to tell a person not in custody that he suspected him of the felony, and that if he would confess he would let him go, but that if he would not he would apprehend him, it might, it is conceived, be well contended that a confession obtained thereby would be inadmissible, on the ground that the party had authority to apprehend, and was in effect a constable *pro hac vice*. After the recent cases, an inducement by a private person, it should seem, can only be considered as inoperative when it is given in the presence of a person in authority, such person expressing his dissent to it, or cautioning the prisoner against trusting to it, or where it is given to a prisoner in custody, no one having authority being present, as if a private person were to

advise a prisoner in gaol through the grating to confess, or send a letter to him to the same effect. 'The difficulty experienced in this matter,' observes Dr. Greenleaf, p. 259, 'seems to have arisen from the endeavour to define and settle, as a rule of law, the facts and circumstances, which shall be deemed in all cases to have influenced the mind of the prisoner in making the confession. In regard to persons in authority there is not much room to doubt. Public policy, also, requires the exclusion of confessions obtained by means of inducements held out by such persons. Yet even here the age, experience, intelligence, and constitution, both physical and mental, of prisoners are so various, and the power of performance so different in the different persons promising, and under different circumstances of the prosecution, that the rule will necessarily sometimes fail of meeting the truth of the case. But as it is thought to succeed in a large majority of cases, it is wisely adopted as a rule of law applicable to them all. Promises and threats by private persons, however, not being found so uniform in their operation, perhaps may, with more propriety, be treated as mixed questions of law and fact; the principle of law that the confession must be voluntary being strictly adhered to, and the question whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left in the discretion of the judge under the circumstances of the case.'

(r) *Rex v. Pountney*, 7 C. & P. 302. The prisoners were acquitted.



Inducement  
by husband in  
order to ex-  
onerate him-  
self.

afterwards, he told her if she knew anything about it to tell the truth; the constable, though present, made no observation, except that he must take her to the station-house, and desired her to go up stairs and put her things on; while she was up stairs she desired the constable to call her husband, and then made a statement as to certain articles of dress, which she produced, as having been purchased with the money which had been stolen. It was objected that what the prisoner said was inadmissible, as it was obtained by an inducement held out by her husband in the presence of the constable; and as the produce of the stolen property was found in the husband's house, he was *primâ facie* liable to account for it, and that a statement made by the wife in the presence of and under the coercion of the husband, by which she accused herself and exculpated him, was clearly caused by undue influence on her mind: Pollock, C. B., 'The fact of the constable being present and not dissenting from what was said places the expressions used by the husband on the same footing as if they had been used by the constable; and I think that, as the constable was a person in authority, such an inducement ought to be sufficient to exclude the admission. Besides, I think there is a great deal of weight in what is urged as to the effect of the prisoner's statement being to exculpate her husband, and that I ought to be careful not to admit anything which may have been said in consequence of his coercion.' (s)

Inducement in  
the presence  
of a constable.

So where two prisoners charged with murder were being conveyed in a cart, and the constable was in the cart with them, and could hear all that passed, and one prisoner said to the other 'You had better speak the truth,' and the constable made no remark; Wightman, J., after consulting Parke, B., held that a statement then made was inadmissible, as the inducement appeared to have the sanction of the constable who was present, and apparently assented to it. (t)

A threat in  
the presence  
of the owner  
of a mare  
on which an  
unnatural  
offence had  
been com-  
mitted.

So where on an indictment for committing an unnatural crime with a mare, the prisoner was found by the owner of the mare in a stable with the mare, and his trousers undone, and the mare bleeding and straining; and a man shortly afterwards, at a house whither the prisoner had gone, said to the prisoner, 'I wish to know what business you had in the stable?' he said, 'You know.' The man said, 'I don't know, and have come on purpose to know, and will know before I leave, and if you don't tell me I will give you in charge to the police till you do tell me.' The prisoner said again, 'You know.' The man said, 'I don't know, but, according to what I could see of the mare, it is the best of my belief that you had connection with her.' He said, 'I had; for God's sake say nothing about it.' The owner of the mare was close by at the time this conversation took place. It was held, on a case reserved, that there was a threat used; and though at the time of the threat there was no statement of the charge, yet before the confession the prisoner was told, in the presence of the owner of the mare, that the charge was for having connection with the mare, which was just the same as if the threat had been made by the owner himself, and he, being the owner of the mare,

(s) Reg. v. Laugher, 2 C. & K. 225.

(t) Reg. v. Millen, 3 Cox, C. C. 507.

was a person in such authority that a threat by him would exclude a subsequent confession. The confession, therefore, ought not to have been received. (*u*)

So where upon an indictment for setting fire to the house of R. Lyford, it appeared that on the morning of the fire the prisoner, who was the servant of the prosecutor, was sent for into the parlour, in which Mrs. Lyford and Mr. Winders were; and that Mr. Winders, who was not a constable, or in any office or authority, said to the prisoner, 'You had better tell how you did it;' and that thereupon she made an answer. Patteson, J., said, 'It is the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority; and in this case I should have received the evidence of the statement made to Mr. Winders, if the inducement had been held out by him alone. But here the inducement does not rest with him alone, because Mrs. Lyford, who was the wife of the prosecutor and also the mistress of the prisoner, was present with Mr. Winders, and must, as she expressed no dissent, be taken to have sanctioned the inducement. I think, therefore, that the inducement must be taken as if it had been held out by Mrs. Lyford, who was a person in authority over the prisoner, and that therefore the evidence is inadmissible.' (*v*)

Taylor's case.  
Inducement  
in the presence  
of a mistress.

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On an indictment for a misdemeanor in attempting to set fire to her master's house, it appeared that the prisoner, a girl aged thirteen, was a domestic servant to the prosecutor, whose wife lived with him, and took her share in the management of the house. After the attempt to set fire to the house was discovered, the prisoner's mistress, in the absence of the prosecutor, said to her, 'Mary, my girl, if you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if William H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you.' She made no answer. The mistress then said, 'Pray tell me if you did it.' The prisoner then confessed. It was contended on the part of the prosecution that the wife had no authority, real or apparent, over the prisoner, so as to hold out any hope which could influence the prisoner to make a false statement, in order that her life might be spared, and therefore that the confession was admissible. The confession was admitted, and the question as to its admissibility reserved for the consideration of the judges, who thought the confession ought not to have been received. (*w*)

Upchurch's case.  
A confession  
obtained from  
a servant  
through hopes  
and threats  
held out by  
the wife of the  
master and  
prosecutor is  
inadmissible.

So where upon an indictment for stealing the goods of two partners, the wife of one of the partners said, 'I told the prisoner it would be better for him if he would tell how we had been robbed, and put us on our guard. I occasionally take the management of the shop. I manage the shop in my brother and husband's absence.' For the prosecution it was urged that an inducement by the prosecutor's wife rendered a confession inadmissible only when it was held out in the presence of her husband. An inducement by the wife of a constable would not vitiate a

Inducement  
by the wife of  
one of two  
partners.

(*u*) Reg. v. Luckhurst, Dears. C. C. 245.

(*w*) Rex v. Upchurch, R. & M. C.C.R.

465. See Reg. v. Garner, 1 Den. C. C.

(*v*) Reg. v. Taylor, 8 C. & P. 733.

329, *post*, p. 435.

confession; Parke, B., ‘The wife of a constable has no control over the prisoner. This woman, being the wife of one of the prosecutors, and concerned in the management of their business, must be looked upon as a person in authority. I think this confession inadmissible.’ (x)

The wife of a person, in whose house an offence is committed, and who is not the prosecutor nor engaged in the prosecution, apprehension, or examination of the offender, and the offence not being in any way connected with the management of the house, is not a person in authority so as to exclude a confession.

But where upon the trial of a prisoner for murder, there was offered in evidence against her a confession made by her in the presence of her mistress to a surgeon, who was attending her, of her having strangled her child with a thread, and placed the dead body in a privy, where it was found with the string round its neck. Her mistress had told her before the surgeon came in that ‘she had better speak the truth,’ and in answer she said she would tell it to the surgeon. An objection was taken that any subsequent confession was inadmissible. After consulting Coleridge, J., Parke, B., received the evidence, being of opinion that in this case her husband, not being the prosecutor, nor the offence in any way connected with the management of the house, the prisoner’s mistress could not be considered as having any control over the prosecution so as to raise a presumption that the inducement held out by her would be likely to cause her to tell an untruth. And upon a case reserved, after argument for the prisoner, Parke, B., delivered judgment: ‘A rule has been laid down, that if the threat or inducement is held out actually or constructively by a person in authority, the confession cannot be received, however slight the threat or inducement; and the prosecutor, magistrate, or constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible. But in referring to the cases where the master or mistress have been held to be persons in authority, it is only when the offence concerns the master or mistress that their holding out the threat or promise renders the confession inadmissible. In the present case the offence of the prisoner, in killing her child and concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence. In practice the prosecution is always the result of the coroner’s inquest. Therefore we are clearly of opinion that the confession was properly received.’ (y)

Result of the cases.

The preceding cases clearly establish the position that, if a threat or inducement be held out in the presence of a person in authority, the effect is precisely the same as if it had been held out by the person in authority. (z)

Simpson’s case. The confession of a girl fifteen years old, occasioned by many applications by the

On a trial for setting fire to a house, it appeared that the prisoner, a girl about fifteen years old, was a servant in the prosecutor’s house, and that soon after the fire was put out Handsley, a neighbour of the prosecutor’s, said to the prisoner, ‘I doubt you have set this house on fire by the candle between the laths.’ She said she did not. On the same day, Mrs. Bowis, who lived about

(x) Reg. v. Warringham, 2 Den. C.C.R. 447, note.

(y) Reg. v. Moore, 2 Den. C. C. 522, 3 C. & K. 153.

(z) Reg. v. Parker, L. & C. 42, at first sight may appear the other way; but it may better rest on another ground, as is shown in my note, *post*, p. 397.



three hundred yards from the house of the prosecutor, and who was the mother of Mrs. Blackburn, the wife of the prosecutor, spoke to the prisoner in the prosecutor's house in the presence of Mrs. Blackburn, who was very deaf, and the prisoner's mother, and told her she had better confess the truth, because she believed it was her that fired both the house and the stack, and that it would be a great deal the worse for her if she did not confess. The prisoner said she did not. On the same day the prisoner was taken before a magistrate at Spilsby. On the next morning, Mrs. Bowis saw the prisoner again on the road to her house. Mrs. Bowis said to the prisoner, she should not come to her house, and told her again it was her that fired both the house and stack; she said she did not do it. Soon after Handsley came up and joined them, and said to the prisoner, 'Don't be so bold; perhaps you will have to go to Spilsby to-morrow.' Spilsby was the place where the magistrates met. He told her that perhaps somebody will come forward to-morrow that saw you do it. She took her apron up, and held it to her face, and said no more. She always denied it; and when Handsley said she might have to go to Spilsby, she denied it again. He said, 'If you be guilty, go along with Mrs. Bowis and beg your master's and mistress's pardon, and get away, and be better in future, and we shall not seek after you;' and he said, 'Never mind your wages; I'll give you a few shillings out of my pocket.' And Handsley also told her it would be better for her to confess. After he went away, Mrs. Bowis went with the prisoner to Blackburn's house, and talked to her about the fire all the way; and after they got there, they went out of the house, and Mrs. Bowis said to the prisoner, 'Now, Sarah, you lighted the bunch of matches, and put it into the thatch of the house;' before she said that, she told the prisoner that if she went to Spilsby again she would be a great deal worse off, and she said to her several times, both going along the road to the prosecutor's house, and also in the house, and also when she spoke to her out of doors, that it would be a great deal better for her if she would confess, and a great deal worse for her if she did not confess. The counsel for the prisoner objected to evidence being given of what the prisoner said, on Mrs. Bowis charging her as before stated, on the ground that after these promises and threats had been held out to her, her answer could not be received unless she had a caution. For the prosecution it was contended that her answer might be received, because Handsley was neither a constable, nor did he stand in any relation to the prosecutor; and though Mrs. Bowis was the mother of the prosecutor's wife, yet that promises and threats made by a person standing in that situation were not sufficient to exclude a confession. Littledale, J., allowed the evidence to be given, but reserved the question for the opinion of the judges, whether it ought to have been received. On Mrs. Bowis saying to the prisoner, 'Now, Sarah, you lighted the bundle of matches, and put it into the thatch?' the prisoner said, 'Yes, I did.' Mrs. Bowis then told Mrs. Blackburn what had passed, and Mrs. Blackburn then came out, and then Mrs. Bowis, in the presence of Mrs. Blackburn, asked the prisoner what she did it for; whether it was for anything against the family? She said 'No.' Mrs.

prosecutor's relations and neighbours, amounting to threats and promises, is not admissible.

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Blackburn asked if any one persuaded her to it? She said 'No;' she said she had no malice. The prisoner in her defence asserted her innocence, and said that Mrs. Bowis said that if she would confess to it she should have her liberty, and she added that she did it on purpose to get her liberty, and that they frightened her to do it. The jury said they found the prisoner guilty with her own confession; but Littledale, J., told them they must find her either guilty or not guilty, and then they gave a verdict of guilty; and all the judges, upon a case reserved, were unanimously of opinion that the confession ought not to have been received, and that the conviction was bad. (*a*)

[843]  
Row's case.  
Inducements  
by persons  
not in autho-  
rity.

With regard to the persons whose inducements will not exclude a confession, the following cases may be mentioned:—While the constable who apprehended the prisoner had him in custody to take him before a magistrate, some of the neighbours who had nothing to do with the apprehension, prosecution, or examination of the prisoner officiously interfered, and admonished the prisoner to tell the truth, and consider his family, which was a large one. No answer or observation thereon was made by the constable, nor did the prisoner answer them, but he desired the constable to call upon him in an hour at the prison, which he did, and there the prisoner made a full confession, which was received in evidence, and, upon a case reserved, the judges present agreed that the evidence was admissible, and the conviction right, because the advice to confess was not given or sanctioned by any person who had any concern in the business. (*b*) So where the counsel for the prisoner objected to a

(*a*) *Rex v. Simpson*, R. & M. C. C. R. 410. The grounds upon which this decision proceeded are not mentioned in the report, and the real import of the case does not appear to be correctly abstracted in the text books, as observes Mr. Joy, p. 9; and after abstracting the case he well observes, 'that it was in the prosecutor's house, and in the presence of the prisoner's mother, and of the prisoner's mistress, a person in authority over her, and under her implied sanction, that the prisoner was told in the first instance that it would be better for her to confess. So in the conversation that immediately elicited the confession, the inducement was held out in the prosecutor's house, [this is an error, it was after "they went out of the house,"] and although it does not appear distinctly whether the prosecutor or his wife were then present, [it is clearly to be inferred that they were not present, for after the prisoner said "I did," Mrs. Bowis told Mrs. Blackburn, and she "then came out,"] the influence caused by the inducement held out on the preceding morning, in the presence of the prosecutor's wife, and in his house, may perhaps be considered to have continued,' Joy 10 and 11, and he refers to *Rex v. Upchurch*, *ante*, p. 389, and *Reg. v. Taylor*, *ante*, p. 389, to show that the mistress is a person in authority. It may be observed, also, that *Patteson, J.*, held in *Reg. v. Taylor*, that an inducement held out by a person in the presence of the prisoner's

mistress must be taken as if it had been held out by the mistress herself: from which it may be inferred that that very learned judge considered the person holding out the inducement as the agent for that purpose of the mistress. In that case, as the prosecutrix expressed no dissent, she was taken to have sanctioned the inducement; so in the present case the same must be inferred as to the inducement first held out in the presence of the mistress; and as by her conduct in the latter part of the transaction the prosecutrix sanctioned what Mrs. Fowis had done in her absence, the learned judges may have thought that Mrs. Bowis was the agent of the prosecutrix for the purpose of discovering the guilt of the prisoner. If a person were expressly employed by the prosecutor to discover the person who had committed a felony, there seems good reason why he should be considered as a person having so much to do with the apprehension and prosecution as to render a confession obtained by his inducements inadmissible. See *Rex v. Stacey*, *ante*, p. 386.

(*b*) *Rex v. Row*, R. & R. 153. See *Rex v. Pountney*, *ante*, p. 387, and *Reg. v. Taylor*, *ante*, p. 389, and *qu.* whether as the constable not only expressed no dissent to the inducements used, but by going to the prison seems to have sanctioned them, there was not ground for contending that the confession was improperly obtained.

confession before a committing magistrate, and offered to prove that the wife of the constable had told the prisoner, some days before the commitment, that it would be better for him to confess, Wood, B., overruled the objection, and admitted the confession. (c)

In a case of murder a surgeon stated that he had held out no threat or promise to induce the prisoner to confess; but a woman who was present said that she had told the prisoner she had better tell all; and then the prisoner made certain confessions to the surgeon. It was objected that, as the confession was made after an inducement held out, it could not be received in evidence; but Park, J. A. J., after consulting Hullock, B., held that as no inducement had been held out by the surgeon, to whom the confession was made, and the only inducement had been held out by a person having no authority, it must be presumed that the confession to the surgeon was a free and voluntary one. If the promise had been held out by a person having any office or authority, as the prosecutor, constable, &c., the case would be different; but here, some person having no authority of any sort officiously says, 'You had better confess.' No confession follows, but some time afterwards, to another person, the prisoner, without any inducement held out, confesses. The learned judge added, that he and Hullock, B., had not the least doubt that the evidence was admissible. (d) So where the counsel for the prisoner proposed to show that the prisoner, being locked up alone in a room at a public-house, was told by a man that another prisoner had told all, and that he had better do the same to save his neck, and that on this he confessed. It was held that, as the promise (if any) was by a person wholly without authority, the subsequent confession to the constable, who had held out no inducement, must be considered as voluntary, and was therefore admissible. (e)

Gibbons' case.

[241]

The prisoner was indicted for placing a piece of iron on a railway, and a platelayer in the service of the company, but who was not employed by any of his superiors to see the prisoner, had told him that it would be a good deal better for him if he owned to it. The prisoner knew that the platelayer worked on the line. Cresswell, J., 'I am disposed to think the statement of the prisoner is receivable, the witness not being a person having any authority to make any promise; still he was in a position that might reasonably lead the prisoner to believe he had;' and thereupon the counsel for the prosecution declined to ask as to the statement of the prisoner. (f)

Inducement by a railway servant.

There has been a difference of opinion among the judges whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable: some of the judges thinking it receivable, and others thinking it is not so. (g) And several cases have occurred, in which confessions made to persons without authority, in consequence of inducements held out by such persons, have been rejected. (h) But it is said to be

Confession to a person not in authority after inducement by such person.

(c) *Rex v. Hardwick*, 1 Phill. Ev. 408.

(d) *Rex v. Gibbons*, 1 C. & P. 97.

(e) *Rex v. Tyler*, 1 C. & P. 129, Hullock, B.

(f) *Reg. v. Frewin*, 6 Cox, C. C. 530. The prisoner was not defended. The

marginal note treats this as an actual decision. See the note (g), *ante*, p. 387.

(g) Per Parke, B., in *Rex v. Spencer*, 7 C. & P. 776.

(h) In *Rex v. Dunn*, 4 C. & P. 543, a witness proved that the prisoner wished to



‘the opinion of the judges that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority.’ (i)

Result of the cases.

The result of these cases seems to be, that a confession is not inadmissible, although made after an exhortation, or admonition, or other similar influence, proceeding at a prior time from some one who has nothing to do with the apprehension, prosecution, or examination of the prisoner: for a promise made by a person who interferes without any authority of this kind is not to be presumed to have such an effect on the mind of the prisoner as to induce him to confess that he is guilty of a crime of which he is innocent.

Instances of admissible confessions.

[845]

An inducement to one prisoner will not exclude a confession by another.

It is no objection that the confession was made under a mistaken supposition that some of the prisoner's accomplices were in custody: not even though some artifice has been used to draw him into that supposition. (j)

Jacobs and Tarrant, two apprentices, were indicted for stealing from their master, who, suspecting Tarrant, told him that if he did not confess he would send for a constable. Jacobs could hear what was said. Tarrant said he had robbed the prosecutor, and that Jacobs had robbed him too. Jacobs said, ‘You are a liar; I have only taken one handkerchief.’ It was held that the statement of Jacobs was admissible; for an inducement or threat offered to one person cannot affect the admissibility of a confession made by another, although that other be present when the inducement is offered. (k)

An inducement as to one crime will not exclude a confession as to another crime.

An inducement held out to a prisoner with reference to one charge will not exclude a confession of another offence, of which the prisoner was not suspected at the time the inducement was held out. The prisoner had been in the custody of several constables, one after another, and it was suggested on his behalf that one of them had improperly induced him to confess, and this con-

sell a stolen book to him, and that he told him he had better tell where he got it. Bosanquet, J., ‘Any person telling a prisoner that it will be better for him to confess will always exclude any confession made to that person. Whether a prisoner's having been told by one person, that it will be better for him to confess, will exclude a confession subsequently made to another person, is very often a nice question; but it will always exclude a statement made to the same person.’ In *Rex v. Slaughter*, *ibid.* note (a), the same learned judge rejected a confession made by the prisoner to one of his fellow-workmen, who had told him it would be better for him to confess. In *Rex v. Arundel*, Gloucester Summer Assizes, 1830, the same learned judge ruled the same way, saying, ‘If an unauthorised person makes a promise, it will not prevent a statement made to another person from being received in evidence; but if the statement be made to the person who makes the promise, I think it ought not to be received.’ The same distinction is also adverted to in a note to *Rex v. Gibbons*, *ante*, p. 393. For this distinction,

however, there seems no sufficient reason. The correct inquiry in every case is, whether the inducement was such as to lead the prisoner to suppose that it would be better for him to confess himself guilty of a crime he did not commit. If it was, then a statement made under its influence, whether to the party using the inducement, or to another person, would be inadmissible. At the same time, it must ever be a circumstance deserving of consideration, in conjunction with others, that the prisoner did not make the confession to the party using the inducement at the time, but made it afterwards to another party; as that tends to show that he was not under the influence of the inducement when he confessed; and this is the view which the court seems to have adopted in *Rex v. Gibbons*. See also Mr. Joy's observations, pp. 26, 27. C. S. G.

(i) Per Patteson, J., in *Reg. v. Taylor*, 8 C. & P. 733, *ante*, p. 389.

(j) *Rex v. Burley*, 1 Phill. Ev. 406.

(k) *Reg. v. Jacobs*, 4 Cox, C. C. 54. The Common Serjeant, after consulting Erle, J.

stable was called, and stated that the prisoner was in his custody on another charge, and was not suspected at that time of the offence for which he was on his trial, and that he made a statement. It was submitted that if a promise was held out to him, it was immaterial what the charge was. Littledale, J., 'I think not. If he was taken up on a particular charge, I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge.' The confession was admitted. (*l*)

But where several felonies form part of the same transaction, an inducement held out as to one will exclude a statement as to another. On an indictment for attempting to set fire to the house of one Vidler, it appeared that the bed and bedding of two rooms in the house were found on fire, and soon afterwards a silver tea-spoon and a broken salt-spoon were found in the sucker of the pump. Vidler said to the prisoner, that if she did not tell the truth about the things that were found in the pump, he would send for the constable to take her, but he did not say anything to her about the fire. Coltman, J., held that this was such an inducement to confess, as to exclude anything that the prisoner said respecting the fire; as it was really all one transaction. (*m*)

If what is said to a prisoner have no tendency to induce him to make an untrue statement, his confession is admissible. On an indictment for cattle-stealing, a witness stated that he had had a conversation with the prisoner, in which the prisoner asked the witness if it would be better for him to confess; upon which the witness replied that it would be better for him not to confess, but that the prisoner might say what he had to say to him, for it should go no further; it was objected that the statement made to the witness was not receivable, as it had been obtained under a promise. Coleridge, J., 'The only proper question is, whether the inducement held out to the prisoner was calculated to make his confession an untrue one. I think that what was said in the present case must have had a contrary tendency.' (*n*) So if what is said to a prisoner contain neither a promise, threat, or inducement to confess, the statement of the prisoner is admissible. The prisoner having been charged on oath by Betsy Burford, an accessory before the fact, with having set fire to three hay-stacks belonging to Organ, Nichol, and Gillman, the constable went with a warrant, specifying all the three charges, and stating them to have been made on the oath of the accessory, and when the prisoner was apprehended she was told that there was a very serious oath laid against her by Betsy Burford, who had sworn that she had set fire to Organ's, Nichol's, and Gillman's ricks; on which the prisoner made a statement, which was allowed to be given in evidence. (*o*)

If a person advise a prisoner to be sure to tell the truth, and he then makes a statement, such statement is admissible, on the ground that such advice cannot be supposed to induce the prisoner to confess that he is guilty of a crime of which he is really

Unless they are parts of the same transaction.

The proper question is whether the inducement be calculated to produce a false statement.

Long's case.

[346]

Advising a prisoner to be sure to tell the truth.

(*l*) *Rex v. Warner and Morgan*, Gloucester Spr. Ass. 1832. MSS. C. S. G.

(*m*) *Reg. v. Hearn*, C. & M. 109.

(*n*) *Rex v. Thomas*, 7 C. & P. 345.

(*o*) *Rex v. Long*, 6 C. & P. 179, Gurney, B. The statement to the prisoner was nothing more in substance than the statement contained in the warrant.

innocent. On an indictment for forgery, the committing magistrate proved that no inducement was held out to the prisoner to confess; but the prosecutor had said, in the presence of the prisoner, that he considered the prisoner as the tool of one Gardiner, and the magistrate then told the prisoner to be sure to tell the truth: on which he made a statement. It was objected that this statement was not receivable; for though this was not, in form, an inducement to confess, it was in effect so. A person in authority advising a prisoner to tell the truth, conveyed to the mind of the accused an intimation that it would be better for him if he confessed the charge. Littledale, J., 'I think I ought to receive the evidence. It can hardly be said that telling a man to be sure to tell the truth is advising him to confess what he is really not guilty of. The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed.' (p)

Holmes' case.

So where at the conclusion of the examinations before the magistrate the prisoner began to make a statement, when the magistrate said to him, 'Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial;' it was objected that the statement then made was inadmissible; it was answered that the only proper question was whether the words said to the prisoner had any tendency to induce him to make a false statement. Here the prisoner was cautioned not to say anything that was false, and the preceding case was expressly in point. Rolfe, B., 'I am glad to find that there is such an authority; there are some previous cases the other way, where it was held that it was an inducement to tell a prisoner that it would be better to tell the truth. I think this statement admissible.' (q)

Sleeman's case.

The prisoner was indicted for setting fire to her master's farm-building; she was about to go away from a policeman, but he prevented her, saying she was his prisoner upon the charge of this arson. She desired to change her dress. He said she might do so, but she must remain in custody, and he gave her into the charge of Mrs. Allen, who was a married daughter of her master, but did not live with her father, and had no control over the prisoner by reason of any relation of master and servant. Mrs. Allen went with her into a laundry where her clothes were; but both Mrs. Allen and the prisoner considered that the latter was in custody. Mrs. Allen said to her, 'Jane, I am very sorry for you; you ought to have known better; tell me the truth whether you did it or no.' She said, 'I am innocent.' Mrs. Allen said, 'Don't

(p) *Rex v. Court*, 7 C. & P. 486. This case seems somewhat at variance with several other cases where a confession has been rejected because the prisoner was told it would be better for him to tell the truth. See *Rex v. Enock*, 5 C. & P. 339, *ante*, p. 379, *Rex v. Williams*, MSS. C. S. G. *ante*, p. 377, *Rex v. Compson*, *ante*, p. 379, *Rex v. Edwards*, *ante*, p. 383, *Rex v. Griffiths*, *ante*, p. 385, *Rex v. Row*, *ante*, p. 392, and *Reg. v.*

*Hearn*, *ante*, p. 395. In these cases it is conceived that, although the inducement was in terms to tell the truth, yet the learned judges understood it as conveying to the prisoner's mind an intimation that he would gain some benefit by confessing himself guilty, even if he were not so. See the observations of Pollock, C.B., on these cases, in *Reg. v. Baldry*, 2 Den. C. C. 430, *ante*, p. 372.]

(q) *Reg. v. Holmes*, 1 C. & K. 248.



run your soul into more sin, but tell the truth.' The prisoner then confessed. And on a case reserved upon the question whether the confession was legally admissible in evidence, it was held that there was no threat or inducement, and no sufficient authority on the part of Mrs. Allen to exclude a statement made in consequence of any inducement to confess held out by her. (r)

John and George Parker were indicted for stealing and receiving hops, the property of Mr. Walker. Lamb, a policeman, had gone to George's house, where John and another brother, William, then were, and had found some hops in a room up stairs. He and the prosecutor then went into a parlour, where John, George, and William were. Lamb there charged William and John with stealing the hops, and George with receiving them, knowing them to have been stolen; on which William said, 'Well, John, you had better tell Mr. Walker the truth.' Neither the prosecutor nor Lamb dissented from or remarked on William's advice; whereupon John said, 'I will tell the truth. I did take some hops, and must risk it.' Lamb then took the three to the Bridewell, and on their way John said of his own accord, 'I'll tell you how I got them hops,' &c. Upon a case reserved, which stated that, 'if the confession was, under the circumstances, receivable, the conviction was to stand,' the conviction was affirmed. (s)

Parker's case.

The result of these cases is that 'as a universal rule an exhortation to speak the truth ought not to exclude a confession.' (t)

Result of the cases.

But it has been repeatedly held that to tell a prisoner that it would be better for him to tell the truth will exclude a confession. (u)

Where a prisoner and his wife were both in custody on a charge of receiving bank notes, but in separate rooms, and a person said to him, 'I hope you will tell, because the prosecutrix can ill afford to lose the money;' and the constable said, 'If you will tell where the property is you shall see your wife;' Patteson, J., said, 'I think that this is not such an inducement as will exclude the evidence of what the prisoner said: it amounts only to this,

Lloyd's case.

(r) *Reg. v. Sleeman*, Dears. C. C. 249. This case can only safely rest on the ground that there was no threat or inducement. As Mrs. Allen had the prisoner actually in her custody, she clearly was acting in the prosecution, and as such was a person in authority; and it has been the uniform course, where a private person has actually had a prisoner in custody, to reject confessions obtained by any threat or inducement used by him. This case was not argued, and no case was cited; and *Rex v. Enoch*, *ante*, p. 386, is a direct authority against it on this point.

(s) *Reg. v. Parker*, L. & C. 42. It was objected at the trial that the inducement was held out in the presence of the prosecutor and policeman, and acquiesced in by them, and therefore the confession was not admissible. The sessions overruled the objection, on the ground that there was no threat or promise held out by any person in authority, &c., and de-

ferred sentence 'until the opinion of the Court of Appeal should have been taken upon the point raised by the prisoner's counsel.' The case was not argued, and the court only said, 'the conviction must be affirmed;' and as it cannot be presumed that the court intended to overrule all the cases, *ante*, p. 387, *et seq.*, by which it has been settled that an inducement held out in the presence of a person in authority is the same as if it were held out by that person, it must be taken that the decision proceeded on the ground that desiring a prisoner to tell the truth is not an inducement; and this view of the case renders it consistent with all the authorities.

(t) *Per Erle, J.*, *Reg. v. Moore*, 2 Den. C. C. 522.

(u) See *per Maule, J.*, in *Reg. v. Garner*, 1 Den. C. C. 329. *Per Pollock, C. B.*, in *Reg. v. Baldry*, 2 Den. C. C. 430.

that if he would tell where the money was he should see his wife.' And the statement made by the prisoner was received. (*v*)

Oath not to  
reveal a con-  
fession.

[847]

It is no objection to receiving a confession that the party to whom it was made takes an oath that he will not reveal what is told to him. After the prisoner had been committed on a charge of murder, a fellow-prisoner said to him, 'I wish you would tell me how you murdered the boy;—pray split.' The prisoner said 'Will you be upon your oath not to mention what I tell you?' The other prisoner went upon his oath, that he hoped, if he told, that he might never stir out of that place again. The prisoner then made a statement. It was held that this was not such an inducement as to render the statement inadmissible, and that, although such oaths were very wrong and wicked, still they were not binding; and that every person, except counsel and attorneys, were bound to reveal what they might have heard. (*w*)

Nolan's case.

So where a constable told a prisoner that his father had been charged with murder. He had been previously cautioned not to criminate himself, as the witness would bring it all against him. The prisoner said he hoped no one would be charged with the murder but himself, and then made a confession. Doherty, C. J., having conferred with Torrens, J., admitted the confession, observing that, although such announcement was likely to act upon the feelings of the prisoner, he would not be warranted on that ground in refusing to receive it. (*x*) So where the prisoner was indicted for concealing the birth of her child, a medical witness said that he examined the prisoner in custody, and found that her breasts were full of milk, and asked her whether she had not recently had a child, and added that if she refused to tell he would examine her person more closely; the prisoner then said, 'It is unnecessary to examine me, for I had a child.' Torrens, J., admitted this confession, on the ground that the witness was endeavouring to ascertain a fact within his own province, and not inconsistent with the prisoner's innocence, and that the declaration of the witness was not a threat within the rule which excludes confessions. (*y*)

Cain's case.

Proposal to  
confess  
coming from  
the prisoner.

If the proposal to confess comes from the prisoner, it seems that his confession is admissible, although the prosecutor, in consideration of his doing so, says he will do all he can for him. Upon an indictment for housebreaking, it appeared that the prisoner being in the shop of the prosecutor, handcuffed, some recommendations to confess had been, in the absence of the prosecutor, made to him by the person who had been left in charge of the house; and the prisoner said, that if the handcuffs were taken off he would tell where he put the property. He had expressed doubts whether, if he told where the property was, he could rely on being leniently dealt with, and, after the prosecutor came in, he was told that they would do all they could for him. It was objected that the statement was inadmissible, as it was made under duress, and to deliver himself from the confinement. Bosanquet, J., 'I

(*v*) *Rex v. Lloyd*, 6 C. & P. 393.

(*w*) *Rex v. Shaw*, 6 C. & P. 372,  
Patteson, J.

(*x*) *Nolan's case*, Joy, 16. 1 Crawl. &

Dix, C. C. 74.

(*y*) *Cain's case*, Joy, 16. 1 Crawl. &  
Dix, C. C. 37.

do not think there is anything in the objection, but I will take a note of it.' Taunton, J., 'I take it no man ever makes a confession voluntarily, without proposing to himself in his own mind some advantage to be derived from it.' The statement was received. (z)

In a case where Miller, the chief officer of the police at Liverpool, stated, that on the 18th of November the prisoner, a boy of fourteen years of age, was apprehended by his directions, without any warrant, between twelve and one o'clock, and that he was carried to the police office about one o'clock. The magistrates were then sitting at a very short distance, and continued sitting till between two and three, and till the business presented to them was finished; but the prisoner was not carried before them, because the police officer was engaged elsewhere. The officer ordered the prisoner to Bridewell on his own authority, between four and five o'clock: and between five and six o'clock he told the prisoner that, in consequence of the falsehoods he had told, and the prevarications he had made, there was no doubt but he had set the premises on fire; and he therefore asked him if any person had been concerned with him, or induced him to do it? The prisoner said he had not done it. The police officer replied that he would not have told so many falsehoods as he had if he had not been concerned in it, and he again asked him if anybody had induced him to do it? The prisoner then began to cry, and made a full confession. In speaking of the falsehoods, the police officer referred to an examination of the prisoner he had himself made. The prisoner was taken before he had dined, and had had no food from the time he was apprehended till after his confession. Bayley, J., thought it deserved consideration, whether a confession so obtained, when the detention of the prisoner was *perhaps illegal*, and when the conduct of the officer was calculated to intimidate, was admissible in evidence, and reserved the point for the opinion of the judges, a majority of whom held the confession rightly received, on the ground that no threat or promise had been used. (a)

In another case (b) where the prisoner, while in gaol, asked the turnkey if he would put a letter into the post for him, and, after his promising to do so, the prisoner gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, gave it to the visiting magistrates of the gaol, who gave it to the prosecutor; Garrow, B., held that the letter so obtained was admissible in evidence, and said he remembered making an objection, when at the bar, to evidence under the same circumstances before Gould, J., who overruled it.

If the expressions be not calculated to raise any hope of some benefit or advantage of a mere temporal nature, it seems that they will not exclude a confession. Upon the trial of a girl for arson, evidence was offered of declarations made by the prisoner to her

Thornton's case. A confession obtained without threat or promise from a boy fourteen years old, by questions put by a police officer in whose custody the boy was on a charge of felony, and when he had had no food for nearly a day, held rightly received.

[848]

Letter from the prisoner in gaol.

There must be the hope of temporal benefit.

(z) *Rex v. Green*, 6 C. & P. 655. The statement did not amount to a confession, and Bosanquet, J., desired the jury to lay it out of their consideration. See Dr. Greenleaf's observations, note (u), *ante*, p. 370.

(a) *Rex v. Thornton*, R. & M. C. C. R. 27. Best, C. J., Bayley, J., and Holroyd, J., *dissentientibus*.

(b) *Rex v. Derrington*, 2 C. & P. 418, Garrow, B.



mistress, after her mistress had told her that it would be better if she would confess if she were guilty, for she would never be easy in her mind till she had confessed. Holroyd, J., after consulting Bayley, J., was of opinion that the evidence was receivable; but it was afterwards excluded on other grounds. (c)

Gilham's case.  
A confession  
made in con-  
sequence of  
persuasion by  
a clergyman,  
not with any  
view of tem-  
poral benefit,  
is admissible.

[849]

Upon an indictment for murder, it appeared that the prisoner and the deceased had been in the service of Mrs. Cox, at Bath. The deceased was murdered in the night of the 26th of January, and the prisoner was apprehended on the 30th of that month, and some articles belonging to Mrs. Cox afterwards found in a room hired by him. When in gaol, the prisoner had the Bible and the *Whole Duty of Man* by him; the gaoler pointed out several passages for him to read in the Prayer Book, particularly the opening sentences of the service, and told him if he wished to have a spiritual adviser he would endeavour to get him one; and after some conversation the prisoner expressed a wish to have the chaplain of the gaol. The chaplain went to the gaol and asked the prisoner why he sent to him; the prisoner answered, to read and pray with him, as he could not do it himself, or make use of the books which were lying before him, which were the Bible, Prayer Book, and *Whole Duty of Man*. The prisoner said he knew he was a sinner, and should soon die. The chaplain asked him how he knew it; he replied, he had been told at the Hall he should be hanged for taking the goods of his mistress; and he then admitted that he had purloined a few things from her. The chaplain saw he was in a very perturbed and distressed state of mind, and asked him if there was not something still more heavy on his conscience; he said he knew he was a sinner as other men, and he knew he was suspected of the unhappy murder. The chaplain told him, if he was innocent to maintain his innocence; but if not, his own heart would tell him. The chaplain, as the minister of God, thought it was his duty to warn him not to add sin to sin, by attempting to dissemble with God. The chaplain then asked him, as he confessed himself a sinner, and as he thought he should soon die, whether he would not wish to repent of his sins; he answered in the affirmative. The chaplain then explained to him what he considered to be the nature of true repentance; and, amongst other things, that it was not a mere acknowledgment of sin, but a deep search into ourselves, and by the purity of the Gospel, whenever we found ourselves deep defaulters, to confess the same before God, with a deep contrition on our part for having violated the law of God. The chaplain told him, that before God it would be better for him to confess his sins. The chaplain also told him, that, next to confessing his sins before God, another most important part of the duty of repentance was to repair, by all possible means in his power, every injury of whatsoever nature he had done to his fellow-creatures; he enlarged very considerably on his repairing the injuries he had done his fellow-creatures, as forming a branch of true repentance; and he said he might say, and repairing any injury done to the laws of his country. The chaplain stated that the prisoner was then extremely agitated; he read to him part of the Communion Service, commenting upon

it as he went along. He thought at one time that the prisoner was on the point of making some immediate communication to him, and he asked him if he should send for Mr. Bourne (the gaoler), meaning it with a view of the prisoner making a communication to Bourne, because he considered he had made a great impression on the prisoner. The chaplain stated the prisoner's agitation and perturbed state of mind during the interview was so great that he could not help being aware that the prisoner had something pressing on his mind; and the chaplain said, while that was the case he could tell the prisoner, and the prisoner would feel, that no services of his would afford him, what he wished they should do, real comfort; telling him also he must be aware that he, as a minister of God, had but one object in view, to bring him to a state of true repentance; and that he could not but himself feel sensible that he was more concerned in the dreadful deed than he had admitted; that he did not wish him to confess to him, but to bear in mind the subject on which he had talked to him and read to him. The prisoner was evidently so worked upon by what had been said, that the chaplain could not but observe it to him, and asked him whether his conscience did not bear witness to the truth of what he had advanced. The chaplain soon after left him, the prisoner having expressed a wish to see him again. He then went and reported to the magistrates what had passed between them; and having recovered himself a little from the agitation he was in from so painful an interview, went to the prisoner again a little before three on the same day, and resumed the tenor of his conversation upon repentance, and confessing his sins before God, and repairing, by every possible means, any injury he had done to his fellow-creatures. As the prisoner had himself alluded to the murder, the chaplain entreated him, if he knew himself guilty, to avail himself, by the means of general repentance and faith in Christ, to be reconciled with God. At one time, during this interview, the chaplain saw so evident an impression made on his mind, that he could not but tell him, his fear, which he had expressed to the prisoner in the morning, respecting his participation in the dreadful deed, was fully confirmed; and that while he was in that state of mind, he (the chaplain) could not afford him the consolation by prayer, which it was his earnest wish to do, and so that his prayers could be of any avail to him; and he soon after left the prisoner. The first interview lasted about two hours, and the second about an hour and a quarter, and during these interviews the chaplain enlarged upon the topics mentioned to the prisoner. The chaplain said he could almost take upon himself to say, that he always used the terms, 'confessing his sins before God;' but he afterwards said that he could not say, that he mentioned 'before God' every time he used the word 'confessing.' After the second interview, the gaoler saw the prisoner, and told the prisoner what had passed between him, the gaoler, and the prisoner's wife; and he also told the prisoner, that he was perfectly satisfied that what he, the gaoler, said in the morning was correct. The prisoner then said he would tell the gaoler all about it. The gaoler said to him, 'Don't tell me anything but what you would wish the mayor and magistrates to know, for whatever you tell me I must inform them of.' The prisoner then

Gillham's case.

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First caution.

Gilham's case.  
First confession to the gaoler.

related to the gaoler the particulars of the murder, and the way in which he had committed it. The gaoler then said to him, 'Now I shall tell all this to the mayor and magistrates.' The prisoner then said, 'That is what I wish;' he said he had endeavoured to make up his mind to confess before; he had a great mind on Monday. He then requested the mayor should come and hear what he had to say: and particularly wished to see the clergyman again. The next morning (Saturday) the gaoler saw him again, and read to him two prayers and a psalm: he said he felt himself a good deal easier in his mind. The mayor of Bath and town clerk came about ten o'clock. The prisoner, before he saw them, told the gaoler that some part of what he had stated the night before was not correct, as to what part of the house he met the deceased in when he first struck her, and he said it was in another part of the house. When the mayor saw the prisoner in the gaoler's room, he said, 'I am come to see you, as I understand you wish to make some communication to me.' The mayor then said to him, 'Before you say anything, I think it necessary to apprise you, as I have done several times during your examination, that it will probably be given in evidence against you. You are, therefore, to use your own discretion, and say little or nothing, as you may think best; and if you have changed your mind since you sent to me, and do not choose to say anything, I will retire, and shall not feel at all angry with you for having brought me down unnecessarily.' The prisoner said something; what he said was taken down in writing, in his own words; it was read over to him by the town clerk, and the clerk asked him if he had any objection to sign it: he said he had not any, but his hand shook so much he could not write his name, but it was all true. The mayor then signed the examination, but it was not signed by the prisoner. This examination of the prisoner was read; and it contained a confession of his having committed the murder, and the circumstances attending it. It appeared that the prisoner had undergone five or six examinations, including the coroner's inquest. In the course of the same morning, after the mayor was gone, one of the mayor's officers saw the prisoner, and in answer to a question how he was, the prisoner told him he was better since he had eased his mind; and in the conversation they had, he told the officer that he had committed the murder, and related some of the particulars. The next morning (Sunday) the prisoner was taken from Bath to the county gaol by another of the mayor's officers, and in answer to an inquiry how he felt, he said he felt a good deal better since he had relieved his mind; and in the course of their journey he told this last-mentioned officer that he had committed the murder, and stated some of the particulars. It was contended on the part of the prosecution that, even supposing the confession made to Bourne, the gaoler at Bath, immediately after the chaplain's interview with the prisoner, were not receivable in evidence, still that the confession made to the mayor was receivable, inasmuch as the mayor cautioned him against saying anything, unless he thought it right, and that what he said would probably be given in evidence against him. But Littledale, J., thought that, after what the chaplain had said to him, nothing that the mayor said could do away the effect which the chaplain

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Second caution.

Second confession to the mayor.

Third confession to the mayor's officer.

Fourth confession to the mayor's officer.

Opinion of Littledale, J.



had produced in his mind, and that it differed from those cases where a confession having been made under circumstances which prevented its being received in evidence, if a magistrate has cautioned a prisoner not to say anything against himself, a subsequent confession made before a magistrate has been admitted in evidence. The learned judge received the confessions in evidence, and the prisoner was found guilty. But the point was reserved for the consideration of the judges; before whom it was contended, on behalf of the prisoner, that the confessions were all made under the influence of hopes and terrors created on the prisoner's mind both by the gaoler and the chaplain, and were therefore inadmissible; that the hopes and fears spoken of in the authorities were of two classes, merely worldly and religious or spiritual. In this case, hopes of temporal favour were created in the prisoner's mind. It was not necessary that hope of pardon should be created; for any expectation of bettering his condition rendered the prisoner's confession inadmissible. That the persons exerting their influence over the prisoner to confess were the gaoler, in whose custody he was, and whose favour might lessen his coercion, and the chaplain, a person also in authority, and whose good opinion and report frequently influenced the fate of prisoners. But if no hopes of temporal favour existed, and the inducements held out were merely religious, still they were of such a nature as to vitiate the confession. Although the chaplain for the most part used the term of 'confessing before God,' yet it was impossible but that the prisoner must have understood him to mean confession to man, from the whole tenor of his exhortations. That the confession was clearly made under the influence of religious hopes, terrors, and menaces. In terms, therefore, it was within the principle of the authorities. That in the case of a prisoner's examination on oath, the only duress that could be exerted was religious duress, and the duress of the religious obligation to speak even the truth rendered the confession so obtained inadmissible. (d) On the part of the Crown it was contended that the confessions were properly received, not having been obtained by any hope of temporal favour, nor any species of duress. The true principle of exclusion was, that confessions obtained by the hopes of pardon and the fear of punishment are made under the influence of a class of motives that might lead to falsehood. But no one could suppose that a man, under the influence of a deep sense of religion, would confess an atrocious murder of which he was not guilty. The motives, therefore, were of a class altogether different from those which usually excluded confessions,

Gilham's case.

Argument before the judges for the prisoner.

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Argument on the part of the Crown.

(d) The following authorities were cited: *Rex v. Radford*, tried at Exeter Summer Assizes, 1823, where a clergyman had prevailed on the prisoner to confess a murder, by dwelling on the heinousness of the crime, and the denunciations of Scripture against it, without giving him any caution that it would be used in evidence against him, and *Best, C. J.*, refused to allow the clergyman to state the confession; saying that he thought it dangerous after the confidence thus created, which would throw the prisoner off his guard, and the impression thus produced,

to allow what he then said to be given in evidence against him. But it is said that this case was not determined on this ground; but that *Best, C. J.*, thought that it was improper in the clergyman to violate the confidence reposed in him by the prisoner, and expressed a strong opinion to that effect; and as the evidence was not wanted for the Crown, it was not pressed, and the prisoner was convicted without it. Per *Follett arguendo*, *ibid.* 200. *Rex v. Sparkes*, cited *Peake, N. P. R.* 78. *Williams v. Williams*, 1 Hagg. 304.

and instead of being entitled to no credit, were, from the nature of religion, of the very sort most likely to produce truth; (e) and if any hope of temporal favour had existed, which was not stated, there had been ample caution given to remove such impression, both by the gaoler and the magistrate. The judges were of opinion that the confessions had been properly received, and that the conviction was right; upon the ground, it is understood, that there were no temporal hopes of benefit or forgiveness held out, and that such hopes, if referrible merely to a future state of existence, are not within the principle on which the rule for excluding confessions obtained by improper influence is founded. (f)

Wild's case.  
A boy of four-  
teen charged  
with murder  
was told by a  
man present  
when he was  
taken up,  
'Now kneel  
you down; I  
am going to  
ask you a very  
serious ques-  
tion, and I  
hope you will  
tell me the  
truth in the  
presence of  
the Almighty,'  
and a state-  
ment made in  
consequence  
held strictly  
admissible.

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Upon an indictment for murder, it appeared that the prisoner, who was a boy of the age of fourteen, was taken into custody by Mr. Wragg, not a constable, and on the same night was in the parlour of the inn, to which he was taken; several persons, neighbours, but no constable, were in the room, and had been asking him questions about the children, whom he was charged with drowning. One Clark, who was present when Wragg took the prisoner up, and who was not a constable, stated, 'I told him to kneel down and tell the truth.' Wragg took him into Adams' parlour, and began to question him how the children came to get into the pit; whether they fell in, or were put in; he said he should not tell anything about it. Wragg asked him if he would tell any one else, if he would go out of the parlour; the prisoner said nothing: Wragg then went out. I said to the prisoner, 'Now kneel you down by the side of me, and tell me the truth.' I believe this was the first thing. He did kneel down. I said, I was going to ask him a very serious question, and I hoped he would tell me the truth in the presence of the Almighty. I then said, 'Did these children fall into the pit?' He said he pushed one in with one foot, and the other with the other, but not purposely. Mr. Moulden asked him if he had any malice or revenge; he said, No. Subsequently to this, the son of the innkeeper stated that next day the prisoner said he would tell him all about it. He neither promised nor threatened him. The prisoner then made a statement to him, which was given in evidence. Other declarations also were given in evidence. An examination of the prisoner, who could not write, was put in; it began, 'W. Wild being cautioned, &c.,' and the evidence being read over to him, said, 'I can give no other account than I have already given,' &c. (g) The prisoner having been found guilty, upon a case reserved as to the admissibility of the evidence, the judges present were unanimous that the confession was strictly admissible, but they much disapproved of the mode in which it was obtained. (h)

(e) *Rex v. Nute*, 4 Burn. J., Doyl. & Wms. 1086, *ante*, p. 378. *Rex v. Hodgson*, *ante*, p. 400, and *Rex v. Mercer*, 2 Stark R. 366, *post*, p. 407, were cited.

(f) *Rex v. Gilham*, R. & M. C. C. R. 186.

(g) The statement is given at length in the report, as well as the statement made to the innkeeper's son, but they are omitted, as nothing turned upon their contents. C. S. G.

(h) *Rex v. Wild*, R. & M. C. C. R. 452.

The conviction was affirmed, but the prisoner was transported for life. Lord Denman, C. J., Vaughan, J., Bolland, B., and Bosanquet, J., were not present at the meeting of the judges. The grounds of this decision are not stated in the report; but it should seem that the case may well be supported on the ground that the words addressed to the prisoner had no tendency whatever to induce him to make a false statement, but, on the contrary, were a most solemn adjuration

It has been said that a prisoner ought not to be questioned by a magistrate; and in *Rex v. Wilson*, (i) the prisoner's statement was on this account rejected as inadmissible; but Mr. Starkie (j) observes, that by the statute of Philip and Mary, (k) and by the 7 Geo. 4, c. 64, s. 2, the magistrate was to take the examination of the prisoner, and he cites a case where Holroyd, J., admitted the prisoner's examination to be read against him notwithstanding this evidence. And in a still later case, (l) Littledale, J., held that the examination of the prisoner, taken before the committing magistrate, was admissible, though it appeared that part of it had been elicited by questions put by the magistrate. And under the 7 Geo. 4, c. 64, a magistrate might, if he thought fit, put questions to a prisoner charged before him with a crime, and consequently the statement of the prisoner in answer to questions so put was admissible in evidence. A prisoner was examined several times before a magistrate, who took down what the prisoner said at each examination, no threat or promise being used, but much being in answer to questions put by the magistrate. The prisoner at each examination had the notes read over to him, and stated them to be correct. He did not sign them, and at the last examination he refused to do so, saying that they were an incorrect account of the transaction. It was held that a magistrate had a right to put questions to a prisoner examined before him on a charge of felony, and that the magistrate might give evidence of what the prisoner said at each examination, he refreshing his memory from his notes. (m)

Confessions elicited by questions by magistrates.

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Magistrates might put questions to prisoners under the 7 Geo. 4, c. 64.

The 11 & 12 Vict. c. 42, instead of adopting the language of either of the former statutes as to taking the examination of the prisoner, introduces an entirely new provision by sec. 18, and specifies a single question to be put to the prisoner, viz. whether he wishes 'to say anything in answer to the charge?' and directs that 'whatever the prisoner shall then say in answer thereto shall be taken down in writing,' read over to the prisoner, and signed by the justice. (n) But it is to be observed that the 11 & 12 Vict. c. 42 does not repeal so much of the 7 Geo. 4, c. 64, as requires the magistrates to 'take the examination' of the party accused. (o)

Under the 11 & 12 Vict. c. 42.

to speak the truth. The decision seems fully warranted by the principle on which *Rex v. Gilham*, *supra*, rests. The decision, however, could hardly be supported on the ground that the inducement was held out by a person without authority, as it was held out by a person present at the apprehension, and who was acting in concurrence with the party who apprehended him, and they were keeping the prisoner in custody, no constable being present. C. S. G.

(i) Holt, N. P. C. 597. Richards, C. B.

(j) 2 Stark. Ev. 38.

(k) Repealed, and substantially re-enacted by the 7 Geo. 4, c. 64, now also partly repealed.

(l) *Rex v. Ellis*, R. & M. N. P. R. 432.

(m) *Rex v. Jones*, Carr. Supp. 13, and 7 C. & P. 239, note (a). Bayley, J., Gaselee, J., and Vaughan, B. And there have been many cases since, where similar

examinations have been held admissible. In *Rex v. Bartlett*, 7 C. & P. 832, Bolland, B., admitted an examination which appeared as if some part of it were in answer to questions put by the magistrate, who, however, stated that he had no recollection of having put any questions; and if he had, certainly none except for the purpose of explaining what had been already said by the prisoner. So in *Rex v. Rees*, 7 C. & P. 568, Lord Denman, C. J., admitted the prisoner's statement made in answer to questions put to him by the magistrate, it having been afterwards read over to him, and he having said that it was in substance correct.

(n) The Irish Act, 14 & 15 Vict. c. 93, s. 14, varies in simply directing the justices to 'take down in writing the statement' of the accused, having first cautioned him, &c.

(o) See the sections and the observations upon them, *post*, p. 438.



A statement rejected where magistrates had improperly questioned the prisoner.

A prisoner indicted for murder was apprehended on that charge, and immediately taken before the magistrates. An appraiser took notes of what passed, but they were not signed by any one. The prisoner was asked one or two questions by the magistrates, to which he gave certain answers, after which he was remanded. It was objected that the magistrates had no right to put these questions; they were tied down by the 11 & 12 Viet. c. 42, ss. 17 & 18 to a particular mode of procedure. It was answered that this matter fell within the proviso in sec. 18. Wilde, C. J., refused to receive the evidence. If this sort of examination were received in evidence it was hard to say where it might stop. A person in custody, or in other imprisonment, questioned by a magistrate, who has power to commit him, and power to release him, might think himself bound to answer for fear of being sent to gaol. The mind in such a case would be likely to be affected by the very influences which render the statements of accused persons inadmissible. (*p*.)

A question put after the prisoner had refused to make a statement.

Where on the hearing before the magistrate on a charge either of the murder or concealing the birth of her child, after the prisoner had been cautioned in the usual manner, and had stated that she had nothing to say, the magistrate, before committing her, asked her where she had put the body; Erle, J., refused to allow the answer to be given. The question ought never to have been put, and it would be very unfair towards the prisoner to receive in evidence an answer so irregularly elicited. (*q*)

Confessions obtained by questions put by constables.

So a confession obtained without threat or promise from a boy fourteen years of age, by questions put by a police officer, in whose custody the boy was, on a charge of felony, was held rightly received. (*r*)

Where rumours had been afloat that the prisoner had been delivered of a child, but the only ground for such suspicion was that she had been observed up to a certain time to increase in size, and had afterwards recovered her usual form; and in consequence of these rumours a police officer went to her, charged her with having been recently delivered, and with having murdered the child, or at least concealed its birth. The result of his questioning was that she made a statement, which he detailed. Erle, J., made strong observations on the impropriety of questioning the prisoner at a time when there was no proof of any crime having been committed, but the evidence was left to the jury. (*s*)

(*p*) Reg. v. Pettit, 4 Cox, C. C. 164. In this case the proceedings of the magistrates were clearly irregular, as no witness had been examined, &c.

(*q*) Reg. v. Berriman, 6 Cox, C. C. 388.

(*r*) Rex v. Thornton, R. & M. C. C. R. 27. *Ante*, p. 399. Reg. v. Kerr, 8 C. & P. 176. *Gabney's case*, Joy, 36. Reg. v. Hughes, *ibid* 39. Although there can be no doubt that confessions elicited by questions put by officers are admissible, still there can be equally little doubt that it is no part of the duty, or rather that it is a breach of the duty, of an officer to put questions to prisoners in their custody, and learned judges have in many cases reprobated such conduct in the

strongest terms; and in a recent case, where it appeared that a constable was in the practice of interrogating prisoners in his custody, Patteson, J., threatened to cease him to be dismissed from his office. *Hill's case*, Rose. Cr. Ev. 45. Reg. v. Hassett, 8 Cox, C. C. 511.

(*s*) Reg. v. Berriman, 6 Cox, C. C. 388. It should, however, be borne in mind in these cases, that every peace officer is justified in apprehending on reasonable suspicion, though no felony has been committed; and that in cases of suspicion it may frequently be perfectly right for a peace officer to ask questions of a suspected person not in custody, provided such questions be fair and adapted to the particular circumstances.

In one case in Ireland where a constable arrested a prisoner, and having given the usual and proper caution (*t*) proceeded to search his house, and having found the prisoner's coat, which was wet from washing, asked him why he had washed his coat? The Chief Baron ruled that the answer could not be given in evidence, and said that where a constable arrests a party he ought to abstain from asking questions; he ought to leave that duty to the magistrate, who alone has the power to reduce to writing what is said by the prisoner. (*u*)

So a confession obtained by questions put by the prosecutor's wife, (*v*) or by persons who are neither constables or officers, (*w*) or by a fellow prisoner, (*x*) is admissible. So where it was proposed on the part of the prosecution to prove what had been said by the defendant in his examination before a committee of the House of Commons, which the defendant had been compelled to attend; and on the part of the defendant it was objected that, since this statement had been made under a compulsory process from the House of Commons, and under the pain of incurring punishment as for a contempt of the House, the declarations were not voluntary, and could not be admitted for the purpose of criminating the defendant; Abbott, J., overruled the objection and admitted the evidence. (*y*)

If the examination of a prisoner taken before a magistrate purport to have been taken on oath, it is not admissible, and evidence will not be received to show that in fact it was not taken on oath. An examination of a prisoner taken before a magistrate was written under the following words, which except as to the name were printed, 'The examination of — Hornage, taken on oath before me, &c.,' and was signed by the magistrate; and Le Blanc, J., rejected the examination, because it purported to have been taken on oath, and would not permit a witness to be examined for the purpose of showing that no oath had in fact been administered to the prisoner, saying that he could not allow that which had been sent in under the hand of the magistrate to be disputed. (*a*) So where the examination of a prisoner began, 'The information and complaint of R. Bentley, taken upon oath,' &c.; Gurney, B., rejected the examination, and would not permit the magistrate's clerk to prove that the examination was not taken upon oath, and that the statement was a mistake. (*b*) So an examination begin-

Questions put by other persons.

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If a prisoner's examination purport to have been on oath, evidence is not admissible to show that in fact it was not so.

(*t*) It is not stated what it was.

(*u*) Reg. v. Bodkin, 9 Cox, C. C. 403. This case seems to deserve reconsideration.

(*v*) Rex v. Upchurch, *ante*, p. 389.

(*w*) Rex v. Wild, *ante*, p. 404.

(*x*) Rex v. Shaw, *ante*, p. 398.

(*y*) Rex v. Merceron, 2 Stark. N. P. C. 366. 'I think there must be some mistake in that case; the evidence must have been given without oath; and before a committee of inquiry, where the witness would not be bound to answer.' Per Lord Tenterden, C. J., in Rex v. Gilham, R. & M. C. C. R. 203, on Rex v. Merceron being cited. See also in Rex v. Garbett, 2 C. & K. 483, further remarks on this case. So if a witness answers questions

to which he might have demurred, as subjecting him to penalties, his answers may be used against him for all legal purposes; and therefore, in an action on 5 Geo. 2, c. 30, s. 21, the defendant's examination before the commissioners was allowed to be given in evidence, to show that by his own confession he had concealed the property of the bankrupt. Smith v. Beadnell, 1 Campb. 30. See also Stockfleth v. De Taster, 4 Campb. 10.

(*a*) Rex v. Smith, 1 Stark. R. 242.

(*b*) Rex v. Bentley, 6 C. & P. 148, and MSS. C. S. G. The prisoner in this case was not sworn: the magistrate having separate books, with printed headings on each page; one being the information book, and another the examination of

ning, 'This deponent saith,' has been rejected, as that implied that the statement was made upon oath. (c) So where it appeared from the depositions that the magistrate had written down that the prisoner was sworn, and made a statement, which he returned as his examination, but a witness said that in fact the prisoner was not sworn; Parke, B., in the presence of Bosanquet, J., said, that as the magistrate had returned that the prisoner was sworn, the statement made could not be received in evidence. (d) So where a statement made by a prisoner before a coroner at an inquest purported on the face of it to have been taken on oath, but the coroner would have proved, if parol evidence were admissible, that in fact no oath was administered to the prisoner; Alderson, B., said, 'As the statement purports to be a statement on oath, I cannot receive it as evidence against the prisoner; and I think, as it so purports, I cannot allow parol evidence to be given to show that the statement was not made upon oath.' (e)

And parol evidence of the prisoner's statement is not admissible.

If the examination of a prisoner is rejected on the ground that it purports to have been taken on oath, parol evidence of the prisoner's statement is not admissible. A statement of a prisoner made before the committing magistrate had at the conclusion the words, 'taken and sworn before me,' and under those words the signature of the magistrate; the statement was rejected, and evidence that the prisoner was not sworn held inadmissible; and it was also held that parol evidence of what the prisoner said before the magistrate could not be received. (f)

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Examination on oath not admissible.

The ground on which these decisions proceeded was, that the account given by a prisoner before a magistrate ought not to be upon oath; and if the prisoner has been sworn, his statement cannot be received. (g)

Observations on the preceding cases.

But although it is quite correct to hold that an examination of a prisoner in writing purporting to be taken on oath is inadmissible, because such an examination is apparently taken in direct violation of the statute, yet it seems clearly erroneous to hold that, when in point of fact the examination has been regularly taken in accordance with the statute, no evidence of it should be admissible, because by accident or negligence it has been stated to be upon oath. Where in direct violation of the statute no examination in writing has been taken, evidence is admissible of what the pri-

soners' book; the magistrate's clerk had, by mistake, entered the prisoner's examination in the information book instead of in the prisoners' examination book. C. S. G.

(c) *Rex v. Shellsell*, Oxford Spr. Ass. 1828, Park, J. A. J. MSS. C. S. G.

(d) *Reg. v. Pikesley*, 9 C. & P. 124.

(e) *Reg. v. Wheeley*, 8 C. & P. 250. It is not expressly stated in the report that this was the examination of the prisoner as a party charged before the coroner, but it is to be inferred that it was so. And see *Reg. v. Owen*, 9 C. & P. 83, *post*, p. 417.

(f) *Rex v. Rivers*, 7 C. & P. 177. Park, J. A. J. The learned judge said, 'I remember a case in which a heading of a deposition was used, and it stated that the prisoner was sworn. The written

evidence was rejected, and parol evidence was offered, and that was rejected also. As I see that there is a writing, I cannot receive parol evidence.' Mr. Phillpotts, vol. 1, p. 403, says, 'But there seems no good ground for this decision;' and in vol. 2, p. 80, he says, 'This is a strong decision, for if there was no oath imposed, and if the prisoner had his choice to speak or not, as he might think right, his statement was voluntary, and why should the mistake or carelessness of the magistrate, or his clerk, in making a mis-statement as to the fact of swearing, be an estoppel to the reception of evidence, which in all other respects is unobjectionable?'

(g) *Rex v. Smith*, 1 Stark. N. P. C. 242. As to examinations by magistrates generally, see *post*, p. 436.



soner said, (*h*) and *à fortiori* such evidence ought to be admitted where the statute has been substantially complied with, but an accidental error, in no way tending to the prejudice of the prisoner, has occurred. It is submitted, therefore, that where the examination on the face of it erroneously states the prisoner to have been examined on oath, it should be permitted to the prosecutor to prove that that was not the fact, and on such proof to give evidence of what the prisoner said before the magistrate.

Upon an indictment for administering poison, it appeared that on the day on which the prisoner was committed, she and several others were summoned before a magistrate, and at a time when she was under no charge, and when there was no specific charge against any person, she and the other persons were examined upon oath touching this poisoning, and their statements taken down in writing; but on the conclusion of the examination, the prisoner was committed for trial on this charge. It was proposed to put in the examination of the prisoner, and *Rex v. Tubby* (*i*) was cited. Gurney, B., ‘This case is quite distinguishable from the case cited. Under the circumstances of that case I should have been disposed to agree with my brother Vaughan. I remember in the case of *Rex v. Walker*, which was a case of forging a will, I gave in evidence an affidavit made by one of the prisoners in the suit in Doctors’ Commons, and the prisoner was convicted and executed. But this being a deposition made by the prisoner at the same time as all the other depositions on which she was committed, I think it is not receivable. I do not think this examination was perfectly voluntary.’ (*j*)

Prisoner examined on oath before any charge made against any one.

The prisoner was indicted for having made a false declaration, the statements in which subsequently became the subject of an inquiry before one of the poor law inspectors, under the authority of secs. 19, 20 of the 10 & 11 Vict. c. 90, (*h*) and the prisoner was examined on oath respecting the declaration, and her answers were reduced to writing in a minute-book, and she had affixed her mark; she was not cautioned that what she said would be used against her; and her statement was held inadmissible, on the ground that the answers were given by an illiterate person, who had not been cautioned, under the compulsion of an oath. (*l*)

Prisoner examined before a poor law inspector.

Upon an indictment against a father and daughter for receiving stolen goods, it appeared that the daughter had been examined upon oath as a witness before the committing magistrate, and it was proposed to ask what she then said in the presence of her father. Gurney, B., ‘I think you cannot do that. We cannot hear anything she said before the magistrate when she was a wit-

As a witness against another prisoner.

(*h*) See the cases, *post*, p. [875].

(*i*) 5 C. & P. 530, *post*, p. 412.

(*j*) *Rex v. Lewis*, 6 C. & P. 161, and MSS. C.S.G. Mr. Phillipps, vol. 1, p. 403, observes, ‘When she was summoned to appear, suspicion attached to her; and the case bears a strong resemblance to that of an individual examined on oath under a charge.’ This is inaccurate, and neither warranted by the report in C. & P. nor my note of the case, and I was counsel in it. The prisoner was summoned in the ordinary way as a person

who could give some evidence touching the matter, and not because any suspicion attached to her. See the note (*m*) *infra*. C. S. G.

(*k*) Sec. 19 authorizes the commissioners or inspectors to summon any person they think fit, and administer an oath, &c. Sec. 20 makes every person giving false evidence guilty of perjury, and every person who refuses to give evidence guilty of a misdemeanor.

(*l*) *Reg. v. Murtagh*, 6 Cox, C. C. 447. Pennefather, B., and Moore, J.

Information  
on oath by a  
prisoner.

ness; if after having been a witness you make her a prisoner, nothing of what was said then can be admitted in evidence.' (*m*)

The prisoner being in Bridewell sent for a magistrate, and asked what was the charge against him, which the magistrate told him. Nothing further passed. About an hour afterwards the prisoner again sent for the magistrate, and made an information, which was produced. The magistrate made no threat, and held out no inducement to the prisoner, and did not caution him against criminating himself. He was sworn, and put his mark to it. The magistrate did not inform the prisoner that his information would be used against him. The magistrate thought the prisoner would be admitted as a Crown witness, and the prisoner might have been under that impression also. The prisoner 'was in as a Crown witness.' The prisoner swore his information again, but not in the presence of the other prisoners, but he refused to support his information, or appear as a witness. The magistrate had refused to admit the prisoner to bail. It was objected that the information was inadmissible as a confession, because the usual caution was not given, and an inducement was used; and, further, that its being on oath rendered it inadmissible; and upon a case reserved, it was held that the information ought not to have been received in evidence. (*n*)

Observations  
by Mr. Phil-  
lipps on exa-  
minations of  
prisoner on  
oath.

[857]

With reference to an examination of a person charged as a prisoner taken upon oath, Mr. Phillipps observes, 'As an examination it is irregular: the modern statute, which regulates the proceedings of magistrates on criminal charges brought before them, makes a distinction between the examination of a prisoner and the informations of those who make the charge; the informations, but not the examinations of the prisoner, being especially required to be on oath. Since the statement upon oath cannot be received as a judicial proceeding or formal examination, is it admissible as a confession? There are objections to it also in that

(*m*) *Rex v. Davis*, 6 C. & P. 177, and MSS. C. S. G. Mr. Phillipps, vol. 1, p. 404, observes, 'It does not appear from the report that this individual was taken as a prisoner before the magistrate; but there were circumstances sufficient to raise a suspicion of guilt, and sufficient also to show that the statement was not perfectly voluntary.' It should seem, from the fact of her being examined as a witness, that she was not taken before the magistrates as a prisoner; and as to the circumstances sufficient to raise a suspicion of guilt, none such are stated to have been proved before the magistrate, either before or at the time when her examination was taken; and assuming that such suspicion might exist in the minds of the magistrates or others, or even that the prisoner might be aware that there was such suspicion, that was not the ground of the decision, but that the prisoner had been examined on oath as a witness; and after the decision in *Reg. v. Wheeler*, *post*, p. 414, it may perhaps be doubted whether this was a sufficient reason for rejecting the deposition. C. S. G.

(*n*) *Reg. v. M'Hugh*, 7 Cox, C. C. 483. Lefroy, C. J., said, 'In an information a witness never states anything with the view of its being used against him, as here it is sought to be used;' and (after speaking of the examination of a prisoner after being cautioned) 'here you would seek to begin by taking an information from a man as a witness, bind him over to give evidence [this is not stated in the case], and then offer this information against him. Under the circumstances of the case, and in absence of all authority, I do not think we should allow this information to be used against the prisoner, thus depriving him of the benefit he should have of making a statement favourable to himself, and explaining the evidence if it were originally contemplated to use this information against him as a confession. Greene, B., and Keogh, J., concurred; but Pennefather, B., who had tried the case, differed. If this case is correctly reported, the decision is open to the gravest doubt, for the prisoner clearly volunteered a statement without any inducement whatever.'

form; the oath imposed on the prisoner, especially whilst in custody, is likely to operate as a constraint, or as a kind of compulsion; the statement therefore cannot be considered as completely free and voluntary. (o)

If a prisoner is sworn and examined by a magistrate by mistake, and his deposition is destroyed, and an examination then taken in the regular way, it is admissible. On an indictment for arson against two prisoners it appeared that when one of the prisoners was first brought before the magistrate, it was thought that he had appeared as a witness, and by mistake he was sworn; but it being discovered that he was one of the accused persons, the deposition, which had been commenced, was torn, and the prisoner subsequently made a statement, after having been cautioned by the magistrate; and that statement was offered in evidence. It was objected that the whole examination before the magistrate was but one transaction, and that the oath was binding during the whole inquiry. Garrow, B., 'What was first taken down and afterwards destroyed does not prejudice the prisoner. We do not know what he said; it is as if it never existed:' and the statement was received. (p)

Prisoner examined on oath by mistake, and error corrected.

The principle of these decisions does not apply to a statement made by a prisoner, in an examination before a magistrate, when he was not in custody, but examined against another person on a distinct charge; provided, of course, there has been no inducement given to confess, and no promise of favour or of a reward for information; a statement so made by one in his capacity of witness, who was perfectly free to refuse answering any questions that had a tendency to expose him to a criminal charge, seems to

Statement by prisoner not under charge or suspicion on oath as witness against another.

[858]

(o) 1 Phill. Ev. 402. Assuming that an oath may be *likely* to operate as a constraint, there seems no reason whatever why, where a prisoner's examination has been taken upon oath, that fact should operate further than to raise a *prima facie* presumption that the statement was not voluntary, and to throw the onus of showing that it was spontaneous upon the prosecutor. Suppose, after the statement of a prisoner had been regularly taken without an oath, he were himself to volunteer to swear to the truth of it, and the magistrate were incautiously to permit him so to do, it would be difficult to assign any good reason why such a statement should not be admissible. In *Reg. v. Wheater*, *post*, p. 414, Lord Abinger, C. B., said, in the presence of all the judges, 'I understand, if a prisoner's examination be on oath, it shall not be received in evidence without reference to a duress or threat; I see no reason for it; in principle the answer may be quite voluntary.' It should be remembered that a magistrate has no authority to administer such an oath, and therefore the prisoner has a right to refuse to take it. In *Reg. v. Wheater*, on *Rex v. Tubby*, *post*, p. 412, being cited, Alderson, B., observed, 'It does not appear there that the oath was a lawful one:' from which,

perhaps, it may be inferred that the very learned Baron considered that a distinction might be drawn between a lawful and an unlawful oath; and it is apprehended that such a distinction might well be drawn, as in the one case the justice has the power to enforce by commitment an answer to any legal questions; in the other he has no such power. And see *Rex v. Shaw*, *ante*, p. 398. The first mention of the mode of taking prisoners' examinations is in Kelyng, p. 2, where the judges' orders direct, 'that all justices of the peace do take examinations of the felons without oath.' The same is stated in B. N. P. 242. The first case where an examination was rejected on the ground that it purported to be on oath is *Rex v. Smith*, 1 Stark. R. 242, *ante*, p. 407. There is no doubt that an examination of a prisoner taken on oath is irregular, and therefore inadmissible as an examination under the statute, and, perhaps, the rejecting the examination of prisoners on oath altogether may have originated in not distinguishing between an examination admissible under the statute, and admissible as evidence at common law. The point seems to have been taken for granted in all the cases, and never solemnly discussed. C. S. G.

(p) *Rex v. Webb*, 4 C. & P. 564.



Deposition by a prisoner against another person on a charge of forgery.

Tubby's case.

Depositions on an accusation of an infamous crime.

Deposition on behalf of a prisoner.

be clearly admissible. (*q*) And it may be laid down generally that a statement upon oath by a person not being a prisoner, and when no suspicion attached to him, the statement not being compulsory, nor made in consequence of any promise of favour, is admissible in evidence against him on a criminal charge. (*r*) Thus where upon an indictment for forgery it appeared that, before the prisoner was either charged with or suspected of having committed any offence, one Shearer had been examined on a charge of forgery, and that the prisoner was called as a witness against Shearer on that occasion, and sworn to a deposition, which was proposed to be read against the prisoner; and it was objected that the deposition, being a statement made upon oath, could not be received as evidence against the prisoner; Parke, J., said, 'I think I ought to receive this evidence. The prisoner was not, at the time when he made this deposition, charged with any offence: and he might on that, as well as on any other occasion, when called as a witness, have objected to answer any questions which might have a tendency to expose him to a criminal charge; and not having done so, his deposition is evidence against him.' (*s*) So where on an indictment for burglary it was proposed to read a statement made upon oath by the prisoner, at a time when he was not under any suspicion, and it was objected that it was a violation of the rule of law that a prisoner should not be sworn; Vaughan, B., said, 'I do not see any objection to its being read, as no suspicion attached to the party at the time. The question is, is it a statement of a prisoner upon oath? Clearly it is not, for he was not a prisoner at the time when he made it.' (*t*)

So where on an indictment for threatening to accuse of an infamous crime, it appeared that the prisoners had made a charge against the prosecutor, and been examined before the magistrate as witnesses against the prosecutor, and their depositions contained both their examinations and cross-examinations; their answers on cross-examination were not only contradictory in themselves, but quite inconsistent with each other. It was held that the examinations were admissible, but that the cross-examinations were not, as there was not any such connection between these answers and the particular charge in this indictment as to make them relevant. (*u*) So where Chidley and Cummins were indicted for maliciously wounding, and at the examination before the magistrates Chidley alone was charged with committing the offence, and Cummins came forward voluntarily, and gave evidence exculpatory Chidley, and confessed that he had inflicted the injuries upon the prosecutor,

(*q*) 1 Phil. Ev. 404.

(*r*) Ibid.

(*s*) *Rex v. Haworth*, 4 C. & P. 254. Greenw. Stat. 138 *n*.

(*t*) *Rex v. Tubby*, 5 C. & P. 530. The deposition was not read, but withdrawn by the counsel for the Crown, as it did not contain anything material. In *Reg. v. Wheeler*, *infra*, Vaughan, J., said, 'In *Rex v. Tubby*, what reason is there for saying that there was any restraint on the person making the statement?'

(*u*) *Reg. v. Braynell*, 4 Cox. C. C. 402, Williams, J. The particulars of the cross-examinations are not stated. See

my note on this decision, *ante*, p. 207. To which it may be added that the examination and cross-examination formed one document, and, according to the general rule, the whole ought to have been read. See *Goss v. Quinton*, 3 M. & Gr. 825, where an examination of a bankrupt contained his examination in chief and cross-examination, and in the latter a copy of an agreement was incorporated, and it was held that the examination was one entire thing, and that the whole must be put in evidence, including the cross-examination and copy of the agreement.

and upon this he and Chidley were committed; it was held that Cummins' deposition was admissible. (v)

On an indictment for forging the acceptance of a bill of exchange, 'Accepted, payable at Masterman & Co's., London, William Booth,' it appeared that the prisoner had been called as a witness for Booth in an action brought against him on that bill, and in cross-examination he made several statements tending to show that the acceptance was a forgery without objection, and afterwards either put himself in the hands of the court or declined to answer questions put to him, but he was compelled to answer these questions, and this examination of the prisoner was proposed to be given in evidence on the trial for forgery; the counsel for the prisoner objected to those parts of the cross-examination being read which followed the prisoner's declining to answer, and applying to the court for protection. The objection was overruled, and, on a case reserved, it was held that if a witness claims the protection of the court, on the ground that the answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer; and, if obliged to answer notwithstanding, what he says must be considered to have been obtained by compulsion, and cannot be given in evidence against him; and that it made no difference in the right of the witness to protection that he had chosen to answer in part, as he was entitled to it at whatever stage of the inquiry he chose to claim it, and that no answer forced from him by the presiding judge, after such claim, could be given in evidence against him. (w)

The examination of a person taken on oath as a witness before commissioners of bankruptcy is admissible in evidence against him on a charge of forgery, he having been cautioned, and allowed to elect what questions he would answer. The prisoner, who was indicted for forging a bill of exchange, had been agent in London for his father, a cloth manufacturer near Leeds, who became embarrassed, and ultimately a bankrupt. The bill in question, which, with other forged bills, was found in the prisoner's possession, and had been paid after dishonour, had been remitted by him to his father, as alleged, by way of return for cloths. The prisoner had been examined by the commissioners under the fiat touching all these bills, after the solicitor of the assignees had failed in making out such a case, on a direct charge of forging them, before the Lord Mayor, as would warrant the committing him for trial. His examination on oath before the commissioners was tendered in evidence on the part of the prosecution, and objected to. It appeared that he had been attended

Where a witness claims the protection of the court on the ground that an answer may criminate him, and is compelled to answer, the answer is inadmissible, whether he claim the protection in the first instance or after having given some answers tending to criminate himself.

Wheater's case. The examination on oath of a person as a witness before commissioners of bankrupt is admissible, he having been cautioned and allowed to answer what questions he liked.

[859]

(v) *Reg. v. Chidley*, 8 Cox, C. C. 365. Cockburn, C. J.

(w) *Reg. v. Garbett*, 1 Den. C. C. 236, 2 C. & K. 474. This was the ruling of nine judges, Parke, B., Alderson, B., Coltman, J., Maule, J., Rolfe, B., Wightman, J., Cresswell, J., Platt, B., and Williams, J., against Lord Denman, C. J., Wilde, C. J., Pollock, C. B., Patteson, J., Coleridge, J., and Erle, J. The nine judges did not decide, as the case did not

call for it, whether the mere declaration of the witness on oath, that he believed that the answer would tend to criminate him, would or would not be sufficient to protect him from answering, where other circumstances did not appear in the case to induce the judge to believe that it would not. The nine judges did not think *Dixon v. Vale*, 1 C. & P. 278, and *East v. Chapman*, 2 C. & P. 573, binding authorities.

before them by his solicitor, and been informed by them that he was at liberty to decline answering any questions which he thought might criminate himself; that to some questions he had demurred on this ground, and those had been passed over; to others he had made objections on other grounds, which had not been allowed, and he had been compelled to answer. The examination was received in evidence, and the prisoner convicted; but it was contended, upon a case reserved, that the examination was inadmissible, as it was a compulsory statement upon oath. The prisoner was liable to an indictment for perjury if he swore falsely, under the 6 Geo. 4, c. 16, s. 99, as well as to all the consequences and penalties incurred by a refusal to answer by sec. 34. The prisoner was compelled to answer some questions, and it must, therefore, be taken that some part of the examination was compulsory. He was, therefore, under duress. The answers also were on oath, which rendered the deposition inadmissible, the reason for which is that it would be a species of duress. It was contended, on the part of the Crown, that the statement was voluntary, and not procured or influenced by threats or duress; the prisoner had the liberty to object to answer, and exercised his right to do so, and if he elected to answer, his answer, although he might have demurred, was receivable in evidence. The cases where statements have been rejected on the ground of the examination having been on oath were inapplicable, as in them the examination was improperly taken, and the party examined was charged as a criminal. In this case the examination was regular. The judges present were all of opinion that the evidence was properly received, and the conviction good, except Lord Abinger, C. B., and Littledale, J., who were of the contrary opinion. (x)

If a bankrupt is examined before a commissioner touching matters not relating to his trade dealings and estate, and he makes no objection, but answers the questions put to him, his examination is admissible in evidence.

So where on an indictment against the prisoner for uttering a forged letter with intent to obtain goods, it appeared that the prisoner had been examined in the Court of Bankruptcy at Exeter under an adjudication in bankruptcy against himself on a petition of a creditor. The prisoner before being so examined had made and signed the declaration required by the 12 & 13 Vict. c. 106, s. 117, and his examination was taken in writing before the commissioner, and signed by the prisoner. In the course of the examination the prisoner was cautioned by the commissioner to speak the truth, and at a later stage of the examination he was told by the commissioner to consider himself in custody. It did not appear that the prisoner claimed the protection of the commissioner, or objected to answer any question, on the ground that the answer thereto might tend to criminate him, or on any other ground. The prosecution proposed to read so much of the prisoner's examination as preceded the statement that he was to consider himself in custody, offering to read the whole examination if desired by the prisoner's counsel; and the part of the examination which preceded the statement referred to was received

(x) *Reg. v. Wheeler*, 2 M. C. C. R. 45, 2 Lew. 157. *Park, J. A. J.*, and *Gurney, B.*, were absent. In *Rex v. Britton*, 1 M. & Rob. 297, the balance-sheet of a bankrupt given on oath, under his commission, was held inadmissible: but the ground of this decision was, that the

balance-sheet could not be given in evidence unless there were a valid commission; and therefore the balance-sheet being part of the proceedings, could not be put in evidence to prove the petitioning creditor's debt as a part of the commission: *per Patteson, J.*, in *Reg. v. Wheeler*.



in evidence, and the prisoner's counsel did not require the other part to be read. The part read was set out in the case; but it was not respecting any matters relating to the trade dealings or estate of the bankrupt. On a case reserved it was contended that the examination was a compulsory examination, and was, therefore, inadmissible. Under the 12 & 13 Vict. c. 106, ss. 117, 254, it was compulsory on the bankrupt to answer all questions 'touching all matters relating to his trade dealings and estate.' The statute deprived the bankrupt of his common law right to refuse to answer questions tending to criminate himself. Supposing a question not to touch the trade dealings or estate of the bankrupt, he ought not to be called on, whilst under examination, to decide whether a question does or does not relate to his trade dealings or estate. For the Crown it was contended that the only question was whether this was a voluntary examination. The bankrupt made no objection, and did not claim the protection of the commissioner. The court held that the examination was properly received. The proper test is whether the party *may* object to answer. If he may, and he does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible against him. This examination was not touching any matters relating to the trade dealings or estate of the bankrupt; he might have objected to the examination, but he did not do so; the examination therefore was voluntary and admissible. (y)

The prisoner was indicted for mutilating one of his trade books, and his examination before the Court of Bankruptcy was given in evidence against him. In this examination questions were put, and answers obtained to them under the threat of committal; these questions and answers related to the prisoner's trade books. Upon a case reserved it was held that, as all the questions touched matters relating to his trade dealings or estate, the bankrupt was bound to answer them, although by his answers he might criminate himself. That the questions, though tending to criminate the bankrupt, are made lawful, and if he refuses to answer them he is liable to be committed as upon a refusal to answer any other lawful question. That the statute has taken away the privilege that a party is not bound to accuse himself, and has enacted that he must answer questions, by answering which he may be criminated; and that one of the consequences is that what may be stated by a person in a lawful examination may be received in evidence against him. The examination, therefore, was properly received. (z)

A compulsory examination of a bankrupt is admissible against him.

(y) *Reg. v. Sloggett*, Dears. C. C. 656. In *Reg. v. Darby*, 2 Cox, C. C. 316, a bankrupt had been examined before a commissioner, not so much with a view to oppose his certificate as to this prosecution, which was for false pretences, and he had not been cautioned; but his solicitor was present; and the Recorder held that, as he had been examined for the purpose of this prosecution, and not with reference to the bankrupt laws, his examination was inadmissible. But this decision can hardly be considered as an authority after *Reg. v. Sloggett*, and *Reg. v. Scott*, *infra*, and there is no weight in

the fact that the prisoner had been examined with a view to the prosecution; that is done every day in cases of perjury, and it cannot affect the admissibility of the evidence. See *Stockfleth v. De Tastet*, 4 Campb. R. 10.

(z) *Reg. v. Scott*, D. & B. 47. Coleridge, J., dissented, and held that an examination might be lawful for certain purposes, and yet not be admissible against the party on a criminal charge, even if that charge were founded on the matters before lawfully inquired into. That the bankrupt's examination is purely for the purpose of getting at his estate, and

Answers and depositions in chancery.

Upon an indictment for forging a deed, the answer and deposition in chancery of the prisoner were tendered in evidence against the prisoner, and were objected to on the ground that they were upon oath: but Vaughan, B., was clearly of opinion that they were admissible, being made before any charge was made against the prisoner. The amended bill in the same suit in chancery was put in and read; it contained a charge of forging the deed against the prisoner, on which it was again objected that the answer and deposition of the prisoner were not admissible, upon the ground that the bill contained such charge of forgery. Vaughan, B., 'The argument would go the length of not admitting depositions in the case of perjury. If the party chooses voluntarily to answer, he is bound by it, and the answers are admissible.' (a) So on an indictment for a conspiracy, the answers in chancery of the defendants, which had been made by them upon oath, in a suit which had been instituted by the prosecutor, are admissible in evidence. (b)

Affidavit.

So the affidavit of a person, no matter how he may have been induced to make it, is admissible against him in both criminal and civil cases. (c)

Difference of opinion as to the admissibility of a deposition made before a coroner.

[860]

A difference of opinion has existed whether the examination of a person upon oath as a witness, before a coroner, be admissible in evidence against such person on his trial. In a case tried at Worcester, where it appeared that a coroner's inquest had been held on the body of A., and, it not being suspected that B. was at all concerned in the murder of A., the coroner had examined B. as a witness; Park, J. A. J., would not allow the deposition of B., so taken on oath, on the coroner's inquest, to be read in evidence on the trial of an indictment against B. for the same murder. (d)

ascertaining his dealings, and that it ought to be used for those purposes only. *Reg. v. Cross, Dears. C. C. 68, S. P.*, followed the decision in *Reg. v. Scott*. With the greatest deference to all the learned judges, it is submitted that the real point in this case was never noticed. Whether a statement of a prisoner be admissible or not does not depend on whether it has been obtained by lawful means or not. Any inducement by promises of benefit or advantage is lawful, and yet it excludes a confession. So there is nothing unlawful in telling a person suspected of a felony that has actually been committed that, unless he confesses, he will be taken into custody, and yet that excludes a confession. It was a fallacy, therefore, to hold that, because the compulsory examination was lawful, it was admissible. Its admissibility, according to all the authorities, depended on whether what took place during the examination was calculated to lead the bankrupt to make false statements. The question was whether the prisoner's mind was liable to be misled so as to make it doubtful whether his statements were true. Probably there are no statements containing more truths than the examinations of fraudulent bankrupts, and consequently

there is very little reason for admitting them in evidence against the bankrupt, in any case except perjury.

(a) *Rex v. Highfield, Stafford Sum. Ass. 1828, MSS. C. S. G.* The prisoner was executed. See *Rex v. Lewis, ante*, p. 409, as to an affidavit in a suit in the Ecclesiastical Court.

(b) *Reg. v. Goldshede, 1 C. & K. 657.* Lord Denman, C. J., who observed that 'the very oath on which an answer in chancery is given is the foundation of these indictments for perjury which we are trying almost daily.'

(c) Per Lord Denman, C. J., *Reg. v. Goldshede, supra*. *Rex v. Walker*, cited 6 C. & P. 161, an affidavit in Doctors' Commons, *ante*, p. 409.

(d) Anonymous, 4 C. & P. 255, note (b). In *Rex v. Clewes*, reported as to other points in 4 C. & P. 221, the grand jury asked Littleale, J., 'Can the evidence of a prisoner, who was examined on oath before the coroner as a witness, be admitted as evidence against the same person, when subsequently indicted for the murder of the person on whose body the inquest was held?' Littleale, J., 'Whatever any prisoner says at any time against himself is evidence, and therefore such a statement is admissible.'

Upon an indictment for rape against Owen, Ellis, and Thomas, it appeared that an inquest had been held upon the body of the woman alleged to have been ravished, and the coroner stated that at the inquest Owen made four statements; he had been sworn before each statement; each of the statements was taken down in writing, and signed by Owen. Ellis made and signed a statement, and so did Thomas; they were sworn before the statements were made. No inducement of any kind was held out to either of the prisoners to make any statement; neither threat nor promise; they were all three brought before the coroner in custody. It was objected that these statements were not receivable in evidence, as they were on oath. These persons were in custody; and in *Reg. v. Wheeley*, (*e*) Alderson, B., rejected the statement of the prisoner, which had been taken at the inquest, because it was on oath, and taken while he was in custody. Williams, J., 'I know that my brother Alderson did so, but I also know that since that there has been a reaction of opinion (if I may be allowed the expression); I shall therefore receive the evidence, and reserve the point if it should become necessary.' (*f*)

Owen's first case. Depositions before a coroner by prisoners admitted on a trial for a rape on the deceased.

But where upon an indictment against the same prisoners for the murder of the same female, whom they had been charged in the preceding case with ravishing, the same depositions of the prisoners, taken on oath on the coroner's inquest held on the body of the deceased, (*g*) were tendered in evidence; Gurney, B., said, 'I am not aware of any instance in which an examination on oath, before a coroner or a magistrate, has been admitted as evidence against the person making it. I have known depositions before magistrates, made by prisoners on oath, and they have been uniformly rejected. In my own experience I do not recollect a case of a deposition before a coroner.' After mentioning *Reg. v. Wheeler*, (*h*) the learned Baron added, 'I confess that I do not, on principle, see the distinction between that and some of the other cases; still I am of opinion that in the present case I ought to reject the evidence.' (*i*)

Owen's second case. The same depositions rejected on a trial for murder of the same woman.

Upon an indictment for the murder of Elizabeth S., it appeared that no suspicion arose that her death had been caused by poison until after the death of Mary Ann S.; but the parents having insinuated that Mary Ann had been poisoned by Riley, she was taken into custody upon the charge, and on the examination before the coroner as to the cause of Mary Ann's death, the mother was examined on oath as a witness, and her deposition was taken in writing, and read over to her, and she put her mark to it. In the course of that examination questions were put to her relative to the death of Elizabeth, and in consequence of her answers, and other circum-

Sandys' case. Deposition before a coroner on an inquest on the body of one person read over on the inquest on another body, and additional statement then made to it.

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The preceding case was then mentioned, on which the learned judge seemed to entertain doubts upon the point, but directed the grand jury to receive the evidence, and leave the point for discussion upon the trial. MSS. C. S. G.

(*e*) *Ante*, p. 408.

(*f*) *Reg. v. Owen*, 9 C. & P. 83. The report then proceeds—Mr. Tooke (the coroner) recalled: 'I asked Owen if he was desirous of giving his evidence, and

he said, Yes: he was sworn, and gave evidence. I asked each of the other prisoners if he wished to give evidence, and each said that he did.' Alderson, B., was the other judge at Stafford when this case was tried.

(*g*) This is the whole statement in the report.

(*h*) *Ante*, p. 413.

(*i*) *Reg. v. Owen*, 9 C. & P. 238.



stances, the body of Elizabeth was disinterred, examined, and found to contain arsenic in the stomach. The parents were thereupon taken into custody, and brought before the coroner, in custody, separately. The mother was told that she was charged with having poisoned her two children, and that that was the time when she might make any statement that she liked to the jury, and that what she said would be taken down in writing. Her former deposition made by her as a witness was then read over to her, and she said that she had a further statement to make, which she made, and what she said was written down, and afterwards read over to her; she was asked to sign it, and refused. The coroner signed it, and it was produced and offered in evidence against the mother, together with her original deposition. It was objected that as the greater part of the statement had been made by the prisoner, when under examination before the coroner upon oath, it could not be read in evidence against her. *Erskine, J.*, received the evidence, but reserved the point for the consideration of the judges. (*j*) But as the mother was acquitted, the judges thought it unnecessary to determine the question.

Depositions before a coroner admitted on the trial of the witness for murder and poisoning.

So on an indictment for murder, *Parke, B.*, received in evidence a deposition made by the prisoner on oath as a witness before the coroner. (*k*) And where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stated that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion; no charge had at that time been made against her; she made a statement on oath, which the coroner took down in writing. *Lord Campbell, C. J.*, after consulting *Parke, B.*, admitted the statement, and the prisoner was convicted and executed. (*l*)

Result of the cases.

The results deducible from the cases seem to be that it is now clearly settled that the mere fact of a party having been examined upon oath will not exclude a statement made by him. It is obvious that such a statement may be just as voluntary as if it were not upon oath, as where a party tenders himself as a witness, and requests to be sworn, of his own mere motion. So too it is clearly settled that if a party be examined upon oath, and has an opportunity of objecting to answer any questions which he thinks may tend to criminate himself, but he answers such questions without objection, his answers are admissible in evidence against him in a criminal proceeding. (*h*) In such a case, by not objecting when he is entitled so to do he is taken to have answered the questions voluntarily. It is equally clearly settled that in such a case it is not necessary that the witness should have been cautioned or put upon his guard as to the tendency of the questions, in order to render his answers admissible. Lastly, if the witness objects to answer any question as tending to criminate himself,

(*j*) *Reg. v. Sandys, C. & M. 345.*

(*k*) *Reg. v. Howarth, Greenw. Coll. Stat. 137, as cited Archb. C. P. 203.*

(*l*) *Reg. v. Sarah Chesham, Chelmsford, March 6, 1861. MSS.* This note was submitted by the Editor to *Lord Wensleydale*, who replied that he had no doubt the note of the decision was correct; though he did not recollect that he was

consulted by *Lord Campbell*, yet he could not doubt that he was. The evidence was not sufficient to prove that the husband died of poison, and therefore the prisoner was indicted for administering it, as *Lord Campbell* informed the Editor.

(*h*) *Reg. v. Garbett, 1 Den. C. C. 236, ante, p. 413.*

but the court improperly compels him to answer it, the answer is not admissible against him. (*m*)

Discoveries in consequence of confessions unduly obtained.

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It has been determined by the opinions of all the judges that, although confessions improperly obtained are not admissible yet that any facts, which have been brought to light in consequence of such confessions, may be received in evidence. (*n*) Thus where a prisoner was indicted as an accessory after the fact for having received property, knowing it to be stolen, and had, under promises of favour, made a confession, and in consequence of it the property had been found in her lodgings, concealed between the sackings of her bed; it was held that the fact of finding the stolen property in her custody might be proved, although the knowledge of it was obtained by means of an inadmissible confession. (*o*) So where a prisoner indicted for stealing a number of diamonds and pearls had been improperly induced to make a confession, from which it appeared that he had disposed of part of them to a certain person; it was held allowable on the part of the prosecution to call that person to prove that he had received the property from the prisoner. (*p*) As far as these cases go, there can be no difficulty as to the propriety of the decisions, because the bare fact of the property being found in the possession of the prisoner in the one case, and of his dealing with it as his own in the other, would, unconnected with any confession, have been clear evidence in support of the prosecution. But the cases have gone further than this, for it has been held that, on a prosecution for receiving stolen goods, where a confession had been improperly drawn from a prisoner, in the course of which he described the place where the goods were concealed, evidence might be given *that he did so describe the place*, and that the goods were afterwards found there. (*q*) In this case it is clear that the bare fact of finding the goods would be no evidence against the prisoner, unless coupled with a part of the improperly obtained confession. And some have accordingly doubted whether any part of such a confession can properly be used for such a purpose. Thus in *Harvey's case*, Lord Eldon, C. J., said, that where the knowledge of any fact was obtained from a prisoner under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction without any confession leading to it; and he so directed

*v. Harris*, R. & M. C. C. R. 338, *post*, p. 451, after the prisoners had been before the magistrate, one of the prisoners went with one of the prosecutors to a field, and said he could find the skin buried, and showed the place, which was dug up and the skin found. So in *Thurtell's case*, cited in *Alison's Cr. L. of Scotland*, p. 584, and *Joy*, 84, although a confession obtained by means of promises or hopes of impunity held out was not used in evidence against him, yet the fact that the goods were recovered, or the corpse found, in consequence of the confession, at the place mentioned in the confession, was held receivable in evidence.

(*p*) *Lockhart's case*, 1 Leach, 386.

(*q*) *Grant's case* and *Hodge's case*, 2 East, P. C. 658.

(*m*) *Reg. v. Garbett*, *ante*, p. 413. It may be remarked that by the Irish Act, 9 Geo. 4, c. 54, s. 2, which was framed on the 7 Geo. 4, c. 64, s. 2, as to taking the examinations of witnesses in felony, it was provided that 'no such examination shall subject the party examined to any prosecution or penalty, or be given in evidence against such party, save on any indictment for having committed wilful and corrupt perjury in such examination;' which seems to show that, otherwise, such an examination might have been given in evidence in any case.

(*n*) 1 Phill. Ev. 411. See *Reg. v. Leatham*, 8 Cox, C. C. 498.

(*o*) *Rex v. Warickshall*, 1 Leach, 263, O. B. 1783. *S. P. Mosey's case*, 1 Leach, 265 n. O. B. 1784. So in *Rex*

What is the correct rule where property is found in consequence of a confession improperly obtained.

the jury in that case. (*r*) But the more established rule, according to later practice and later authorities, is, that so much of the confession as relates *strictly* to the fact discovered by it may be given in evidence; for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been induced to say what is false; but the fact discovered shows that so much of the confession as immediately relates to it is true. (*s*) Thus it is proper, and it is now the common practice, to leave to the consideration of the jury, where a confession has been improperly obtained, the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly, but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case. (*t*) So where on an indictment for burglary it appeared that the prisoner had made a statement to a policeman, under some particular circumstances, which induced the counsel for the prosecution, with the approbation of the court, to decline offering it in evidence; but in consequence of the statement containing some allusion to a lantern, which was afterwards found in a particular place, the policeman was asked whether, in consequence of something which the prisoner had said, he made a search for the lantern; Tindal, C. J., and Parke, B., were both of opinion that the words used by the prisoner, with reference to the thing found, ought to be given in evidence, and the policeman accordingly stated that the prisoner told him that he had thrown a lantern into a pond in Pocock's Fields. The other parts of the statement were not given in evidence. (*u*)

But where on a trial for concealing the birth of a child it appeared that, after the prisoner had been cautioned in the usual manner, and had stated that she had nothing to say, the magistrate, before committing her, asked her where she had put the body of the child; Erle, J., refused to receive the statement in evidence. It was then proposed to ask whether, in consequence of the answer she had given to the magistrate, the witness had made a search in a particular spot, and had found a certain thing. Erle, J., 'No; not in consequence of what she said. You may ask him what search was made and what things were found, but, under the circumstances, I cannot allow the proceeding to be connected with the prisoner.' (*v*)

So it has been determined, after a consideration by all the judges, that, although a confession improperly obtained cannot be received in evidence, yet that any *acts* done afterwards may be given in evidence, notwithstanding they were done in consequence of such confession. (*w*)

(*r*) 2 East, P. C. 658. See also Mosey's case, 1 Leach, 265, in note to Warickshall's case.

(*s*) Rex v. Butcher, 1 Leach, 265, note (*a*) to Warickshall's case, 2 East, P. C. c. 16, s. 94, p. 658.

(*t*) 2 East, P. C. c. 16, s. 94, p. 658.

(*u*) Reg. v. Gould, 9 C. & P. 364. Mr. Phillips, vol. 1, p. 412, after stating this case, adds, 'But the judge in such a case would direct the jury, and so it is understood did direct the jury in that

case, that his statement must not be taken as proof that *he concealed*, but merely as evidence that he knew of or was privy to the concealment, from which, together with the rest of the evidence, they would consider whether it was probable that he concealed it himself.'

(*v*) Reg. v. Berriman, 6 Cox, C. C. 388.

(*w*) Warickshall's case, 1 Leach, 265.

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Acts done in consequence of a confession.



And it should seem that what the prisoner says at the time such acts are done may also be received in evidence. The prisoner was charged with stealing a guinea and two promissory notes, one of which was a Bank of England note for five pounds, and the other a Reading bank note for the like sum. The prosecutor had told the prisoner that he had better confess. Chambre, J., held that, although the prosecutor could not be allowed to prove a confession made after this admonition, he might be permitted to give evidence that the prisoner brought to him a guinea and a five pound Reading bank note, *which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him.* The note thus produced the prosecutor could not identify otherwise than by its corresponding with the stolen note in the sum for which it was given, and in being a note of the same bank. Upon a case reserved, the majority of the judges (*x*) agreed with Chambre, J., in thinking the conviction right and the evidence admissible. (*y*)

Declarations accompanying such acts.

But not only are confessions excluded when obtained by means of improper inducements, but also the acts of the prisoner done under the influence of such inducements, unless confirmed by the finding of the property; for the same influence which might produce a groundless confession might produce groundless conduct. A prisoner was indicted for larceny, and had been induced by a promise from the prosecutor to confess his guilt; and after that confession he carried the officer to a particular house as and for the house where he had disposed of the property, and pointed out the person to whom he had delivered it; that person, however, denied knowing anything about it, and the property was never found; it was held that not only the confession, but the fact of the prisoner's carrying the officer to the house as above mentioned, was inadmissible in evidence. The confession was excluded because, being made under the influence of a promise, it could not be relied upon, and the acts of the prisoner, under the same influence, *not being confirmed by the finding of the property*, were open to the same objection. The influence which might produce a groundless confession might also produce groundless conduct. (*z*)

Not admissible except when confirmed.

The statement or confession of one prisoner, made in the absence of another prisoner when not before a magistrate, is only evidence against himself, and not against another prisoner: (*a*) and in general, the confession of one prisoner on his examination before a magistrate is only evidence against the party who made the

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Confession evidence against the party confessing only.

(*x*) Lord Ellenborough, C. J., Mansfield, C. J., Macdonald, C. B., Heath, J., Grose, J., Chambre, J., and Wood, B. But Lawrence and Le Blanc, Js., were of opinion that the production of the money was alone admissible, and not his saying at the time he produced one of the notes 'that it was one of the notes stolen from the prosecutor.' And see *Rex v. Jones*, R. & R. 152. *Ante*, p. 368.

(*y*) *Rex v. Griffin*, R. & R. 151.

(*z*) *Rex v. Jenkins*, R. & R. 492. Mr. Philipps, Ev. vol. 1, p. 413, says, 'It was held that the evidence of what passed between the prisoner and the officer ought

not to have been received, that is, *it was not receivable as evidence against the third person.*' This is clearly an error; there was only one prisoner indicted, and he for the larceny, and the only question was, whether the evidence was admissible against him. If the person pointed out had been indicted as the receiver, the fact of the prisoner pointing him out as the person, in his presence, and his denial, would undoubtedly have been admissible in evidence against such person. See *Reg. v. Cox*, 1 F. & F. 90, *post*, p. 425. C. S. G.

(*a*) *Hevey's case*, 1 Leach, 232.

although made before a magistrate in the hearing of an accomplice, who did not deny it.

confession, and cannot be made use of against any others, whom on his examination he confessed to be engaged with him in committing the offence; (b) and even if such confession were made before a magistrate in the hearing of another prisoner, it would not be evidence against such prisoner; on the ground that there is a regularity of proceeding adopted before a magistrate, which prevents the prisoner from interposing when and how he pleases, as he would in a common conversation, and the prisoner is brought to answer the charge and evidence given against him, and not the statement made by another prisoner. Thus where the confession was made before a magistrate in the presence and hearing of the accomplice, who did not deny it, Holroyd, J., held (c) that these circumstances were not evidence against the latter, and said that it had been so ruled by several of the judges in a similar case, which had been tried at Chester. (d) So where a confession of the principal, made before a magistrate in the presence of the receiver, in which she stated various facts implicating the receiver, and others as well as herself, was tendered in evidence; Patteson, J., refused to receive in evidence anything that was said by her respecting the receiver. (e) So where upon an indictment against Swinnerton for stealing, and Bowyer for receiving, hay, it appeared that when the prisoners were before the magistrate Swinnerton made a statement in the hearing of Bowyer, which was taken down; Bowyer then made the following statement: 'I must beg pardon that I had it; I reckon that it was not right that I took it. If I had not picked it up some one else would.' This statement was given in evidence, and it was proposed also to put in the statement of Swinnerton, who had pleaded guilty. Patteson, J., 'When before a magistrate a prisoner is called upon to answer the depositions taken on oath, but he is not called upon to make any answer to the statement of another prisoner; I think, therefore, that the examination of Swinnerton is not admissible.' (f)

Deposition of a witness on a summary conviction.

Upon similar grounds also the deposition of a witness who has been examined against a person before a magistrate in a case of summary conviction is inadmissible. In an action for maliciously laying an information against the plaintiff, it was proposed to prove what a witness, called for the defendant, had said in the plaintiff's presence before the magistrate on the hearing of the information, on the ground that he had had the opportunity of cross-examining the witness, and commenting on his testimony; Parke, J., said, 'I think it is the safer course to refuse it, and to hold that the deposition of a witness taken in a judicial proceeding is not evidence, on the ground that the party against

(b) Tong's case, Kel. 18.

(c) *Rex v. Appleby*, 3 Stark. N. P. C. 33. In an action of assault, the defendant offered evidence of what was said by the magistrate before whom the matter had been investigated, in the presence of both plaintiff and defendant; but Best, C. J., refused to admit it; and he observed that what was said by the defendant to the plaintiff was evidence, but not what was said by a third person; or

if it drew any answer from the plaintiff, that made it evidence. And his lordship said he remembered Gibbs, C. J., making the same distinction. *Child v. Grace*, 2 C. & P. 193.

(d) As to when the declarations of one conspirator are evidence against all his comrades, see *ante*, p. 161.

(e) *Rex v. Turner*, R. & M. C. C. R. 347.

(f) *Reg. v. Swinnerton*, C. & M. 593.

whom it is sought to be read was present, and had the opportunity of cross-examining. It clearly would not be admissible against a third person, who merely happened to be present, and who, being a stranger to the matter under consideration, had not the right of interfering: and I think the same rule must apply here. It is true that the plaintiff might have cross-examined or commented on the testimony; but still, in an investigation of this nature, there is a regularity of proceeding adopted which prevents the party from interposing when and how he pleases, as he would in a common conversation. The same inferences, therefore, cannot be drawn from his silence or his conduct in this case, which generally may in that of a conversation in his presence; and as it is only for the sake of these inferences that the conversation can be admitted, I think it better to refuse the evidence now offered.' (g)

But where to an action for false imprisonment the defendant pleaded that the plaintiff had been guilty of embezzlement, and it appeared that the depositions of the plaintiff and his witnesses had been taken on that charge in the presence of the plaintiff before a magistrate, and that the plaintiff had then said, 'I submit that there is no case against me;' Lord Denman, C. J., held that the depositions must be read and the plaintiff's answer to them; but that the depositions were not any evidence of that which was stated in them, except in so much as the plaintiff had admitted them to be true by anything that he had said. (h)

Deposition of witness on a charge of felony.

But if a prisoner in his examination before a magistrate makes an express reference to the examination of another prisoner, taken in his presence before the magistrate, the examination of such prisoner may be given in evidence against the prisoner so referring to it. (i) If a prisoner, when before a magistrate on a charge of an assault, makes a statement in answer to what the person charging him with the assault stated, the statement made by such party and the answer of the prisoner to it are admissible. Upon an indictment for murder, it appeared that the deceased made a

*Secus*, if referred to by the prisoner.

(g) *Melen v. Andrews*, M. & M. 336. See *Finden v. Westlake*, *ibid.* 461, per Tindal, C. J., and see *Child v. Grace*, 2 C. & P. 193, *ante*, p. 422, note (c).

(h) *Jones v. Morrell*, 1 C. & K. 266; and in *Simpson v. Robinson*, 12 Q. B. 511, Lord Denman, C. J., speaking of *Melen v. Andrews*, *supra*, said, 'We do not understand that case as deciding that under no circumstances can such evidence be admitted; though the learned judge thought it in that case safer and better to exclude it, and the plaintiff's counsel acquiesced; for cases might certainly be conceived in which a party, by not denying a charge so made, might possibly afford strong proof that the imputation was just.'

(i) Several instances have occurred where this has been done, and the case is similar to *Rex v. John*, 7 C. & P. 324, and *Dennis's case*, 2 Lew. 261, where the prisoners' examinations referred to the depositions of particular witnesses, and such depositions were held to be admissible in explanation of the prisoner's

statement. In such a case it should seem that it would depend on the manner in which the reference was made to the other prisoner's examination whether the facts stated in such examination were admitted or not. It might be that the prisoner's examination stated that the other prisoner's statement was correct, and if so that would be an admission of the facts stated in it; or the reference might be such as merely to require the reading of the other examination as explanatory of the prisoner's statement, without admitting any fact stated in it. In 2 Stark. Ev. 40, it is said, 'In some instances the confession of one taken in the presence and hearing of another prisoner may be very material to explain the expressions and conduct of the latter upon that occasion; for any declarations of his, by which he assented to what was confessed by another to his own prejudice, would be admissible against him. The confession of the other may also, it seems, be evidence for the purpose of explaining such declarations.' C. S. G.



complaint to a magistrate of the prisoner having struck him a blow (which ultimately occasioned his death), and the prisoner was in consequence brought before two magistrates for the assault, and convicted and fined. On the examination of the charge of assault the deceased made a statement, and the prisoner made a statement in answer to it. (*j*) Tindal, C. J., held that evidence of what was said by the deceased on the examination, and also what the prisoner said in answer, was admissible; but added, 'I shall not hold that what the deceased said is evidence as proving the facts he stated, as it would be if it were a deposition taken under the 7 Geo. 4, c. 64, but only evidence as producing an answer from the prisoner, like any other conversation; and I do not think it is the less evidence because it is on oath. I shall therefore admit it as a conversation.' (*k*)

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Confession in the hearing of a prisoner not before a magistrate.

And so if one prisoner were to make a confession in the presence of another prisoner, when not before a magistrate, such confession would be admissible against the prisoner in whose presence it was made, although he made no observation with reference to it; for a confession may be collected or inferred from the conduct and demeanour of a prisoner on hearing a statement affecting himself. (*l*) But as such statements frequently contain much hearsay and other objectionable evidence, and as the demeanour of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution. (*m*)

Statement made in the presence of a prisoner by his wife.

Not only what is said by a prisoner, but what is said to him, or in his presence, except when before a magistrate, is admissible in evidence, and it makes no difference that what was said was said by a person who cannot be called as a witness. On an indictment for murder, some observations made to the prisoner by his wife, to which he made an evasive reply, were about to be stated, when it was objected that the statement ought not to be made, as the wife, if she could by law be examined, would give a direct contradiction to them; but Gaselee, J., and Parke, J., were both of opinion that the statement might be made to the jury; and that the circumstance of the observations being stated to have been made by the wife, who could not be called as a witness, did not vary the general rule, that whatever was said to a prisoner on the subject-matter of the charge, to which he made no direct answer, was receivable as an implied admission on his part. (*n*) So where the wife of the prisoner, who was indicted for the murder of his

(*j*) This statement was not in writing, and objected to on that ground; but Tindal, C. J., held that, 'this being a summary conviction, is not a case in which magistrates are required to take down the evidence in writing.' And see *Robinson v. Vaughton*, 8 C. & P. 252. S. P.

(*k*) *Rex v. Edmunds*, 6 C. & P. 164. This decision has been doubted, 1 Phill. Ev. 400, and Joy, 79. 80, but as it should seem without any sufficient reason. The decision is precisely in conformity with the distinction taken by Best, C. J., in *Child v. Grace*, 2 C. & P. 193, *ante*, note

(*c*), p. 422, and it is conceived that the evidence was admissible on the ground that *at common law* evidence of a deceased witness given upon oath in a judicial proceeding between the same parties is admissible in a subsequent proceeding, the party against whom the evidence is offered having had an opportunity to cross-examine in the former proceeding. See *Rex v. Carpenter*, 2 Show. 47, and the cases cited, *ante*, p. 249. C. S. G.

(*l*) 1 Phill. Ev. 400.

(*m*) *Ibid*.

(*n*) *Rex v. Smithies*, 5 C. & P. 332.

wife's mother, came into the room where he was in custody, and said to him, 'Oh, Bartlett! how could you do it?' He looked steadfastly at her, and said, 'Ah, what! you accuse me of the murder too?' She said, 'I do, Bartlett; you are the man that shot my mother.' The prisoner did not make any reply. She then turned to the witness and said, 'This was done for money.' It was objected, that as the wife could not be examined on oath, what she had then said could not be used as evidence against him; but the evidence was held clearly admissible. (*o*)

So the confession of the thief made to a constable in the presence of the receiver is evidence against the latter that the property was stolen by the thief. (*p*)

A prisoner indicted for arson had given certain false accounts, as that he had seen the fire from his bed-room window, and had got up to see it; and it was proposed to prove that the prisoner had said to his mother, 'You know I was at home;' on which she said, 'What's the use of denying it?' but it was objected that it would have the effect, in an indirect way, of giving evidence that the prisoner was not at home on the night in question; which ought to be proved by calling the mother. Martin, B., thought the evidence not admissible; for what was said in the presence of the prisoner was only admissible against him when admitted, whereas here it was denied by him. (*q*)

On an indictment for rape it has been held that what had been said by a relative of the prosecutrix to a relative of the prisoner in the presence of the prosecutrix about making it up is admissible in favour of the prisoner. (*r*)

A statement made in the hearing of a person, though not in his actual presence, may be evidence against him. Thus it has been held that, where the plaintiff was in the kitchen of the defendant's house, and the defendant's wife stood at the head of the kitchen stairs, what she there said in a tone of voice loud enough for the plaintiff to hear was admissible against the plaintiff. (*s*)

On an information for a libel, a book containing imputations identical with those in the libel, which had been published some

By thief in presence of receiver.

Statement of prisoner to a person who denies it.

Statement in the presence of a prosecutrix.

Statement in the hearing of a person.

Previous publications

(*o*) *Rex v. Bartlett*, 7 C. & P. 832. See *Rex v. Simons*, 6 C. & P. 540, where Alderson, B., held that what a person is overheard saying to his wife, or even saying to himself, is evidence against him.

(*p*) *Reg. v. Cox*, 1 F. & F. 90. Crowder, J.

(*q*) *Reg. v. Welsh*, 3 F. & F. 275. The very ground of the objection shows that the evidence ought to have been admitted. Instead of being a statement made by the mother and denied by the prisoner, it was an assertion by the prisoner denied by the mother, which is a totally different thing, especially as no reply was made to what the mother said. It has been the constant practice to prove statements made by prisoners in the presence of persons who have denied them.

(*r*) *Reg. v. Arnall*, 8 Cox, C. C. 439. Martin, B., said, 'In a civil case, what is

said in the presence of either of the parties is admissible against him; because it is open to the party so present to express assent or objection to what is said, and that would be admissible against him. In criminal cases the prosecutor, although not in strict law a party to the case, is so in fact, and I think that the rule applicable to conversation in the presence of a party in a civil case might be fairly extended to a conversation in the presence of the prosecutor in a criminal case.' Such a statement as to making up the matter would tend to affect the credit of the prosecutrix in a case of rape; and its admissibility may be more satisfactorily rested upon that ground, but she ought to have been cross-examined as to it in the first instance.

(*s*) *Neile v. Jakle*, 2 C. & K. 709. Maule, J.

of the same libel.

time previously to the application for the information, is not admissible for the purpose of showing that the prosecutor had tacitly acquiesced in the truth of the identical charges contained in the libel. (*t*)

Any statement of a prisoner is admissible, though it relate to an offence different from that with which he is charged.

Where on a trial for murder a statement by a prisoner to a policeman on a charge of robbing the deceased with violence was tendered; it was objected that it was on another charge, before the charge of murder. Pollock, C. B., 'That makes no difference; whatever a man says is evidence against him—in criminal cases as well as civil—at any time and on any matter. A policeman apprehends a man on a charge of highway robbery on a particular night, and he says, I cannot be guilty of that robbery, for on the same night and the same hour I was at a different place; and the policeman may, on that admission, apprehend him on a charge of murder at the time and place so mentioned, and may offer that admission in evidence against him at the trial.' (*u*)

Examinations not in the words of the prisoners are inadmissible.

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The written confession of a prisoner is not admissible in evidence, unless it be in the language used by the prisoner. A prisoner made a confession to an officer, who left the prisoner, and afterwards wrote down from recollection what the prisoner said to him. What the officer wrote was read over to the prisoner before the committing magistrate, and he said that what had been read over to him was the truth, and signed the paper. Best, J., 'We have not the confession of the prisoner; we have only the officer's recollection of it, put into writing when the prisoner was not present, and in the language of the officer, and not in the words used by the prisoner. If a confession be not taken in writing, we must be content with the recollection of the witness who proves it, because we cannot have any more certain account of it. I will receive nothing as a confession in writing that was not taken down from the mouth of the prisoner in his own words, nothing that he says that has any relation to the subject being omitted, nor anything added, except explanations of provincial expressions or terms of art. The reading this paper to the prisoner, and his acknowledgment that it was correct, does not remove the objection. By the change of language a very different complexion might be given to the story from what it had when it came from the mouth of the prisoner, and which he might not discover when it was read over to him. The lower orders of men have but few words to convey their meaning, and they know as little of expressions that they are not in the habit of using as if they belonged to another language. I will not receive this paper in evidence. (*v*) In the same case it is said that Dallas, C. J., had refused to receive, at a former assizes, a confession, because it was not in the prisoner's own words. So where it was proved that the examination of the prisoner before the magistrate was read over to her, and that she signed it, but there was no evidence that it was taken down from what she said or in the words she used, and in fact it was in language clearly not such as she was likely to have used; Littledale, J., refused to permit it to be read. (*w*) And

(*t*) Reg. v. Newman, 1 E. & B. 268.

(*u*) Reg. v. Lee, 4 F. & F. 63. See Fisher v. Ronalds, 12 C. B. 762, per Maule, J.

(*v*) Rex v. Sexton, 1 Burn's J., Doyl. & Wms. p. 1086.

(*w*) Rex v. Mallet, Gloucester Spr. Ass. 1830, MSS. C. S. G.



where a witness having, in her examination before the coroner, stated that she had slept with the prisoner, that he had given her two black eyes, that they had seen a placard, &c., the statement of the prisoner before the coroner was tendered in evidence, and was as follows:—‘Prisoner admits sleeping with the witness, blackening her eyes, seeing the placard,’ &c. : and it was objected that the examination was taken in the third person, which was not complying with the statute, and did not purport to be the language of the prisoner at all, but merely the coroner’s expression of what he considered the prisoner to mean. The jury were to judge of the effect of the statement, and they could not do that without having before them the very words in which it had been made. Lord Denman, C. J., thought the objection of considerable importance. As to the mode of taking the examination of the prisoner, that was a very improper way in which to do it. His lordship did not, however, see how he could exclude the evidence, but he should reserve the point in case it were necessary. (x)

Roche’s case.

Where the confession of a prisoner mentions the name of another prisoner tried at the same time, it seems, according to the later cases, that the whole of the confession, whether by parol or in writing, must be given in evidence. The judge will, however, in such cases, direct the jury that the confession is only to be taken as evidence against the prisoner who made it. On the Oxford Circuit it was the constant practice a few years ago to omit the name of any prisoner that was mentioned in the confession of another prisoner. (y) But it has been held in many cases on that circuit (z) and elsewhere, (a) that the proper course is to state or read all the names mentioned by the prisoner in his confession. A very learned judge has, however, expressed on several occasions a strong opinion that such a course is unfair. (b)

All names in the confession must be mentioned.

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(x) *Reg. v. Roche*, C. & M. 341. Verdict, Not guilty.

(y) See *Rex v. Fletcher*, 4 C. & P. 250. *Rex v. Limer*, Stafford Sum. Ass. 1839, Bosanquet, J. MSS. C. S. G.

(z) *Rex v. Hearne*, 4 C. & P. 215. Littledale, J. *Rex v. Clewes*, *ibid.* 221. *Rex v. Daniel and Garland*, Monmouth Spr. Ass. 1831, MSS. C. S. G. Bosanquet, J., saying, ‘The ground I go upon is, that I do not think I am authorized to direct the officer to read one word instead of another. I cannot tell the officer to read what is not written.’ In *Rex v. Giles and Betts*, Worcester Spr. Ass. 1830, MSS. C. S. G., where there was a parol confession, Littledale, J., said, ‘he was satisfied the proper way was to state the names uttered by the prisoner ; as to state “another person” instead of the name used was not to state the truth, which a witness was sworn to do.’ In *Rex v. Harding, Bailey, and Shumer*, Gloucester Spr. Ass. 1830, MSS. C. S. G., where there was a written confession, Littledale, J., said, ‘Suppose two men are indicted, one as principal, and the other as accessory, and the principal is named in the indictment, and the accessory makes a confession admitting him-

self to be accessory to the principal, how is it to be known that he is accessory to such principal, if the name of the principal is not to be read ? I have considered this case very much indeed, and I am most clearly of opinion that it is to be read as the prisoner made it, because otherwise the evidence is not read as it was given by the prisoner. I have no doubt upon it, and will not therefore reserve the point.’ *Rex v. Walkley*, 6 C. & P. 175, Gurney, B.

(a) *Rex v. Fletcher*, 4 C. & P. 250. Littledale, J., at York, S. C. 1 Lew. 107, Hall’s case, 1 Lew. 110, Alderson, B., at Appleby. Foster’s case, 1 Lew. 110, Lord Denman, C. J., at Carlisle. *Rex v. Fletcher*, *supra*, was the case of a letter written by one prisoner, and implicating another.

(b) Parke, B., in Maudsley’s case, 1 Lew. 110, and Barstow’s case, *ibid.* It would be extremely beneficial to prisoners in such cases to be tried separately, and such a course is nothing more than expedient in cases of difficulty, as it is almost beyond the power of a jury properly to discriminate between the evidence affecting different prisoners. C. S. G.

The whole of a confession or admission must be stated.

The jury are to give such credit to any statement in it in favour of the prisoner as they think fit.

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If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with a witness, be brought forward, the defendant has a right to lay before the court the whole of what was said in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter, not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. (c) But it seems that proof of a detached statement made by a party does not authorize proof by that party of all that he said at that time, but only of so much as can be in some way connected with the statement proved. (d) It seems at one time to have been considered that, if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced must be taken as true. (e) But the correctness of this position was doubted. (f) and it is now settled that the whole of the prisoner's statement must be taken into consideration by the jury, who are not bound to take what he has said in his favour to be true, because it is given in evidence by the prosecutor, but are to weigh it, with all the circumstances of the case, and determine whether they believe it or not. (g) The jury may, therefore, believe one part of the prisoner's statement and disbelieve another. (h) They may believe that part which charges the prisoner, and reject that which is in his favour, if they see sufficient grounds for so doing. (i) In determining whether the statement be true or not, the jury should consider whether it be probable or improbable in itself, and whether it be consistent or inconsistent with the other circumstances of the case. (j) If what he said in his own favour is not contradicted by evidence offered by the prosecutor, nor improbable in itself, it will naturally be believed by the jury; but they are not bound to give weight to it on that account,

(c) By Abbott, C. J., in the Queen's case, 2 B. & B. 297.

(d) Prince v. Samo, 7 A. & E. 627. In this case a witness stated that the plaintiff, on the trial of an indictment, had proved that he had been remanded by the court for the relief of insolvent debtors; and it was held that the opposite counsel could not ask whether the plaintiff had not also, on the same trial, said that an advance was a gift and not a loan; and the court said that the dictum of Lord Tenterden, *supra*, was extrajudicial.

(e) By Bosanquet, Serjt., in Rex v. Jones, 2 C. & P. 630. So where the prisoner was indicted for a larceny, and in addition to evidence of the possession of the stolen goods, the counsel for the prosecution put in the prisoner's statement made before the magistrate, in which the prisoner asserted that he had bought the

goods; Garrow, B., directed an acquittal, saying that if a prosecutor used a prisoner's statement he must take the whole of it together. Ibid.

(f) By Park, J. A. J., in Rex v. Lloyd, Worcester Sum. Ass. 1830, MSS. C. S. G., and 1 Phill. Ev. 399.

(g) Rex v. Clewes, 4 C. & P. 221, Littledale, J. Rex v. Steptoe, 4 C. & P. 397. Rex v. Higgins, 3 C. & P. 603, Parke, J. Rex v. Jones, Monmouth Sum. Ass. 1830, MSS. C. S. G., Park, J. A. J. Rex v. Locker, Stafford Spr. Ass. 1831. Patteson, J. MSS. C. S. G.

(h) 1 Phill. Ev. 399.

(i) Greenl. Ev. 253, citing Rex v. Steptoe, *supra*. Rex v. Clewes, *supra*. Rex v. Higgins, *supra*, and Republica v. McCarty, 2 Dall. 86, 88.

(j) Rex v. Steptoe, *supra*. Rex v. Jones, *supra*.

but are at liberty to judge of it like other evidence, by all the circumstances of the case. (*k*) But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence, must be left to the jury, precisely as in any other case, where one part of the evidence is contradictory to another. (*l*)

The prisoner was indicted for stealing a piece of wood, and it appeared that on the piece of wood being found by a police constable in the prisoner's shop, about five days after it was lost, he stated that he bought it from a person named Nash who lived about two miles off. Nash was not produced as a witness for the prosecution, and the prisoner did not call any witness. Alderson, B., in summing up, said, 'In cases of this nature you should take it as a general principle that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecution to show that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing his watch, and I were to say I bought it from a particular tradesman, whom I name, that is *primâ facie* a reasonable account, and I ought not to be convicted of felony unless it is shown that that account is a false one.' (*m*)

The prisoner was indicted for stealing a gun, which was found in his possession, and when taken into custody he stated to a policeman that he had bought the gun on the road from a tally-man for ten shillings and a gallon of beer; but when before the magistrate he stated that Heath, Randall, and himself had found the gun hidden in a hayrick, and that he had given them a shilling each and a pot of beer, and had taken possession of the gun. It was urged that Heath and Randall ought to be called for the prosecution, and *Reg. v. Crowhurst* and *Reg. v. Smith* (*n*) were cited; but Platt, B., held that this case was very different from those cited. Here the prisoner had given two totally different accounts of the way in which he came possessed of the gun; and it certainly could not be incumbent on the prosecutor to call

Where a person, in whose possession stolen property is found, gives a reasonable account of how he came by it, naming a known person from whom he received it, the prosecution should negative that account.

Where the prisoner gives two contradictory accounts of how he became possessed of property, it is not incumbent on the prosecutor to contradict either of them.

(*k*) Greenl. Ev. 253.

(*l*) *Rex v. Jones*, 2 C. & P. 630. So in a civil case, if a person says, 'that he did owe a debt, but that he had paid it,' such an admission would not be received as evidence to prove the debt, without being also evidence of the payment. Per Hale, C. J. Anonymous case, cited 12 Vin. Abr. tit. Ev. A. 23. What he has said in his own favour may perhaps weigh very little with the jury, while his admission against himself may be conclusive; however, it is reasonable that if any part of his statement is admitted in evidence, the whole should be admitted. 1 Phill. Ev. 399. See also *Smith v. Blandy*, R. & M. N. P. C. 257. *Rose v. Savory*,

2 B. N. C. 145.

(*m*) *Reg. v. Crowhurst*, 1 C. & K. 370. In *Reg. v. Smith*, 2 C. & K. 207, Lord Denman, C. J., said, 'I quite agree with *Reg. v. Crowhurst*, which is very correctly reported. It was mentioned to me by Alderson, B., when it occurred.' And Lord Denman added that in a similar case the magistrate should send for and examine the person mentioned, as he might either exonerate the prisoner or prove his statement to be false. See also *Reg. v. Evans*, 2 Cox, C. C. 270, *ante*, vol. 2, p. 340, as to the improbabilities of a prisoner's statement.

(*n*) *Supra*.



Unless there be good reason to believe the prisoner's statement to be true, the prosecutor need not contradict it.

Where a prisoner openly sold stolen property, and named the persons from whom he received it as soon as charged with the offence, it was held that there was some evidence for the jury, though those persons were not called.

persons whom the prisoner had referred to in one of two contradictory statements. (*o*)

Where it appeared that certain cloth had been cut and carried away from a church, and a knife, which was proved to belong to the prisoner, found on the floor of the church, and in the prisoner's house several remnants of cloth were found, which corresponded with the pieces still remaining in the church, and the prisoner being charged with the offence said he knew nothing of it, and had bought the cloth of one Lake, who lived a mile off; it was contended on the authority of *Reg. v. Crowhurst* (*p*) that the prosecutor was bound to call Lake as a witness. It was held, however, that that was not so; because the discovery of the prisoner's knife in the church went to show that he himself was the thief, and therefore that the account he had so given was either not true, or not likely to be so. The prisoner, therefore, was properly left to reconcile the finding of his knife with his innocence, by showing from Lake that he had come honestly by the cloth notwithstanding that fact; the rule on this matter being that the prosecutor was not bound to call persons named by the prisoner, unless his account was evidently true, or there was good reason to believe it to be true till it was contradicted. Here there was no such reason, as the facts were at variance with the story; but still the story might be true, and it was for the prisoner to make out its truth by calling the man from whom he bought the stolen property. (*q*)

Upon an indictment against the prisoner for stealing and receiving two waistcoats and two pairs of trowsers, it appeared that the articles were stolen on the 2nd of November, and that they were sold by the prisoner for twelve shillings in a public house openly, without attempt at concealment, on the 4th of November, when about thirty persons were in the room. To the constable, who charged him with the felony, the prisoner said, 'Cocking and Derby brought them to my house, and the woman who keeps my house (Mrs. Wilson) will say so, and I, being on the spree, sold them and spent the money.' In consequence of this statement Cocking and Derby were apprehended, and the former convicted of stealing articles taken at the same time from the prosecutor's house; but Derby was discharged for want of evidence. The constable went to Mrs. Wilson, and made inquiries as to the prisoner's statement, but no evidence of what transpired on those inquiries was received. It was urged that, as the prisoner had stated how he came into possession of the articles, and had mentioned the names of real persons from whom he had received them, it was incumbent on the prosecution to negative his statement if false, by calling Cocking, Derby, and Mrs. Wilson; but the sessions overruled the objection, and the prisoner was convicted of stealing; and, upon a case reserved upon the question whether, under the circumstances of the case, which

(*o*) *Reg. v. Dibley*, 2 C. & K. 818. Platt, B., added, 'I think it might be prudent in the prosecutor to have the witnesses in attendance, though he does not call them, to avoid the effect of the observation by the prisoner's counsel that

those persons could have substantiated the prisoner's defence, but that he was too poor to procure their attendance.'

(*p*) *Supra*.

(*q*) *Reg. v. Harmer*, 2 Cox, C. C. 487, Pollock, C. B.

rested solely on a recent possession of the stolen goods, it lay on the prosecution to call the persons to whom the prisoner referred, or some of them, to account for his possession, it was held that there was evidence for the jury, upon which the prisoner might be convicted; but Pollock, C. B., said, ‘I should be sorry that, upon such evidence, any prisoner should be convicted before me.’ (r)

Upon an indictment for burglary, it appeared that, shortly after the robbery, four glass jars containing sweetmeats, which had been taken from the prosecutor’s, were found in the prisoner’s house, not being in any way concealed, and the prisoner’s counsel urged that this was consistent with the account the prisoner had, as he was instructed, given of the way in which the jars had come into his possession; namely, that the prisoner had found them in a field. But no one was called to prove this statement. Alderson, B., told the jury that, if it had appeared that, before suspicion attached to the prisoner, he had given this account of the possession of the property to his neighbours, the property being there at the time, and before search made, he had not the slightest doubt that, *valeat quantum*, this would have been very competent evidence for the prisoner. (s)

Upon an indictment for burning bibles, it was proposed to prove, on the part of the defendant, that he had preached sermons relating to immoral publications previously to the alleged offence, and it was urged that it was a material part of the charge that the defendant had knowingly caused the bibles to be burnt, and therefore for the purpose of showing his intention in getting books together, his directions given in the sermons to the persons who brought in the books were admissible; but it was held that the evidence could not be given. It was true that declarations accompanying acts are admissible to show the intention at the time; and the question of intention was a very material one in the case; but it was to be inferred from legal evidence of facts, and not from declarations of the defendant on former occasions unconnected with the subject-matter of the trial. (t)

Where a confession is tendered in evidence, the proof that it was made voluntarily lies upon the prosecutor; and if it be left in doubt whether the confession were made in consequence of an inducement, it will be rejected. Where a prisoner charged with larceny was told that it would be best for him if he would tell how it was transacted, and it was contended that it did not appear that a statement was made in consequence of this inducement, and if the evidence left that fact doubtful, the onus did not lie on the prosecution to prove the negative; Parke, B., said, ‘Yes,

A statement by a prisoner as to stolen property in his possession before any suspicion against him, is said to be admissible for him.

Declarations unconnected with the acts charged as an offence are inadmissible in favour of a prisoner.

It lies on the prosecution to prove that a statement by a prisoner was voluntary.

(r) Reg. v. Wilson, D. & B. 157. The chairman told the jury that the constable having made inquiries which satisfied him (but the case does not state this), it was not necessary for the prosecution to call the persons to whom the prisoner referred. On the contrary, however, it would rather seem that the fact that the constable did not think the persons named should be called for the prosecution, affords an inference that they would have supported

the prisoner’s statement.

(s) Reg. v. Abraham, 2 C. & K. 550. I never have been able to discover any ground for this *obiter dictum*. Such a statement is not one accompanying an act; it is a mere declaration, and, instead of being against the interest of the prisoner, it is directly in his favour, supposing the goods to have been stolen.

(t) Reg. v. Petcherini, 7 Cox, C. C. 79, Crampton, J., and Greene, B.

it does. You are bound to satisfy me that the confession which you seek to use in evidence against the prisoner was not obtained from him by improper means ; I am not satisfied of that : ' and the confession was rejected. (*u*)

As to the mode of introducing confessions in evidence.

For the purpose of introducing a confession in evidence, it is unnecessary, in general, to do more than negative any promise or inducement held out by the person to whom the confession was made. (*v*) In a trial for murder, it was proposed to give in evidence a statement of the prisoner, made in prison to a coroner, for whom the prisoner had sent. It however appeared that, previous to this time, Mr. Clifton, a magistrate, had had an interview with the prisoner, and it was suggested, on behalf of the prisoner, that he might have told the prisoner that it would be better to confess, and that, therefore, the counsel for the prosecution were bound to call him. Littledale, J., ' As something might have passed between the prisoner and Mr. Clifton respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do so. However, if they will not call him, the prisoner may do so if he chooses.' (*w*) So where a prisoner being in the custody of two constables on a charge of arson, one Bullock went into the room, and the prisoner immediately asked him to go into another room, as he wished to speak to him, and they went into another room, when the prisoner made a statement ; it was urged that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess. It was evident that the prisoner acted under some influence, as he first proposed going into another room ; and *Rex v. Swatkins* (*x*) was relied upon. Taunton, J., ' A confession is presumed to be voluntary unless the contrary is shown ; and as no threat or promise is proved to have been made by the constables, it is not to be presumed.' Having consulted Littledale, J., his lordship added, ' We do not think according to the usual practice that we ought to exclude the evidence, because a constable may have induced the prisoner to make the statement ; otherwise we must in all cases call the magistrates and constables, before whom or in whose custody the prisoner has been.' (*y*)

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If there be any probable ground to suspect that an officer has improperly obtained a confession, such officer ought to be called.

But if there be any probable ground to suspect that an officer, in whose custody a prisoner has previously been, has been guilty of collusion in obtaining a confession, such suspicion ought to be removed, in the first instance, by the prosecutor calling such officer. Upon an indictment for arson, it appeared that a constable, who was called to prove a confession, went into a room in an inn, where he found the prisoner in the custody of another constable, and as soon as he went into the room, the prisoner said he wished to speak to him, and motioned the constable to leave the room, which he did, and left them alone. The prisoner immediately made a statement. The witness had not cautioned the prisoner at all, and nothing had been said of what had passed between the constable and the prisoner before the witness entered

(*u*) *Reg. v. Warringham*, 2 Den. C. C. 447, note.

(*v*) 1 Phill. Ev. 409.

(*w*) *Rex v. Clewes*, 4 C. & P. 221. The counsel for the prosecution declined to call Mr. Clifton, and he was called and examined by the prisoner's counsel. See

this case, *ante*, p. 383.

(*x*) *Infra*.

(*y*) *Rex v. Williams*, Gloucester Spr. Ass. 1832, MSS. C. S. G. The statement was rejected on another ground. See *ante*, p. 377.



the room. It was contended that the other constable must be called to show that he had used no inducement to make the prisoner confess. Patteson, J., 'I am inclined to think the constable ought to be called. This is a peculiar case, and can never be cited as an authority, except in cases where a man being in the custody of one person, another who has nothing to do with the case comes in, and the prisoner motions the first to go away. I think, as the witness did not caution the prisoner, it would be unsafe to receive the statement. It would lead to collusion between constables.' (z)

In order to induce the court to call another officer in whose custody the prisoner had been, it must appear either that some inducement had been used, or some express reference made to such officer. A prisoner, when before the committing magistrate, having been duly cautioned, made a confession, in which he alluded to a confession, which he had previously made to Williams, a constable; it was submitted that Williams ought to be called to prove that he had not used any inducement. Littledale, J., 'Although I do not think it necessary that a constable, in whose custody a prisoner has been, should be called in every case, yet as in this case there is a reference to the constable, I think he ought to be called.' Williams was then called, and proved that he did not use any undue means to obtain a confession; but he had received the prisoner from Marsh, another constable, and the prisoner had made some statement to Marsh. It was then urged that Marsh should be called. Littledale, J., 'I do not think it is necessary that a constable should be called, unless it appear that some promise was given, or some express reference was made to the constable. There was a distinct reference made to Williams, and therefore I thought he must be called; but there is no reference to Marsh. It does not appear either that any confession was made to Marsh. It only appears that a statement was made; that might be either a confession, a denial, or an exculpation.' (a)

A confession is obviously not conclusive evidence against a prisoner, and when it involves matter of law as well as matter of fact, is to be received with more than usual caution. (b) Thus on an indictment for setting fire to a ship with intent to defraud

It must appear either that some inducement has been used, or some express reference made to an officer, in order to make it incumbent on the prosecutor to call such officer.

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Of the effect of confessions.

(z) *Rex v. Swatkins*, 4 C. & P. 548, and MSS. C. S. G. It afterwards appeared that the prisoner had gone voluntarily before the magistrates at the inn, and then ran away, was brought back by the constable, and detained by him in the room for the purpose of being a witness, and that he was not charged with the offence till after the statement was made. Patteson, J., 'If he was not under any charge, that varies the case. As he was at that time attending as a witness, and was not in custody on any charge, I shall receive the statement in evidence, without putting the prosecutor to call the other constable.'

(a) *Rex v. Warner and Morgan*, Gloucester Spr. Ass. 1832, MSS. C. S. G. The prisoner's counsel then proposed to

call Marsh, which was objected to as not being at the proper time, but Littledale, J., said, 'It is much the more convenient time to do so. If it should afterwards turn out that the confessions were in consequence of what Marsh had said, they must all be struck out, but it would be very difficult to do away with the impression they might have made on the mind of the jury.' Marsh was then called for the prisoner, and proved that when the prisoner was in his custody it was not for the offence for which he was then being tried. See this case, *ante*, p. 395. This case was tried at the same assizes as *Rex v. Williams*, *supra*, but after that case had been tried. C. S. G.

(b) 1 Phill. Ev. 401.

Greenfell and Eddy, being part-owners of the ship, a declaration of the prisoner that Greenfell and Eddy were part-owners was received in evidence; but it was objected that the bill of sale, under which Greenfell and Eddy claimed, was invalid in point of law; and it was held that, if by reason of the invalidity of the document evidencing the transfer of their shares, their legal title to them could not be established, the declaration of the prisoner could not be relied upon for that purpose. (*c*) So where, on an indictment for bigamy, the prisoner had confessed the first marriage, but it appeared that the marriage was void for want of the consent of the guardian of the woman, the prisoner was acquitted. (*d*)

Where a confession has been rightly received on a trial in the first instance, and it is afterwards shown that it was unduly obtained, and yet such confession is left to the jury, the conviction of the prisoner cannot be supported.

Upon an indictment for administering poison with intent to murder, it appeared that the prisoner had given her mistress some milk, in which a quantity of fag water had been mixed. Fag water is a mixture of arsenic, soft soap, and water, used for dressing sheep. In order to prove that the prisoner had put the fag water in the milk, that she knew the nature of it, and intended to murder her mistress, her own confession to Mr. Gilby, a medical man, made in the presence of the prisoner's mistress and her husband, was offered in evidence. Gilby swore that he did not tell the prisoner that it would be better or worse for her to tell; that he used no threats or promises, nor did any one else: before Gilby's arrival the prisoner had not made any confession, nor had any threats or promises been held out to her. Patteson, J., admitted the prisoner's statement to Gilby, who said, 'I asked her if she had given the woman anything in her milk; she said she had mixed fag water with the milk; she had put in half a teacupful. I asked her if she was aware of the nature of it; she said she knew it was poison; she thought it would kill the woman; she had done it to be released from her service.' A woman was then called who was present at this conversation, and she swore that Gilby told the prisoner, in the presence of her mistress and her husband, that it would be better for her to speak the truth. She could not tell whether he had told her so before he asked her what she had done; but it was before she answered. Gilby, being recalled, said, 'I could not positively swear that I did not tell the prisoner that it would be better for her to tell the truth; I don't recollect that I did. It is very likely I might tell her it would be better for her to tell the truth.' The counsel for the prisoner contended that the confession ought to be struck out of the judge's notes, and not submitted to the jury; but after consulting Lord Denman, C. J., Patteson, J., declined to strike out the evidence of the confession, and put the whole to the jury, feeling that it was impossible, after they had heard the confession, to expect that they could weigh and consider the other facts in the case without reference to the confession; and in truth those other facts by themselves would not have warranted a conviction. The jury convicted, and upon a case reserved upon the question whether the right course had been pursued, Patteson, J., said, 'I think if it had appeared in the first instance that the medical man had used the words "it would be better for you to speak the truth," I should

(*c*) *Rex v. Philp*. R. & M. C. C. R. 255.

(*d*) *Anonymous*, 3 Stark. Ev. 894, note (*m*), *cor.* Le Blanc, J.

have excluded the evidence of the confession. The only question is, whether, when that evidence had been properly admitted, which was the case here, I ought to have struck it out of my notes, after proof that the confession was not voluntary. The prisoner was certainly bound to show that it was not so; but that being proved by the second witness, I think I should have treated the evidence of the confession as though it had been inadmissible in the first instance.' Pollock, C. B., 'We are all of opinion that the conviction cannot be sustained.' (e)

As analogous to the former part of this section, concerning admissions and confessions by the defendant himself, it may be proper in this place to mention the subject of acts and declarations of co-conspirators and of agents. How far the acts and words of one conspirator are evidence against the others, has already been mentioned in a former part of this work. (f) With respect to the statements and acts of agents, it was decided, on the impeachment of Lord Melville, by the House of Lords, that a receipt given in the regular and official form by Mr. Douglas (who, it was proved, had been appointed by Lord Melville to be his attorney, to transact the business of his office of treasurer of the navy, and to receive all necessary sums of money, and to sign receipts for the same), was admissible in evidence against Lord Melville, to establish this single fact, that a person appointed by him, as his paymaster, did receive from the Exchequer a certain sum of money in the ordinary course of business. (g) In the *Queen's case*, (h) it was said by Abbott, C. J., in delivering the opinion of the judges, that it would not be allowable on the part of the prosecution to give evidence that an agent, who had been proved to have been employed by the defendant to procure evidence for the defence, but who had not been examined as a witness, offered a bribe to some third person, who also had not been examined. This was not the question proposed by the House of Lords to the judges, but the converse of it, considered by the chief justice, for the purpose of showing the grounds of the determination of the judges. The actual question proposed for their consideration was, as to the competency of proving, on the trial of a criminal prosecution, certain acts supposed to have been

Acts and declarations of co-conspirators and of agents.

Agent of defendant.

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Agent of prosecutor.

(e) *Reg. v. Garner*, 1 Den. C. C. 329, 2 C. & K. 920. All that is reported to have fallen from the judges on the point is stated, because in the marginal note in Den. C. C. it is stated to have been held, 'that although the confession was rightly admitted by the judge in the first instance, and taken down by him as evidence, it should be struck out of his notes after proof by the prisoner that it had been made under the above inducement.' It is plain that the decision only warrants the marginal note I have above inserted, especially as the evidence besides the confession would not have warranted a conviction, and therefore was not enough to go to the jury. The marginal note in C. & K. is equally erroneous. Where a jury have heard a confession proved, which afterwards turns out to have been improperly obtained, the prisoner can

hardly in any case be *fairly* tried, however much the judge may endeavour to induce the jury to throw the confession out of their consideration, and it deserves consideration whether, in order to prevent the injury that might thus arise to a prisoner, the judge would not be well warranted in discharging the jury, in order that the prisoner might be tried by another jury. *Newton's case*, 13 Q. B. 716. It might be well in such a case to ask the prisoner, whether he wished the jury to be discharged on that ground, and to discharge the jury upon his desiring it.

(f) *Ante*, p. 161. See also 2 Stark. Ev. tit. *Conspiracy*.

(g) 29 How. St. Tr. 746. 1 Phill. Ev. 386.

(h) 2 Brod. & Bing. 302.



done by the agent of the *prosecutor*. And they determined that similar proof, as to the conduct of the prosecutor's agent in offering a bribe, was inadmissible. The question, the Lord Chief Justice observed, regarded the act of an agent addressed to a person not examined as a witness in support of the indictment, the proffered proof not apparently connecting itself with any particular matter deposed by the witnesses, who had been examined in support of the indictment, and leaving therefore those witnesses unaffected by the proposed proof, otherwise than by way of inference and conclusion. His lordship concluded by observing that, notwithstanding the opinion he had delivered, he was by no means prepared to say, that in no case, and under no circumstances appearing at a trial, it might not be fit and proper for a judge to allow proof of this nature, to be submitted for the consideration of a jury; and that the inclination of every judge was to admit, rather than exclude, the proffered proof.

Acts of  
servants.

There are sundry instances where an employer is criminally responsible for acts done by his agents or servants, in the course of their employment and for his benefit. Thus in case of a libel in a newspaper, a person who derives profit from, and furnishes means for, carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and is answerable, although it cannot be shown that he was individually concerned in the particular publication. (*i*) So a master has been held criminally responsible for the sale by his servants of bread containing a noxious quantity of alum. (*j*)

## SEC. II.

### *Examinations before Magistrates.*

Examination  
of prisoner  
before magis-  
trate.

1 & 2 P. & M.  
c. 13, repealed  
by the 7  
Geo. 4, c. 64.

THE cases in the foregoing section are applicable to confessions by prisoners generally; the subject of confessions, contained in the statutory examinations of prisoners before the committing magistrate, remains to be considered in the present section.

By the 1 & 2 P. & M. c. 13, intituled, '*An Act touching bailment of prisoners*,' sec. 4, 'Justices of the peace, when any prisoner is brought before them for any manslaughter or felony, before any bailment or mainprize, shall take the examination of the said prisoner, and information of them that bring him of the fact and circumstances thereof, and the same, or as much thereof as shall be material, shall put in writing before they make the same bailment: which said examination, together with the said bailment, the said justices shall certify at the next gaol delivery to be holden within the limits of their commission.' This statute extended only to cases where the party accused was admitted to bail; but it was further enacted by the 2 & 3 P. & M. c. 10, intituled, '*An Act to take examinations of prisoners suspected of manslaughter or felony*,' after reciting the 1 & 2 P. & M. c. 13, and

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2 & 3 P. & M.  
c. 10, repealed  
by the 7  
Geo. 4, c. 64.

(*i*) Per Lord Tenterden, C. J., *Reg. v. Gutch*, M. & M. 433.

(*j*) *Rex v. Dixon*, 3 M. & S. 11, *ante*, vol. 1, p. 170, and see other cases there cited.

that the said Act doth not extend to such prisoners as shall be committed and not bailed, that the justice 'before he shall commit a prisoner brought before him on suspicion of manslaughter or felony, shall take the examination of the prisoner, and the information of those that bring him, of the fact and circumstance thereof, and shall put the same, or as much thereof as shall be material to prove the felony, in writing, *within two days after the said examination*, and the same shall certify in such form, and at such time as he ought to do, if such prisoner so committed had been bailed.' These statutes did not extend to misdemeanors or high treason. (a) But the 7 Geo. 4, c. 64, s. 2, after reciting that it is expedient to extend the provisions of the 1 & 2 P. & M. c. 3, and 2 & 3 P. & M. c. 10, enacts, 'that the two justices of the peace, before they shall admit to bail, and the justice or justices, before he or they shall commit to prison, any person arrested for felony, or on suspicion of felony, *shall take the examination of such person*, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing; and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know or declare anything material touching any such felony or suspicion of felony, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions or sessions of the peace, at which the trial thereof is intended to be, then and there to prosecute or give evidence against the party accused; and such justices and justice respectively *shall subscribe all such examinations, informations, bailments, and recognizances*, and deliver or cause the same to be delivered to the proper officer of the court *in which the trial is to be.*' (b)

7 Geo. 4,  
c. 64, s. 2.  
Examination  
of prisoners in  
felonies.

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Sec. 3. 'Every justice of the peace before whom any person shall be taken on a charge of misdemeanor, or suspicion thereof, *shall take the examination of the person charged*, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, before he shall commit to prison, or require bail from the person so charged, and in every case of bailment shall certify the bailment in writing, and shall have authority to bind all persons by recognizance to appear to prosecute or give evidence against the party accused, in like manner as in cases of felony; and *shall subscribe all examinations, infor-*

7 Geo. 4, c.  
64, s. 3.  
Misdemean-  
ors.

(a) *Rex v. Paine*, 1 Salk. 281. S. C. 1 Lord Raym. 729, cited by Lord Kenyon in *Rex v. Eriswell*, 3 T. R. 723. 1 Hale, 306. They extended, however, as the new statute must be considered to do, to petty treason, so far as to make examinations and informations under them admissible in evidence, by reason of the offence being substantially the same as murder, but such an information could not support a conviction for petty treason if the witness were living, though unable to travel, or kept out of the way by the contrivance of the prisoner; the 5 & 6

Edw. 6, c. 11, s. 12, requiring the witnesses, *if living*, to be examined in petty no less than in high treason, *Fost. 337*. However, as a prisoner might be convicted of murder on an indictment for petty treason, depositions or informations, even in such a case, would be evidence to support a conviction for murder, though not for petty treason. *Radbourne's case*, 1 Leach, 457. The 24 & 25 Vict. c. 100, s. 8, enacts that petty treason shall be treated in all respects as murder.

(b) The Irish Act, 9 Geo. 4, c. 54, s. 2, is almost word for word like this section.

mations, bailments, and recognizances, deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court, in like manner as in cases of felony.' (c)

Sec. 4. Duty  
of coroners.

Sec. 4 prescribes the duty of coroners upon inquisitions in putting the evidence in writing and binding over the witnesses, but contains no provision as to taking the examination of any person charged with or suspected of causing the death of any person on whose body the inquisition is held. (d)

7 Geo. 4. c. 64,  
partially re-  
pealed by the  
11 & 12 Vict.  
c. 42.

The 11 & 12 Vict. c. 42, s. 34, repeals so much of the 7 Geo. 4, c. 64, 'as relates to the taking of bail in cases of felony, and to the taking of the *examinations and informations against persons charged with felonies and misdemeanors*, and binding persons by recognizance to prosecute or give evidence.' It, therefore, does not, in terms, repeal the parts of the 7 Geo. 4, c. 64, which provide that the justice 'shall take the examination' of the person charged. And the Irish Act, 12 & 13 Vict. c. 69, s. 34, which seems to have been very carefully framed from the 11 & 12 Vict. c. 42, uses precisely the same words in repealing the 9 Geo. 4, c. 54, ss. 2, 3. (e) The inference therefore is, that so much of the former Acts as relates to the taking of the examination of the person accused was intentionally left unrepealed. It was settled that under the former Acts the magistrate might, if he thought fit, put questions to the prisoner, especially if they were put for the purpose of explaining what the prisoner had said; (f) and as the parts of the former Acts thus left unrepealed had been referred to as warranting that course by several writers on the subject, it may be that these parts were left unrepealed in order that the law on this point should continue as it was. Be that, however, as it may, these parts still form part of the law, and, being left unrepealed

(c) The Irish Act, 9 Geo. 4, c. 54, s. 3, is almost word for word like this section.

(d) See the section, *post*, p. 478, note (k). It seems in several cases to have been taken for granted that the coroner had the same authority to take the examination of a prisoner as a magistrate. See *Rex v. Reed*, M. & M. 403, *post*, p. 457, *Reg. v. Roche*, C. & M. 341, *ante*, p. 427. *Brogan's case*, Rosc. Cr. Ev. 60, *post*, p. 463, C. S. G.

(e) The 12 & 13 Vict. c. 69, is in fact a re-enactment of the 11 & 12 Vict. c. 42, as to Ireland, and only slightly varies from it. The forms of cautioning prisoners in sec. 18, and the schedule, are the same in both Acts. But the 12 & 13 Vict. c. 69, is repealed by the 14 & 15 Vict. c. 93; and by sec. 14 of that Act, No. 2, 'whenever the examination of the witnesses on the part of the prosecution shall have been completed, the justice or one of the justices present shall (without requiring the attendance of the witnesses) read or cause to be read to the person accused the several depositions, and then take down in writing the statement (A c.) of such person (having first cautioned him that he is not obliged to say anything unless he desires to do so, but that whatever he

does say will be taken down in writing, and may be given in evidence against him on his trial); and whatever statement the said person shall then make in answer to the charge shall, when taken down in writing, be read over to him, and shall be signed by the said justice or one of the justices present, and shall be transmitted to the Clerk of the Crown or Peace, as the case may be, along with the depositions, and afterwards upon the trial may, if necessary, and if so signed, be given in evidence against the person accused, without further proof thereof, unless it shall be proved that it was not signed by the justice purporting to sign the same; but nothing herein contained shall prevent the prosecutor from giving in evidence any admission or confession, or other statement made at any time by the person accused, and which would be admissible by law as evidence against such person.' And the form (A c) in the schedule is altered to this, 'and the said C. D., having been first duly cautioned that he was not obliged to say anything, but that whatever he did say might be given in evidence against him upon his trial, saith, &c.'

(f) *Post*, p. 449.



in the special manner in which they are, they must be construed together with the new enactments, and it should seem that the reasonable construction is that the justices should follow the directions of the 11 & 12 Vict. c. 42, s. 18, as to cautioning the accused in the manner there pointed out, and permitting the accused to make whatever statement he likes; but that they are at liberty, if they think fit, to ask questions of the accused. Such questions, however, ought to be limited to the purpose of explaining what the prisoner says, or what his statement may tend to show needs explanation. But questions calculated to lead to answers prejudicial to the prisoner should on no account be asked; and the power should in every case be used with extreme caution and great discretion.

The 11 & 12 Vict. c. 42, s. 1, gives jurisdiction to magistrates over 'any treason, felony, or indictable misdemeanor, or other indictable offence whatsoever,' and provides for the mode of bringing any person, who has committed, or is suspected of having committed, any such offence, before a justice; and by sec. 17 enacts that 'in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement (M.) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.' (g)

Sec. 18. 'After the examinations of all the witnesses on the

The 11 & 12 Vict. c. 42, s. 1, gives justices jurisdiction over all indictable offences.

Examination of witnesses.

After examin-

(g) The Irish Act, 14 & 15 Vict. c. 93, s. 14, No. 1, is similar to this clause; but omits the words 'or so ill as not to be able to travel.'

ation of the witnesses justice to read their depositions to the accused and caution him as to any statement he may make;

and inform him that he has nothing to hope or fear from either promise or threat.

part of the prosecution as aforesaid shall have been completed, the justice of the peace, or one of the justices by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing (N.), and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.'

(N).

*'Statement of the Accused.'*

*' : A. B. stands charged before the undersigned, [One] of Her Majesty's justices of the peace in and for the [county] aforesaid, this                      day of                      in the year of our Lord                      for that he the said A. B. on                      at                      [&c., as in the caption of the depositions]; and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows: "Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" whereupon the said A. B. saith as follows:—*

*'[Here state whatever the prisoner may say, and in his very words, as nearly as possible. Get him to sign it if he will.]*

*'Taken before me at                      mentioned. (h)*

*the day and year first above                      'A. B.                      'J. S.'*

(h) By sec. 28, 'the several forms in the schedule to this Act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law.'

By sec. 20, 'the several recognizances (of the prosecutor and witnesses), together with the information (if any), the depositions, the statement of the accused, and the recognizance of bail (if any) in every such case, shall be delivered by the said justice or justices, or he or they shall cause the same to be delivered, to the proper officer of the court in which the trial is to be had, before or at the opening of the said court, on the first day of the sitting thereof, or at such other time as the judge, recorder, or justice, who is to preside in such court at the said trial, shall order and appoint.'

Depositions and statements of prisoners to be returned to the court where the trial is to be.

It may be well, in the first place, to make a few remarks upon the new clause relating to the statements of prisoners. An attentive perusal of it shows that, as far as it relates to what is to be done by the justice in cautioning the accused and taking down the statement, the clause is merely mandatory; it commands what shall be done, but it does not state what shall be the consequence, if any, of any neglect to comply with its directions. In this respect it is similar to the previous enactments, and under them it was settled that a non-compliance with their requirements did not exclude the proof of what the accused might have said before the magistrate; but that if the written examination were irregular, or no written examination had been taken, the statement of the prisoner might be proved by any evidence which was applicable to such a state of things; and there can be no doubt that a similar construction ought to be put, and indeed seems in one case (*i*) already to have been put, on the new clause. Whenever, therefore, a case occurs in which the provisions of the new clause have been so far neglected that a prisoner's statement cannot be admitted under that clause, the question will arise whether it is admissible under the 7 Geo. 4, c. 64, which has been shown not to be repealed in this respect, or, if not admissible under that statute, whether it may be proved otherwise. And thus it appears that there may be some cases where the statement may be admissible under the new clause; others where it may be admissible under the 7 Geo. 4, c. 64; and others where it may be admissible under neither the one nor the other, and yet capable of proof by legitimate evidence. In the latter cases the decisions before the new statute will still be as good authorities as they were before, and therefore they are retained in this chapter; but as the first question in any case must now be whether the new clause has been complied with, and it is not till it appears that it has not that recourse to the other modes of proof can become necessary, it seems the better course, in the first place, to insert all the decisions on the new clause, and then to introduce the authorities on the previous state of the law. It may be as well to add that there may occasionally occur cases where the new clause has been complied with, and yet some of the previous decisions may be necessary to be referred to. If, for instance, the question were to arise as to the admissibility of evidence to add to or explain the written statement, or to account for interlineations or erasures in it, the former decisions on these points would be just as good authorities under the new as under the former clauses.

Observations on the new clause.

(*i*) *Reg. v. Sansome, post*, p. 445.



Mode of taking, &c., the examination of the accused.

The following appears to be the strictly regular course of proceeding as directed by the Act:—

1. Whenever any person is charged with any indictable offence before a justice, every witness against him is to be examined on oath or affirmation in the presence of the accused, who is to have liberty to put any questions to any witness. 2. The depositions are to be taken in writing, and signed by the witnesses and justice. 3. After the examinations of all the witnesses for the prosecution are completed, the justice, without requiring the attendance of the witnesses, is to read or cause to be read the depositions to the accused. 4. The accused is then to be cautioned in the manner or to the effect stated in the section, and it is the proper course also to caution him in the manner stated in the proviso. (*j*) 5. The accused is to be asked the question stated in the clause, and whatever he says in answer thereto is to be taken down in writing, and signed by the justice, and, according to the direction in the form in the schedule, by the accused, if he can be induced so to do, and his very words, as near as possible, are to be used. 6. The statement is to be kept with the depositions, and transmitted to the court at which the trial is to be. (*k*)

Such being the mode of proceeding directed by the statute, the clause then provides that ‘upon the trial of the said accused person,’ the said statement ‘may, if necessary, be given in evidence without further proof thereof,’ unless it shall be proved that the justice did not in fact sign the same.

Distinction between section 17 & 18 as to depositions and prisoners’ statements.

There is a remarkable difference between sec. 17, relating to depositions, and sec. 18, relating to examinations of prisoners, which deserves notice. By sec. 17, if on the trial it is proved that a witness is dead or too ill to travel, and that the deposition was taken in the presence of the accused, and that there was a full opportunity for cross-examination, then ‘*if such deposition purport to be signed by the justice*’ by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof; unless it shall be proved that such justice did not sign it. But sec. 18 omits the words in italics. The distinction between the two, therefore, is that the former has made a deposition admissible if it purports to be signed by the justice; but the latter has not done so; and the words ‘without further proof thereof’ seem to be insensible in this clause, as no proof is previously mentioned: the inference from this is, that the words contained in the former clause were omitted accidentally in this clause; and it seems clear that this is so, for the Irish Act, 12 & 13 Vict. c. 69,

(*j*) See Reg. v. Sansome, *post*, p. 445.

(*k*) The proper course of proceeding is to inform the accused as soon as the case is called on of the charge against him. If there be a written information, the proper course is to read that to the accused; if there be no such written information, then the charge should be stated verbally. The accused should then be told that, after each witness has been examined, he may ask him any question he thinks fit; but that he should not interrupt him whilst giving his evidence;

and that, after all the witnesses have been examined, he may make any statement he likes, but that he is not obliged to say anything, and that, if any threat or promise has been held out to him, he must not rely on it, and that whatever he says may be given in evidence against him on his trial. Of course it is not meant that this should dispense with the cautions directed by the statute; but this procedure is pointed out as that which is the most regular, and best adapted to the ends of justice.

s. 18, after the words ‘without further proof thereof,’ inserts, ‘if the same purport to be signed by the justice or justices by or before whom the same purports to have been taken.’ This distinction between these sections does not seem to have been observed by any one; and, on the contrary, this clause seems to have been treated as if the words in question were contained in it; (*l*) and there can be little doubt that if the question were raised, it would be held that this clause had made any statement which on the face of it appeared to be according to the form in the schedule, and in compliance with the directions of the clause, and which had been transmitted with the depositions, admissible in evidence; for this course seems to have been deliberately sanctioned in several cases, (*m*) and the judges are said to have been of opinion that this was the correct course in a case where the point was not expressly decided, as the signature of the justice was proved; (*n*) and it seems difficult to point out any other reasonable construction of the clause. Nevertheless it certainly would be prudent, in any case of importance, to be prepared to prove what took place before the magistrate and his signature, especially as a prisoner might in the course of the case raise a doubt as to the regularity of the proceedings before the justice.

Assuming, however, that the statement, if regular on the face of it, would be admissible without any proof, the further question arises whether the prisoner might not impeach it, and show that it was so irregularly taken as not to be admissible; and it would seem clear that he might do so. Before this Act the prisoner was always at liberty, either by cross-examination or otherwise, to show that his statement was not admissible; and although this clause says that the statement may be given in evidence unless it shall be proved that the justice did not sign it, yet it never can be held that this enactment was intended to prevent the prisoner from proving that the statement was induced by promises or threats, or improperly and untruly taken down. The utmost effect that can reasonably be given to the clause is that the statement, when produced, shall be in precisely the same position as if a witness had proved the handwriting of the justice to it.

On an indictment for stabbing it appeared that, immediately after the witnesses had been examined before the magistrate, the prisoner had tendered to the magistrate a statement in writing signed by himself, admitting his guilt. This statement was signed by the magistrate, and appended to a caption in the form (N.) in the schedule to the 11 & 12 Vict. c. 42, with an addition of the caution in the proviso. (*o*) Alderson, B., objected to this statement being put in without proof dehors the caption of the statement itself, that the provisions of the 11 & 12 Vict. c. 42, s. 18, as to cautioning a prisoner, had been complied with. On which

Can the prisoner impeach his statement returned by the magistrate?

Query whether there must be proof that the prisoner was cautioned independently of the statement in the prisoner's examination.

(*l*) Reg. v. Higson, *post*, p. 444.

(*m*) Reg. v. Harris, Reg. v. Hunt, *post*, p. 446.

(*n*) See Reg. v. Sansome, *post*, p. 445.

(*o*) This caution followed after the caution in the form in the schedule, and was in these terms, ‘and you are also clearly to understand that you have nothing to hope from any promise of favour, and nothing to fear from any threat which

may have been holden out to you, to induce you to make any admission or confession of your guilt; but whatever you shall now say may be given in evidence against you upon your trial, notwithstanding any such promise or threat.’ This caution exactly follows the terms of the proviso, and is a very good precedent to follow.

it was urged for the Crown that the magistrate's signature was a sufficient authentication of all that was contained in the caption of the prisoner's statement. Alderson, B., having consulted Coleridge, J., said, 'As the point is new, and the admission or rejection of the prisoner's statement will not, in my opinion, make any difference in the case against him, I will not decide the question as to the effect of the magistrate's signature, but I will receive the prisoner's statement, merely on the ground of its having been transmitted with the depositions. At the same time, however, I entertain a very strong opinion that the legislature did intend that independent proof should be given that the condition precedent as to cautioning the accused was complied with; and I am confirmed in this view by the fact that, if the form of caption given by the Act were to be literally followed, and the signature of the magistrate be all that needs to be proved in order to render a prisoner's statement admissible, there would be no evidence at all that the accused had ever been cautioned as the Act provides; for that form contains no statement whatever of the requisite formalities as to the cautioning the accused having been complied with.' (p)

Query whether proof be necessary of the caution in the proviso.

On an indictment for forgery a statement by the prisoner before the magistrate was offered in evidence. Appended to the statement was a declaration by the magistrate that he had, previously to the prisoner's being called upon for his defence, repeated the form contained in schedule (N.); but there was nothing to show that the caution contained in the latter part of sec. 18 of the 11 & 12 Vict. c. 42 had been used. For the prisoner it was urged that proof must be given of a strict compliance with the terms of the proviso. For the Crown it was answered that the form given by the statute had been scrupulously adhered to, and that the rest was merely a direction to the magistrate, which it was to be presumed he had complied with. Coleridge, J., after consulting Cresswell, J., said that they were both inclined to think that the proviso was a condition precedent, and that in the absence of any proof that it had been acted upon, the statement was not receivable in evidence; but they added that, as it was desirable so important a point should be settled, they would receive the evidence, and reserve the question, if it should become necessary. (q)

Where there has been no previous promise or threat, it is sufficient if a prisoner be cautioned in the terms contained in the enacting part of the 11 & 12 Vict. c. 42, s. 18, to

Upon an indictment for attempting to procure abortion the statement of the prisoner before the magistrate was tendered in evidence. The magistrate's clerk who was called to prove it stated, that when the prisoner was before the magistrate, the witnesses for the prosecution having been examined in his presence, the magistrate thus addressed him: 'Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything, unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;' that the magistrate added

(p) Reg. v. Higson, 2 C. & K. 769. The form contains the first caution, but not the second caution, in the proviso; therefore the last dictum as reported is clearly inaccurate. It seems clear that in this case the magistrate's signature

was proved by a witness.

(q) Reg. v. Kimber, 3 Cox. C. C. 223. Acquittal. See Reg. v. Sansome, *infra*, which seems to overrule the opinion here given.



nothing more. The prisoner then made the statement, which was taken down, read over to him, and signed by him and by the magistrate. The statement was in the form in the schedule to the 11 & 12 Vict. c. 42, and contained the words so proved to have been addressed to the prisoner by the magistrate. It was objected that the statement was not admissible, as the magistrate had not given the caution against any promise or threat required by the proviso in sec. 18 of the statute; but Lord Campbell, C.J., overruled the objection; and, upon a case reserved, after argument, Lord Campbell, C.J., thus pronounced judgment: 'The objection to the admissibility of this statement of the prisoner is unfounded. The signature of the magistrate, and that of the prisoner, were proved. It would have been admissible at common law, and is so still unless excluded by the statute. It is argued that the object of the caution in the first proviso is to do away the effect of a previous inducement; but as there was no previous inducement here, it is not necessary in this case to decide whether, if a previous threat or inducement had been held out to the prisoner, the caution prescribed by the first proviso is to be regarded as a condition precedent or as merely directory. The 28th sec. of the statute declares that the forms given in the schedule are to be deemed good, valid, and sufficient in law, and the form in the schedule does not contain the second caution. It would, therefore, seem that both at common law and under the statute the statement in this case was admissible in evidence against the prisoner.'

The court, however, intimated that it would be prudent in justices always to give the prisoner the second caution, as being the only course, which would preclude all possibility of question as to the admissibility of his statement; for as it was not yet decided whether that caution was absolutely requisite when a previous inducement or threat had been held out, and the justice could never be certain whether such previous threat or inducement had or had not been held out, a perplexing question might arise as to the sufficiency of the first caution to remove the effect on the prisoner's mind of such threat or inducement, should it turn out in fact that such threat or inducement had been held out. (*r*)

make his statement admissible at common law, and *semble* also under that statute.

Magistrates should always give the caution in the proviso, as it can never be known for certain that no inducement has been previously held out to the prisoner.

(*r*) *Reg. v. Sansome*, 1 Den. C. C. 545, 3 C. & K. 332, E. T. 1850, from which report the statement in the text is given. In the report of the case in 4 Cox, C. C. 203, Parke, B., is reported to have said, 'I do not mean at all to say that there is any reason to doubt that the first caution as well as the second is not a condition precedent to the admissibility of the statement. The last proviso seems to override both cautions.' Alderson, B., 'Mr. Mellor gives no effect to the words of the last proviso, "at any time;" he reads it as if it were "*at any other time*."' Parke, B., '*Primâ facie* the examination is right if it purports to be signed by the magistrate, and there is no evidence that he did not sign it; and I think it would be admissible if neither of the cautions were stated to have been given.' These dicta are neither in 1 Den.

C. C. 545, or 3 C. & K. 332. It is to be observed that the only question reserved in the case was, whether proof *in fact* of the caution required by the first proviso was necessary, and that proof in fact had been given of the first caution, and consequently any dicta as to the *form* of the written statement were extrajudicial. It is further to be remarked that the 11 & 12 Vict. c. 42, s. 18, has not made the form in the schedule the only means of proof, and consequently a statement of the prisoner which would be admissible at common law, may, if that statute has not been complied with, be given in evidence. In the report in Cox, Lord Campbell, C. J., said, 'It seems to me that that proviso contains merely a direction to the magistrate how to proceed, and not a condition precedent. If he neglects his duty, there is no clause of

In a previous case Alderson, B., said, 'It is difficult to understand the 18th section of the 11 & 12 Vict. c. 42, unless by supposing the first proviso to apply to a case where the magistrate is made aware that there has been a previous promise or threat made to the prisoner, in which case he is directed to give a second caution;' (s) and Alderson, B., afterwards said, 'But may not this view be taken of the Act, that it is under no circumstances more than directory, and that, if not resorted to, the statement of the prisoner may be proved as before?' (t) Both these dicta seem quite consistent with the opinions expressed in *Reg. v. Sansome*, (u) and to be very correct.

Cases of similar statutory forms.

There is a class of cases which bear a considerable resemblance to the form given by this statute. In many instances forms of summary convictions have been given, and it is fully settled that convictions following these forms are good, although they omit to mention matters which were essentially necessary to be proved before the convicting justices; (v) and these authorities tend to show that a prisoner's statement, if in the form in the schedule, would be sufficient in any case, unless it were impeached on extrinsic grounds.

Prisoner's statements admitted without any evidence.

Where a statement of a prisoner was in the form in the schedule, and returned with the depositions, and it was submitted that no evidence was necessary to prove that it had been properly taken; Erle, J., said, 'Without deciding whether any further evidence is necessary, I think, if the prisoner's statement can be proved in the old way, it will be advisable to adopt that course;' and accordingly the statement was proved by a police officer. But on its being stated that, as the practice of the sessions had been to receive the depositions without further evidence, it was very important to have the point settled; Erle, J., consulted Rolfe, B., and found that he admitted the statements without any evidence, considering them as having been duly transmitted with the depositions unless anything appeared to the contrary; and as that had been the practice of the sessions, Erle, J., said he should in future adopt the same rule; (w) and in a subsequent case Erle, J., followed this practice. (x)

A prisoner's statement in

In *Sansome's* case it is said that the judges were all of opinion that if a confession by a prisoner, purporting to be signed by a

nullity in the statute; nothing to exclude a confession, which would be admissible at common law.' In 3 C. & K. 332, Erle, J., said, 'If there was proof that the statement was read over to the prisoner, and signed by him and by the magistrate, it would be receivable in evidence at common law.' The reference to the second proviso plainly shows that these dicta were pointed at cases where the clause had not been complied with, but there was a statement made before the magistrate which was admissible at common law; for that proviso applies to any statement of the prisoner made 'at any time,' and therefore includes a statement made by the prisoner in answer to the charge before the magistrate.

(s) *Reg. v. Bond*, 1 Den. C. C. 517.

(t) *Reg. v. Bond*, 4 Cox, C. C. 231.

(u) *Supra*.

(v) *Reg. v. Johnson*, 8 Q. B. 102, *Barnes v. White*, 1 C. B. 192. In re *Alison*, 10 Exch. R. 561.

(w) *Reg. v. Harris*, 4 Cox, C. C. 147, Aug. 1849.

(x) *Reg. v. Hunt*, 4 Cox, C. C. 149. In this case the counsel for the prosecution applied to have the examination read, and Erle, J., said, 'I hand it down, taking notice that it is in the proper form, and that it has been duly transmitted by the justice to the proper officer of the court; for if it appears to have been so transmitted, and there is nothing shown to the contrary, then it is to be assumed to have been duly taken according to the recent statute; and therefore no further evidence is necessary.'

magistrate, has been duly returned to the judge, and has on the face of it the statement that the first caution has been given, it is admissible in evidence without any further proof. (*y*)

Section 18 of the 11 & 12 Vict. c. 42, is only intended to apply to the concluding examination of a prisoner before the committing magistrate after all the witnesses have been examined, and does not apply to a voluntary statement made by a prisoner in the course of the examination, and before the conclusion of the case for the prosecution. Such a statement is admissible, and it is immaterial whether it is made before, during, or after a remand. (*z*) Therefore where a policeman took a prisoner before a magistrate, and applied to have her remanded, and produced a cash-box and iron chisel, stating his belief that it was with that instrument that the prisoner had opened the box; upon which the prisoner spontaneously, and without any question having been put to her, said that she had not opened the box by means of the chisel, but by a hammer; and no examination was taken before that magistrate, who merely granted a remand; it was held that the statement of the prisoner was admissible against her, although she had not been cautioned before she made it, and might be proved by the policeman. (*a*)

A prisoner was taken before the magistrate on the 20th of October, and charged with stealing £70 in money from his employers, and remanded after some witnesses had been examined. He was brought up a second time on the 24th of October, and then further evidence was given, and that which had been given on the former occasion was read over. The magistrate then addressed him in the language prescribed by the 11 & 12 Vict. c. 42, s. 18; but did not tell him, as required by the proviso, that he had nothing to hope from any promise of favour or to fear from any threat. The prisoner's answer was taken down. It was, 'I shall say nothing here; I had rather say it at my trial.' The solicitor for the prosecution then asked for another remand. The prisoner objected, and assigned a reason, and being asked whether he wished that to be taken down as part of his statement, he said that he did, and it was written down; it was, 'It is my intention to plead guilty to the charge.' This statement was not signed by the prisoner or the magistrate. The prisoner was then remanded, and brought again before the magistrate on the 31st of October. No new witnesses were examined, nor any questions put for the prosecution, but an attorney for the prisoner put a few questions to one of the witnesses, who had been before examined. The evidence was then read over and the witnesses were resworn. The statement made by the prisoner at the former examination was then read to him. His attorney objected to its being taken as his statement, because an addition had been made to the evidence in answer to

the form in the schedule is admissible without any proof.

The examination of a prisoner is that alone which is taken after all the witnesses have been examined. A voluntary statement at any other time is admissible, and may be proved by any one who heard it.

A prisoner was duly cautioned at an examination, and made a confession; he was then remanded, and brought up again, and a few questions put for him to the witnesses; and the confession was held admissible.

(*y*) This is stated in the reports in 3 C. & K. and 4 Cox, 203, but not in 1 Denison, C. C. 545, and he was counsel in the case; and it is to be observed that what Denison reports Lord Campbell to have said is, that 'it would seem that both at common law, and under the statute, the declaration in this case was admissible in evidence against the prisoner;'

i.e. in a case where in *fact* the first caution and the signatures of the prisoner and magistrate had been proved. Reg. v. Harris and Reg. v. Hunt, *supra*, were not referred to in this case.

(*z*) Per Jervis, C. J., Reg. v. Stripp, *infra*.

(*a*) Reg. v. Stripp, Dears. C. C. 648.



his questions. The magistrate then again asked the prisoner in the terms prescribed by the statute whether he wished to make any statement, and he declined doing so. The prisoner's counsel objected to the former statement being received; but it was admitted; and, upon a case reserved, it was contended that the statement was inadmissible: 1st, because it was not returned with the depositions; (b) 2ndly, that the statement was made after an insufficient caution. But the judges were unanimously of opinion that the statement was properly received in evidence. It was read over to the prisoner at the second examination, and the proper caution mentioned in the Act of Parliament given to him before it was taken. It is true that on the last examination some other questions (apparently for no other purpose than to try to raise this point) were put to one of the witnesses by the prisoner's attorney; but this made no real difference. If it was receivable, as undoubtedly it was, before they were put, it was properly received at the trial. (c)

Evidence rejected of what a prisoner said, although his statement had not been taken in writing.

On an indictment for murder it appeared that at the time the authorities were unable to get evidence as to the murderers; but several persons who were suspected were brought before the magistrates and examined at the time, and amongst others the prisoner. The magistrate stated that he did not recollect anything about what took place on account of the lapse of time. The constable, however, who had taken the prisoner before the magistrate at the time, swore that the prisoner was duly cautioned; and that the magistrate did not take down in writing the prisoner's statement; but the constable was able to prove it. It was objected that the object of the 12 & 13 Vict. c. 69, s. 18, was to prevent parol evidence being given of the statement of a prisoner before the magistrate. It was answered that the concluding part of sec. 18 left the law on this subject as it was before, and that before the Act parol evidence of what a prisoner said to the magistrate was admissible upon proof that it was not reduced to writing. Monahan, C. J., 'Then the magistrate is to be at liberty to take it down or not as he pleases. I think it was to prevent this that the Act was passed. I cannot admit the evidence.' (d)

When the prisoner's examination should be taken.

The proper time for taking the examination of a prisoner had always been held to be after the witnesses have been examined, and he has heard what they have deposed against him; (e) and it is expressly made so by the new clause.

As to the manner in which prisoners should be cautioned.

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The frequent warnings given to prisoners not to say anything that may criminate themselves, had, on several occasions, rendered it necessary for learned judges to state what was the proper course of proceeding in taking the examinations of prisoners. Thus before the new Act it was laid down that 'A prisoner ought to be told that his confessing will not operate at all in his favour, and that if any one has told him that it will be better for him to confess, or worse for him if he does not, he must pay no attention

(b) It is not so stated in the case, but merely that the clerk who took it down read it.

(c) Reg. v. Bond, 1 Den. C. C. 517, 3 C. & K. 337.

(d) Reg. v. McDermott, 6 Cox, C. C. 479. This decision cannot be supported.

It is contrary not only to the cases before the Act, but to Reg. v. Sansome, *ante*, p. 445.

(e) Rex v. Fagge, 4 C. & P. 566, Garrow, B. Rex v. Bell, 5 C. & P. 162. Rex v. Spilsbury, 7 C. & P. 187.

to it; and that anything he says to criminate himself will be used as evidence against him on his trial. After that admonition it ought to be left entirely to himself whether he will make any statement or not; he ought not to be dissuaded from making a perfectly voluntary confession, because that is to shut up one of the sources of justice.' (f) A prisoner is not to be entrapped into making any statement; but when a prisoner is willing to make a statement, it is the duty of the magistrates to receive it; but magistrates, before they do so, ought entirely to get rid of any impression that may have been made on the prisoner's mind that the statement may be used for his benefit, and the prisoner ought to be told that what he thinks fit to say will be taken down, and may be used against him on his trial. (g)

Before the new Act it was held that the examination of a prisoner ought to be taken down in the precise words used by him; and the language ought not to be changed; and where it appeared to be in such language as the prisoner did not use, or could not have used, it was not admitted in evidence against him, (h) and the new form directs it to be in his very words as near as possible.

The examination of a prisoner must not be taken upon oath; but although it was in one case considered otherwise, (i) it seemed to be settled that questions might be asked of the prisoner by the magistrate, if he thought fit so to do, and that the examination would not be rejected on the ground that the magistrate did put questions to the prisoner, especially if such questions were put merely for the purpose of explaining what the prisoner himself said; (j) and this still seems to be the law. (jj)

As by the statute the magistrate is expressly enjoined to put the examination into writing, it will be intended that he did as the law requires; and parol evidence of a prisoner's statement before him ought not to be received until it is clearly shown that in fact such a statement never was reduced into writing. (k) And in order to render parol evidence of a prisoner's statement admissible, it is not sufficient for a witness to state that he did not see

In what manner the examinations should be taken.

Not upon oath. Questions may be asked.

Parol evidence of examination before magistrate, is admissible after clear proof that the examination was not taken in writing.

(f) Per Gurney, B. *Rex v. Green*, 5 C. & P. 312.

(g) *Reg. v. Arnold*, 8 C. & P. 621, Lord Denman, C. J.

(h) *Rex v. Sexton*, 1 Burn. Just. Doyl. & Wms. 1086, *ante*, p. 426, and other cases there cited. The proper course is to take the examination in the first person; e.g. 'I did so and so,' &c., and to insert the very words the prisoner uses, whatever they may be. C. S. G.

(i) *Rex v. Wilson*, Holt, R. 597, per Richards, C. B.

(j) *Rex v. Ellis*, R. & M. N. P. R. 432. *Rex v. Bartlett*, 7 C. & P. 832. *Rex v. Rees*, 7 C. & P. 568, and see the cases *ante*, p. 405.

(jj) See the observations *ante*, p. 438.

(k) *Jacobs' case*, 1 Leach, 309. *Fearshire's case*, *ibid.* 202. *Hinxman's case*, *ibid.* 310, note (a). *Fisher's case*, *ibid.* 311, note (a). *Rex v. Hollingshead*, 4 C. & P. 242. *Phillips v. Wimburn*, 4 C. & P. 273. *Reg. v. McGovern*, 5 Cox,

C. C. 506. Where the law authorizes any person to make an inquiry of a judicial nature, and to register the proceedings, the written instrument so constructed is the only legitimate medium to prove the result, 3 Stark. Ev. 786. Hence parol evidence cannot be received of the declaration of a prisoner taken under the statute, where the examination has been taken in writing. But if the statute had not made the taking an examination in writing a judicial proceeding, there is nothing, it is conceived, in the rules of evidence which would make the statement reduced to writing primary evidence, to the exclusion of any collateral parol proof of what the prisoner declared. If several witnesses were to hear a confession, not made in the course of an examination under the statute, and one of them were to reduce it to writing, as it was being delivered, such writing would not exclude the testimony of the other witnesses. See *ante*, p. 224.

[876] anything taken down in writing, (l) or that no examination was taken in writing, (m) but the magistrate's clerk must be called to prove that he did not take down in writing what the prisoner said. (n) But if in fact the examination was not taken in writing, parol evidence may be given of the prisoner's declarations. Hall and two others were tried for burglary. The evidence was clear against the two others; but, excepting one or two slight circumstances, certainly not sufficient of themselves to have put Hall on his defence, the only evidence against him was his examination before the magistrate, which was not taken in writing, either by the magistrate or by any other person, but was proved by the *vivâ voce* testimony of two witnesses who were present, and which amounted to a full confession of his guilt. On a case reserved on the question whether this evidence of the confession was well received, all the judges, except Gould, J., were of opinion that the conviction was right. (o) So where it was proved that the magistrate before whom the prisoners were examined was very deaf, and did not take down what they said when before him; Taunton, J., permitted parol evidence to be given of their statements before the magistrate. (p) So a written examination before a magistrate will not exclude evidence of a previous parol declaration, which has not been reduced into writing. (q) And in *Rowland v. Ashby*, (r) Best, C. J., said, 'My opinion is that, upon clear and satisfactory evidence, it would be admissible to prove something said by a prisoner beyond what was taken down by a magistrate.'

Harris's case. Parol evidence may be given to add to the written examination of a prisoner taken by a magistrate.

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And it has since been expressly held that parol evidence is admissible to add to the written examination of a prisoner statements made by him while before a magistrate, and which are not contained in such examination. Upon an indictment against Butler, Harris, and Evans, for stealing a ewe, the property of Bennett, it appeared that Harris, Butler, and Evans were taken before a magistrate about stealing three sheep of Bennett, Pennell, and Price; at the meeting Bennett, Pennell, and Price were all present. The magistrate identified the examinations, and said that was all that was taken down; that was what each of the prisoners said; it was all in his writing, he had no clerk; the in-

(l) *Phillips v. Wimburn*, 4 C. & P. 273, Tindal, C. J.

(m) *Rex v. Isaac Packer*, Gloucester Spr. Ass. 1829, MSS. C. S. G. In this case the witness stated that no examination was taken in writing, and Parke, J., said, 'As all things are to be presumed to be rightly done, I must have the magistrate's clerk called to prove that no examination of the prisoner was taken in writing, and unless you can clearly show that the magistrate's clerk did not do his duty, I will not receive the evidence.' So in *Rex v. Phillips*, Worcester Sum. Ass. 1831, MSS. C. S. G., where a witness stated that he believed that what the prisoner said before the magistrate was not taken down in writing, but he was not quite certain that that was so; Bosanquet, J., said that the justice's clerk ought to be called to show whether anything had been taken in writing, as it

must be presumed that he had done his duty; and the clerk was accordingly called, and proved that nothing was taken in writing, and then parol evidence was received of what the prisoner said before the magistrate.

(n) It should seem on the same ground that, where there is no magistrate's clerk present, the magistrate should be called to prove that he did not take the examination in writing. See *Rex v. Harris, R. & M. C. C. R. 338*, *infra*, where this course was adopted. C. S. G.

(o) Hall's case, cited by Grose, J., in *Lambe's case*, 2 Leach, 559. *Rex v. Huet*, 2 Leach, 821.

(p) *Rex v. Shillecock and Barnes*, Stafford Spr. Ass. 1832, MSS. C. S. G.

(q) *Rex v. McCarty*, 2 Stark. Ev. 38. See also *Rex v. Reason and Tranter*, 16 How. St. Tr. 35, by Eyre, J.

(r) R. & M. N. P. C. 231.



formations were taken as to the three sheep before Evans and Harris were examined; he took down everything that they said that he heard. The papers produced contained everything as he believed that transpired before him, and he intended to take down all that was said to him, and he believed he did. The room was very full. The papers produced were the depositions of Pennell, Price, and Bennett, as to the stealing of their sheep respectively, and Butler's examination and confession as to each offence. The following were the examinations of Harris and Evans:—'J. Harris being called upon for his defence, voluntarily saith that he was concerned in stealing a sheep, the property of J. Pennell, but that J. Butler was the foreleader in the business.' 'W. Evans voluntarily saith that he did not kill the sheep, but that he helped to carry it away.' A witness stated that Mr. C., the magistrate, examined Harris and Evans, and he wrote; that when Harris was asked about Bennett's sheep, Mr. C. was at the table with his paper and pen before him, but his hand was not going. What Harris said about Bennett's sheep was said to Mr. C. Mr. C. heard what Harris and also what Evans said about Bennett. He took down in writing what they said about Bennett's sheep; (s) what they said they said to Mr. C. Harris said he was connected with the taking of Bennett's sheep. Harris said they took a neddy out of the road, and put the sheep upon him. Evans said he helped to take the sheep—Bennett's sheep; this was addressed to Mr. C. Another witness said that he heard Harris say that he helped to take Bennett's sheep; that he addressed Mr. C.; that Harris said to Evans, 'Speak the truth, you may as well speak the truth as not;' that Evans then said he helped to do it; he helped to take Bennett's sheep: what Evans said was addressed to Mr. C. The evidence of these two witnesses was objected to, but received; and, upon a case reserved upon the questions whether, as Harris and Evans had made a confession as to Pennell's sheep, which had been taken down in writing by the magistrate, any confession as to Bennett's sheep could be supplied by parol evidence; and whether, as the magistrate had taken down in writing everything he heard, and he intended to take down all that was said to him, and he believed he did, parol evidence could be given of anything else that was addressed to the magistrate; the judges were unanimously of opinion that the evidence being precise and distinct was properly received. (t)

(s) Quære, whether this should not be 'Pennell's sheep?' My MSS. note has no such statement of this witness, and 'Bennett' might easily be printed erroneously instead of 'Pennell.' C. S. G.

(t) *Rex v. Harris, R. & M. C. C. R.* 338, Lord Lyndhurst, C. B., Bosanquet, J., Taunton, J., and Gurney, B., *absentibus*. Mr. Phillpotts, vol. 2, Ev. 83, *et seq.*, contends that if a prisoner's statement, taken down in writing, is given in evidence against him, as containing an admission of some fact, or a confession of guilt, and the magistrate has omitted to insert some other material part of his statement, the counsel for the Crown will not be allowed to supply the omission by

the evidence of witnesses; and mentions as the only authority in favour of this proposition *Rex v. Mulvey, Lancaster Spr. Ass. 1831, Matth. Dig. 157, S. C.* as *Rex v. Maloney, Rosc. C. E. 57*. This case is stated immediately after *Rex v. Moore, post*, p. 453, and the whole statement is, 'but if it ought to have been taken down in writing, and was not, it is inadmissible.' Whether, therefore, there was any statement in writing by the prisoner, or at what time the statement proposed to be given in evidence was made, does not appear. Mr. Phillpotts then proceeds to allege that *Rex v. Harris* 'will be found, on an attentive perusal, not to bear upon the point in question,

Evidence admissible to add to an information.

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Evidence contradicting the statement.

Blanks left for names.

And in like manner where a defendant had laid an information that he apprehended danger to his life from the plaintiff, which was put in and read, it was held by all the judges of the Common Pleas that evidence was admissible to prove anything the defendant had said as part of his information beyond what was put in writing, either for the purpose of explanation or addition. (*u*)

The following cases have also been decided with reference to the same subject. Where, on an indictment for larceny, the prosecutor stated that the prisoner, *when under examination* before a magistrate, made a confession of his guilt, and was about to state it; but, on referring to the depositions returned, it appeared that the prisoner was there stated to have said, 'I decline to say anything;' Lord Abinger, C. B., was of opinion that the prosecutor's statement could not be received in evidence. (*v*)

Where three prisoners were taken before the magistrate at the same time on the same charge, and each made a statement, which was taken down by the magistrate's clerk, but he had left a blank whenever either of the prisoners had mentioned the name of either of the other prisoners, conceiving that such mention of the name was not evidence against the person so mentioned, and it was proposed to supply these blanks by the parol evidence of the clerk; Patteson, J., said, 'I think I ought not to receive the parol evidence; I think that the rule ought not to be extended. In the present case the statement professes to be a complete account of

nor even afford an argument against the proposition above maintained;' and, after stating the facts of that case, adds (in a note, p. 85), 'It is not to be inferred from this decision that parol evidence can be given of anything else that was addressed to the magistrate. The proposed evidence was receivable, being *distinct* (that is *distinct from the examination produced, and distinct from the offence therein mentioned*); this is quite different from its being in addition to the examination. The examination produced related to *another offence*, and was not admissible as evidence in this prosecution; the only reason of its being produced doubtless was to show that the confession, which it was proposed to prove by the evidence of the two witnesses, was not *included* in the examination, but *altogether* omitted; for that purpose, and that only, it was proper and indispensable to produce the written examination. The point decided then was nothing more than this, that parol evidence might be given of a confession made by a prisoner before the committing magistrate, who took a written examination relating to *other distinct* charges, but which did not in any respect relate to the offence for which he was afterwards tried.' It must be observed, however, that the learned author is in error in several points. In the first place, the term '*distinct*,' coupled as it is with '*precise*,' means '*plain, clear, and unequivocal*,' and not what is suggested. In the next place, the examination of Evans, which was in answer to the three charges, all heard at the same time, only

mentions 'the sheep,' without specifying which of the three. In any view of the case, therefore, the judges must have held that parol evidence was admissible, to show *what* sheep Evans mentioned; and as the evidence of the two witnesses strongly tends to show that the statement of Evans related to the sheep of Butler, the inference is that the judges held that it was allowable to add to the examination of Evans that he stated that the sheep therein mentioned belonged to Butler. Lastly, as the examination of each of the prisoners was a *single* statement '*in defence*' of three charges, the case does decide that parol evidence is admissible to add to the statement of each prisoner in answer to the charge of stealing Bennett's sheep; and it is just the same as if the statement had been, 'as to Pennell's sheep I say so and so, and as to the others I decline to say anything.' C. S. G.

(*u*) *Venafra v. Johnson*, 1 M. & Rob. 316. See *Jeans v. Wheedon*, 2 M. & Rob. 486, and the note to that case.

(*v*) *Rex v. Walter*, 7 C. & P. 267. The ground of this decision is not stated, and it may have been that the very learned Chief Baron considered the evidence proposed as *contradicting* the statement of the prisoner returned by the magistrate, as the confession proposed to be given in evidence was said to be made 'when the prisoner was under examination,' and not during the time the witnesses were being examined *against him*. See the observations in note (*f*), *post*, p. 455.



what took place; and I am of opinion that supplementary evidence ought not to be received.’(w) So where an examination of a prisoner on oath was not allowed to be given in evidence, and it was proposed to give in evidence what the prisoner said, which was not taken down, and *Rex v. Harris* (x) cited; Gurney, B., said, ‘It is very dangerous to admit such evidence, and I think it ought not to be done in this case.’(y)

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Statements and remarks of the prisoner while the witnesses are being examined against him.

The general rule respecting confessions is that ‘a free and voluntary confession made by a person accused of an offence is receivable in evidence against him, whether such confession be made at the moment he is apprehended, or while those who have him in custody are conducting him to the magistrate’s, or even after he has entered the house of the magistrate for the purpose of undergoing his examination,’(z) or even whilst the witnesses are being examined against him, and it is only to the period of time during which the magistrate is taking the prisoner’s examination that the written statement of the prisoner can apply. Any remarks or statements therefore made by the prisoner after the inquiry before the magistrate has begun, and whilst the witnesses are being examined, may be received in evidence, although the prisoner’s examination is afterwards taken in writing.

Thus where one of two prisoners was committed before the other was apprehended, and the depositions against the one prisoner were read over before the magistrate to the other prisoner, and after they were read that prisoner went across the room to a witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination of the prisoners before himself, and the statement to the witness was not contained in it; Parke, J., held that what the prisoner had said to the witness might be given in evidence.(a) So ‘an incidental observation made by a prisoner in the course of his examination before a magistrate, but which does not form a part of the judicial inquiry so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against him at the trial.’(b) So where a man and woman were before the magistrates on a charge of burglary, and in the course of the examination of a witness a glove was produced, which had been found on the man with part of the stolen property in it, on which the man said, ‘She gave me the glove, but she knew nothing of the robbery;’ the depositions having been put in, and the clerk to the magistrates having proved them, and there being no such statement in the depositions or examination of the prisoner, Erskine, J., held that what the man said might be proved by parol evidence.(c)

(w) *Reg. v. Morse*, 8 C. & P. 605.

(x) *Supra*, note (t).

(y) *Rex v. Lewis*, 6 C. & P. 161, *ante*, p. 409.

(z) Per Grose, J., in delivering the judgment of the judges in *Lambe’s case*, 2 Leach, 552.

(a) *Rex v. Johnson and Spiers*, Gloucester Spr. Ass. 1829, MSS. C. S. G. This case was relied upon at the trial of

*Rex v. Harris*, *supra*, by the counsel for the Crown. MSS. C. S. G.

(b) *Rex v. Moore*, Matth. Dig. C. L. 157, Parke, B.

(c) *Reg. v. Hooper*, Gloucester Sum. Ass. 1842. The clerk to the magistrates could not remember the observation, and it was proved by two policemen. MSS. C. S. G.



Parol evidence of a prisoner's answer to a magistrate's question while the witnesses were being examined.

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Parol evidence may be given of a question asked by a magistrate in the course of examination of a witness, and of the prisoner's reply to it, neither the one nor the other being taken down in writing. On the examination of a prisoner on a charge of murder, one of the witnesses stated that she had bought a pot of the prisoner, upon which one of the magistrates asked what sort of a pot it was, and the prisoner, although the question was not particularly addressed to him, made an answer. It was submitted that no evidence could be given of what passed before the magistrate except the depositions. Coleridge, J., 'What the magistrate himself said would not be taken down. That may certainly be asked.' It was then submitted that the statement made by the prisoner and signed by the magistrate must be put in before it could be asked what the prisoner said. Coleridge, J., 'There seems to be no necessity for putting in the written examination. It is not what the prisoner says when called upon for his defence that is asked, but an observation made in the course of the case, and as that would not be put down as part of his statement, I am clearly of opinion that it is receivable.' The clerk to the magistrate then proved that he took down the examination of the witnesses, and that he took down what the prisoners said when they were asked what they had to say for themselves, but that he did not take down anything which either of the prisoners said before the witnesses had been all examined. Coleridge, J., 'At the close of the evidence for the prosecution the prisoner is asked if he wishes to say anything, and if he does, it is taken down, and the evidence of that statement is the written examination; but if a prisoner says something while the witnesses are under examination that does not stand on the same ground, I shall receive the evidence.' (d)

Two cases bearing the other way are reported, but they cannot be supported. (e)

Statement made by a prisoner on the first day of his examination, but not returned

Where there were two investigations by the same magistrates who committed the prisoner, and on the first occasion two witnesses were examined, and a statement was made by the prisoner, and taken down in writing, but it was not read over to the prisoner, nor was he asked to sign it. The depositions of the witnesses were not taken formally till the second occasion, and

(d) *Rex v. Spilsbury*, 7 C. & P. 187.

(e) In *Reg. v. Weller*, 2 C. & K. 223, whilst a witness was giving evidence before the justice as to some nails in some shoes, the prisoner said something as to them, which did not appear in the depositions; and Platt, B., refused to admit this statement, on the ground that the justice ought to have taken it down in the depositions. In *Reg. v. Carpenter*, 2 Cox, C. C. 228, a prisoner had told the constable that he had sold a coat to one Riddle, who being examined before the magistrate denied that the prisoner had sold him the coat at all, and thereupon the prisoner interposed and named another person to whom he had sold it; and at the close of the examinations the prisoner made a statement which contained nothing about the coat; it was held that the incidental observation was not admissible. Wilde, C. J., read *Rex*

*v. Moore*, *Matth. Dig. C. L. 157*, as set out *ante*, p. 453, and added, 'Here the very matter upon which they were inquiring was the mode in which the prisoner was dressed upon the night in question, and what had become of a particular coat, which it was supposed that he wore. It was the duty of the magistrate to take down any remark that had a bearing upon that subject, and I do not think that I ought to receive parol evidence of it.' It is clear that these decisions proceeded on a mistake; the duty of the magistrate under the 7 Geo. 4, c. 64, was to take the examination of the prisoner at the end of the examinations of the witnesses. Any remark by the prisoner during the examination of the witnesses never could form any part of his examination under the 7 Geo. 4, c. 64, and still less can it under the 11 & 12 Vict. c. 42.

the magistrate did not return with them the statement made by the prisoner on the first occasion; but on the contrary returned the following memorandum: 'The prisoner, being advised by his attorney, declines to say anything.' It was objected that as the magistrate returned that the prisoner had declined to say anything, it was not competent for the clerk, in contradiction of the magistrate's own account, to give in evidence that which purported to be a statement made before the magistrate. But Littledale, J., and Parke, B., were both of opinion that the evidence was admissible, although the magistrate might have neglected his duty in not returning what the prisoner said. And Parke, B., added, 'Let the effect of the evidence be what it may with the jury, it is clearly admissible. What a prisoner says is evidence against himself, whether the officer was right or wrong in not returning the statement, or furnishing a copy of it to the prisoner.' (*f*)

by the magistrate.

If a written examination be produced on the part of the prosecution, as the examination of the prisoner taken in writing by the magistrate according to the statute, it has been said that the prisoner is at liberty to meet such evidence by contrary testimony, and to show that the written instrument is inaccurate. (*g*)

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The examination of a prisoner, when reduced into writing, ought to be read over to him, and likewise tendered to him for his signature. And by the late statute (*h*) the magistrate is expressly required to subscribe it. The signature, however, of the prisoner is not required by the statute, but he is to be got to sign it if he will. (*i*) In *Lambe's case* (*j*) the question referred to the opinion of the twelve judges was whether an examination, taken in writing by a committing magistrate, containing a confession of the prisoner's guilt, *not being signed by the prisoner or the magistrate*, was admissible in evidence. The examination, after being taken in writing, was read over to the prisoner, who said, 'It is all true enough;' but upon the clerk's requesting him to sign it, he said, 'No; I would rather decline that.' A majority of the judges were of opinion, upon principle as well as precedent, that the examination or paper writing was well received in evidence. Grose, J., in delivering their opinion, said, that it was clearly receivable in evidence at common law, and that there was nothing in the 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, to render it inadmissible. Surely, as the learned judge observed, if what a man says, though not reduced into writing, may be given in evidence against him, *à fortiori* what he says, when reduced into

Signing by the magistrate and the prisoner.

Examination not signed by the prisoner but admitted to be correct.

(*f*) *Reg. v. Wilkinson*, 8 C. & P. 662. *Rex v. Walter*, *ante*, p. 452, was cited in support of the objection, and the reporters observe that the only difference between the cases is that in *Reg. v. Wilkinson* the statement was made on a different day from the statement which the magistrate returned; but it is conceived the true distinction between the cases is this, that the statement by parol in *Rex v. Walter* evidently was made at the same time as the statement returned by the magistrate, and was in effect a contradiction to it. In *Reg. v. Wilkinson*, the statement proposed to be given in evidence was made the first day, and the

statement returned the second; the first, therefore, could in no way contradict the latter statement. In *Reg. v. Bond*, 1 Den. C. C. 517, Alderson, B., said, that in *Rex v. Walter* 'the statement returned was inconsistent with the statement given in evidence; it was given to contradict the statement returned by the magistrate;' which fully bears out my note to the last edition.

(*g*) 3 Stark. Ev. 787.

(*h*) 11 & 12 Vict. c. 42, s. 18, *ante*, p. 439.

(*i*) See the form in the schedule, *ante*, p. 440.

(*j*) 2 Leach, 552,



Where the prisoner did not sign or admit it to be correct.

What is the distinction in these cases.

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writing, and afterwards admitted by parol to be true, is admissible. But where the clerk of the magistrate stated that he took down the examination from the mouth of the prisoner, and that it was afterwards read over to him, and he was told he might sign it or not as he pleased, and he declined to sign it; Wood, B., was of opinion that the document could not be read; 'In *Lambe's case*, said the learned Baron, 'the prisoner, when the examination was read over to him, said it was true; and here, if the prisoner had said so, the case might have been different.' (k) Where the solicitor for the prosecution, on the examination of the prisoner before a magistrate, at the desire of the latter, took minutes of the examination in writing, which were read over to the prisoner, who said, 'It is all true;' but when they were read over to him again, after an interval of a few hours, said that part of them was not true, and refused to sign them; it was held that these minutes might be read in evidence. (l)

The distinction in these cases appears to have been that, if the prisoner admitted the examination to be correct, the examination itself might be read in evidence; but if the prisoner declined to sign it, or did not admit it to be correct, the written examination could not be read in evidence, but it might be used to refresh the memory of a witness who might state what the prisoner said. A statement made before a magistrate having been taken down in writing and read over to the prisoner, he was asked to sign it; he asked whether he was bound to sign it or not, and being told that he was not, he said he had rather not sign it; and Littledale, J., was clearly of opinion, both upon the cases and on principle, that the examination was not admissible. (m) So where the examination of a prisoner having been taken down in writing before a magistrate, he was neither asked to sign it, nor was it read over to him; Littledale, J., refused to allow the examination to be read in evidence. (n) So where a statement made by a prisoner before a magistrate was taken down by the clerk, and read over to the prisoner, but not signed by him, Patteson, J., thought that it would be the more safe course that this examination should not be read; but that the clerk to the magistrate by whom it was taken should refresh his memory from it. (o) But where a pri-

(k) *Rex v. Telicote*, 2 Stark. N. P. C. 483. *Foster's case*, 1 Lewin, 46. *Hirst's case*, *ibid.* See also *Rex v. Bennet*, 2 Leach, 553, note (a). In *Rex v. Jones*, 7 C. & P. 239, upon an indictment for murder, the court allowed evidence to be given of the examination of the prisoner before a magistrate, taken at several times, and reduced to writing by him: the prisoner had declined to sign it, on its being completed and read over to him; but acknowledged it contained what he had stated, although he afterwards said there were many inaccuracies in the statement he had given. The writing was not admitted as documentary evidence, but as a memorandum to refresh the memory of the magistrate, who gave parol evidence of the prisoner's statement.

(l) *Thomas's case*, 2 Leach, 637. See

also *Bradbury's case*, *ibid.* 639, note (a).

(m) *Rex v. John Sykes*, *Shrewsbury Lent Ass.* 1830. *Lambe's case*, and *Rex v. Telicote*, *supra*, were cited. MSS. C. S. G.

(n) *Rex v. Samuel Wilson*, *Shrewsbury Spr. Ass.* 1830, MSS. C. S. G. Neither in this case, nor in *Rex v. Sykes*, nor as far as appears in *Rex v. Telicote*, was it proposed to give evidence by parol of what the prisoner said. The only point, therefore, decided in these cases was that an examination neither assented to as correct nor signed by the prisoner is not admissible as an examination duly taken under the statute before a magistrate. C. S. G.

(o) *Rex v. Pressly*, 6 C. & P. 183. It has been well observed, that in this case 'it was of no practical importance which course was adopted, but there appears no



soner was before the magistrate on two days, and all that he said the first day was taken down in writing and read over to him, and he was asked whether it was correct or not, and he said it was; and on the second day he was asked to sign this statement, but he refused to do so; and it was objected that it was inadmissible, as he had refused to sign the examination; Bosanquet, J., said, 'If minutes only of what a prisoner says are taken down, and not read over to him, although they could not be read as evidence against him, yet they might be used to refresh the memory of the witness as to what the prisoner said. In this case the prisoner admitted that the examination was correct; where that is the case I have always understood that it was a settled point that the examination should be received.' (p)

Where the prisoner had been examined before the Lords of the Council, and a witness took minutes of his examination, which were neither signed by him, nor read over to him after they were taken; it was held that, though they could not be admitted in evidence as a judicial examination, yet the witness might be allowed to refresh his memory with them, and, having looked at them, to state what he believed was the substance of what the prisoner confessed in the course of the examination. (q) And if an examination before a justice of the peace be taken in writing, under such circumstances of irregularity as preclude the writing from being itself given in evidence, yet it may be proved, as at common law, by some one who was present, as far as his recollection will enable him to state, that he heard the prisoner make the confession, and if he were the person who wrote down the examination, he may refresh his memory with it. Thus where the prisoner had refused to sign his examination before the magistrate, or to admit its truth, Bayley, J., allowed parol evidence to be given of the prisoner's statement, and permitted the magistrate's clerk to read over the examination to refresh his memory. (r) And in another case Bayley, J., did the same thing, and further held, that if the clerk who took it down at the time could, on referring to it, recollect its contents, he might read it. (s) And so where on an indictment for murder the examination of the prisoner by the coroner was inadmissible on account of an irregularity in the mode of taking it, and thereupon, for the prosecution, it was proposed to ask the coroner what the prisoner said on the occasion of his examination, and this was objected to, as being properly the subject of the writing, and if that was not admissible, the inferior evidence of the witness's recollection must be rejected; Tindal, C. J., overruled the objection, and the coroner stated from memory so much of what the prisoner said as was inquired into. (t)

Where a prisoner had been examined before a magistrate, and his examination reduced into writing by the magistrate's clerk, but nothing appeared in the face of the paper to show that it was an

Examination taken down in writing, and used to refresh the witness's memory.

Irregular examination may be used to refresh the memory.

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reason for treating a prisoner's examination, which, although not signed by him, complies with all the requisites of the statute, as an informal document.' Rose. Cr. Ev. 58.

(p) *Rex v. Uriah Daniel*, Monmouth

Spr. Ass. 1831, MSS. C. S. G.

(q) *Layer's case*, 16 How. St. Tr. 215.

(r) *Dewhurst's case*, 1 Lew. 47.

(s) *Hirst's case*, 1 Lew. 47.

(t) *Rex v. Reed*, M. & M. 403.

examination taken on a charge of felony, or that the magistrates who signed it were then acting as magistrates; Patteson, J., said, 'The clerk to the magistrates may be called to prove what the prisoner said, and refresh his memory from the paper;' and this was done. (*u*)

Statements made by prisoner before the conclusion of the examination of the witnesses.

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We have seen that the proper time for taking the examination of a prisoner by a magistrate, is after the witnesses have been examined, and he has heard what they have to say. (*v*) A statement, therefore, made by a prisoner before that time, although taken in writing, was not, properly speaking, an examination within the 7 Geo. 4, c. 64, and consequently was not admissible in evidence as an examination of the prisoner. But although an opinion was once intimated that 'nothing which a prisoner stated before he knew what the evidence against him was ought to be used to criminate him,' (*w*) yet it is clearly settled that any statement made by a prisoner, before a magistrate, and taken in writing, though inadmissible as an examination, may be proved by the person who took it down, he refreshing his memory by the written paper. The prisoner and his younger brother had been in custody since the 17th of May, and various depositions had been taken between that day and the 21st, on which day several depositions were taken in the presence of the prisoner, and the younger brother was about to state a confession made to him by the prisoner on the previous evening, when the prisoner interrupted him and made a full confession of his guilt, which the magistrate's clerk immediately reduced into writing, and it was read over to the prisoner, who put his mark to it, and it was attested by the clerk: 'Taken and signed by the said B., in the presence of,' &c. On subsequent days, other depositions were taken, some of them in the presence, some in the absence, of the prisoner. It was objected, that the confession was inadmissible, first, because it was made before all the evidence was gone through, and on this point *Rex v. Fagg* (*x*) was relied upon; secondly, that some of the depositions were taken in the absence of the prisoner; thirdly, that there were interlineations and erasures; fourthly, that there was a false attestation; and, lastly, that as the best evidence must be given, if the paper was inadmissible, the parol statement of the clerk was not receivable; but Gaselee, J., having consulted Lord Tenterden, C. J., said, 'Lord Tenterden agrees with me, that the opinion of Mr. B. Garrow, in *Rex v. Fagg*, is much too general, as it would go to exclude any acknowledgment

(*u*) *Rex v. Tarrant*, 6 C. & P. 182.

(*v*) *Ante*, p. 448.

(*w*) Per Garrow, B., in *Rex v. Fagg*, 4 C. & P. 566. The statement of the prisoner in this case was made before the evidence in support of the charge had been gone through, and Garrow, B., strongly inclined to think it was inadmissible, and after making the observation stated in the text, censured the taking such a statement from the prisoner. The censure might well have been spared, as it is undoubtedly most proper for the magistrate to take down whatever a prisoner may say of his own accord, at any time during the progress of the inves-

tigation of the case before him, and cases frequently occur where prisoners volunteer statements long before the witnesses against them have been examined. In *Rex v. Mellor*, Stafford Sum. Ass. 1833, each of the prisoners as soon as they got before the magistrate made a statement, and upon such statement each of them was convicted before Gurney, B. In *Reg. v. Watson*, 3 C. & K. 111, *infra*, Patteson, J., said, 'In cases like this the prisoner ought to be first told, that that was not the proper time for him to make a statement, and that the preceding note ought to be qualified to that extent.'

(*x*) *Supra*.



of guilt made by a prisoner to a constable. He also agrees with me that the interlineations and erasures are cured by the attestation, which cannot be called a false attestation, though it would have been more regular to have said that the prisoner put his mark, as is customary in affidavits in the superior courts. We are both of opinion that it is no objection that some of the depositions were taken in the absence of the prisoner. We are also both of opinion that the confession may be repeated by the magistrate's clerk who heard it, and that he may refresh his memory by the aid of the written paper.' (y) So where the prisoner was asked at the end of the evidence of one of the witnesses against him whether he wished to ask the witness any questions, and he did not ask the witness any questions, but made a statement, which was taken down by the magistrate's clerk, and signed by the magistrate, but not by the prisoner, and no caution had at that time been given to the prisoner; Patterson, J., said, 'This is not evidence in itself; but if some one is here who was present, and heard the prisoner make this statement, that person may be called to give evidence of it, and may be allowed to refresh his memory from what is written on the depositions;' and the clerk to the magistrate was called, and proved the statement, refreshing his memory by what he had written in the depositions. (z)

The prisoner was indicted for receiving goods knowing them to have been stolen. There was a second indictment against him for breaking into and stealing from a church. When examined before the magistrate on this second charge, he made a confession as to the first charge. This was taken down in the usual manner, read over to the prisoner, and signed by the magistrate; but the prisoner refused to sign it. It was objected that the 7 Geo. 4, c. 64, only made these confessions evidence, on the authority of the magistrate's signature, when the confession was made on an examination having reference to the charge in support of which the confession was sought to be given in evidence. Erle, J., held that it mattered not for what purpose the confession was made; if it were made before a magistrate, taken down in the regular manner, and received the magistrate's signature, it thereby became valid evidence against the prisoner upon the trial of any other charge than that upon the examination in reference to which such confession had been made. (a)

A confession of one offence during an examination of a charge of another offence.

An examination before a magistrate must not be upon oath; and when an examination previous to committal purports to have been taken upon oath, evidence has been held inadmissible to show that in fact it was not so taken. (b)

It must not be on oath.

It is said by Lord Hale, (c) and upon his authority it is so laid down in the subsequent treatises on the subject, that an examination taken before a magistrate, in order to be read in evidence against a prisoner, must be proved on oath by the magistrate that took it, or the clerk that wrote it, to have been truly taken.

Examination before a magistrate, how proved under the former statutes.

(y) *Rex v. Bell*, 5 C. & P. 162.

this case.

(z) *Reg. v. Watson*, 3 C. & K. 111.

(b) *Ante*, p. 407.

(a) *Reg. v. Pomeroy*, 1 Cox, C. C.

(c) 2 P. C. 52, 284.

231. The constable proved the facts in



examination of one of the prisoners was offered in evidence against him, and a person who was present, and saw the prisoner and the magistrate sign the examination, and heard the prisoner cautioned, was called to prove these facts; it was objected, upon the authority of Lord Hale, that this writing was inadmissible, unless either the magistrate or his clerk proved that the examination was properly taken; and Patteson, J., after saying that his own opinion was strongly opposed to such a doctrine, yielded nevertheless to the authority of Lord Hale, and refused to admit the examination, but added that, had it appeared that the question had mainly turned upon the admission or rejection of the examination, he would have received the evidence, and reserved the point, and that he by no means wished his present decision to be cited as a precedent. (*d*)

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Distinction  
between signature  
and  
mark of a  
prisoner.

Where on an indictment for larceny it was proposed to put in the prisoner's examination before the magistrate, and to prove it by a bystander; but the examination had the prisoner's mark to it only; Lord Denman, C. J., refused to receive the evidence, unless it were proved by the magistrate or his clerk; he observed that the necessity of proving the deposition in this manner had been doubted, but the distinction appeared to him to be that, where the examination of a prisoner before a magistrate is taken down in writing and signed with the prisoner's name, it need not be proved by the magistrate or his clerk; but if not signed by him, or if his mark only be attached to it, it is necessary to be proved by the magistrate or the clerk; for if the prisoner signs his name, this implies that he can read, and that he has read the examination, and adopted it. But if he has not signed it, or has only put his mark, there are no grounds to infer that he can read, or that he knows the contents, and no person can swear that the examination has been correctly read over to him, except the person who read it. (*e*)

Statement by  
a foreigner  
translated into  
English.

On the trial of a Dutchman it was proved that his statement was taken down by the magistrate's clerk, who had since died, and that it was handed to the prisoner, who put his mark to it; but the witness would not swear to the mark. The signature of the justice was proved; and an interpreter, who had translated to the prisoner all that took place, after reading the examination over, stated that he heard the prisoner make a statement in

(*d*) *Rex v. Richards*, 1 M. & Rob. 396, note.

(*e*) *Rex v. Chappel*, 1 M. & Rob. 395, Aug. 11, 1834. In *Smith's case*, 2 Lew. 139, a writing purporting to be the examination of a prisoner, and to bear his mark, was tendered in evidence, and the magistrate's signature proved by a bystander, who stated that the clerk was writing when the prisoner was examined, and when the examination was finished he repeated to the prisoner, apparently from the paper, what the prisoner had said, and the prisoner then put his mark to the paper; but whether the prisoner's statement was taken down correctly, or at all, he had no means of judging. *Rex v. Chappel* was cited, but Parke, B., was

disposed to admit the examination, as he thought there was sufficient *prima facie* evidence that the prisoner's examination was taken down in fact, as the law requires, and if so, that it must be presumed to have been taken down correctly, and read over correctly, until the contrary was proved. He conferred with Lord Denman, C. J., who entertained doubts about the propriety of his former opinion, and thought it fit for the consideration of the judges; but as the examination was not essential in the present case, Parke, B., rejected it, intimating, that in any case in which it was necessary he would admit it, and take the opinion of the judges.

Dutch; that he translated it, and saw the clerk write the translation down, and, to the best of his belief, the words in the statement produced were the English words. Erle, J., read the note (*e*), which was the same in the last edition, and admitted the statement. (*f*)

And where a constable swore that he heard the prisoner make her statement, and saw the magistrate take it down, and that it was read over to her by the magistrate, and she put her mark to it, after which the constable put his name to it as attesting the mark, and the magistrate signed the examination as taken before him; but the constable did not see the contents of the paper which the clerk read over; Vaughan, J., and Patteson, J., were of opinion that the examination was sufficiently proved; and Patteson, J., said that he was by no means satisfied that it was in any case necessary to call either the magistrate or his clerk. Some of the books did indeed so lay down the rule, and he had reluctantly yielded to their authority on a recent trial on the Western Circuit; (*g*) not, however, without expressing great doubt as to the propriety of such a rule. The present case was, however, quite distinguishable from that; here there was an attesting witness, who had been called to prove the fact which he attested. He was clearly of opinion that the examination, so authenticated, was admissible in evidence against the prisoner. (*h*)

Attesting  
witness.

There are, however, many cases, some decided previously and some subsequently to those which have been mentioned, which show that it was not necessary to call either the magistrate or his clerk, who took down the prisoner's statement, but that it was sufficient to call a person who was present, to prove the taking of the examination and the signature of the magistrate. (*i*)

It was not necessary to call either the magistrate or his clerk to prove the taking of the examination.

[886]

Thus where on an indictment for murder it appeared that the prisoner's examination had been taken down by the magistrate's clerk, who was not present to authenticate it when produced at the trial; and it was objected, that it could not be received in evidence, although the magistrate before whom it was taken had signed it, and was present to prove his signature; Holroyd, J., held it to be sufficient, and it was read. (*j*) And so where a constable, who was at the magistrate's whilst the prisoner was under examination, was in and out of the room backwards and forwards, and absent at a time as much as two or three minutes together, but saw the examination signed; Bolland, B., held that the examination was admissible, as it must be presumed that the magistrate had done his duty. (*k*) So where the examination produced purported to be the examination of the prisoner, and was signed by the magistrate and also by the prisoner; but there was no proof either that it was taken from the prisoner's mouth, or that he had stated the facts that were contained in it; Parke, J.,

(*f*) Reg. v. Christance, 1 Cox, C. C. 143.

(*g*) Rex v. Richards, *supra*, note (*d*).

(*h*) Rex v. Hope, 1 M. & Rob. 396, note. S. C. 7 C. & P. 136, Feb. 4, 1834. In Rex v. Taylor, 7 C. & P. 136, note, tried before Patteson, J., a statement made by a prisoner similarly proved was read without objection.

(*i*) It should seem that proof of the

magistrate's signature alone would not be sufficient, as that would only show that he had signed the examination of a person of the same name as the prisoner, but that there must be some evidence of the examination being that of the prisoner. C. S. G.

(*j*) Hobson's case, 1 Lew. 66, 1823.

(*k*) Rex v. Thomas Haines, Shrewsbury Spr. Ass. 1830, MSS. C. S. G.



was of opinion that the proof of the two handwritings was sufficient, and he allowed the examination to be read in evidence. (*l*) So where the only evidence in court, in addition to proof that it was the examination of the particular prisoner, was that of a person who knew the magistrate's handwriting, by which the examination was authenticated; Bosanquet, J., and Alderson, B., intimated an opinion, that the statement might be read on proof of the magistrate's handwriting, on the ground that the law required the magistrate to certify that it had been duly taken; and Alderson, B., likened it to the case of an affidavit, where proof of the magistrate's handwriting was evidence of the party's having been sworn. The learned judges, in reference to Lord Hale's doctrine, (*m*) said, it could not be intended that the magistrate or his clerk must be called, on account of their office, but that any one who could show that the examination was duly taken would be sufficient. The confession, however, was not read, but the prisoner was convicted on other evidence. (*n*) So where the prisoner's statement before the committing magistrate was proved by a witness, who deposed to the signatures of the magistrate and prisoner; Lord Denman, C. J., held that it might be given in evidence without calling the magistrate or his clerk. (*o*) So where neither the magistrate nor his clerk were in court, but a constable swore that he was before the magistrate, and heard the statement of the prisoner read over to him by the clerk, and proved the handwriting of the magistrate to the depositions returned to the court; Parke, B., allowed the prisoner's statement to be read in evidence against him. (*p*) So where on an indictment for attempting to set fire to a house it appeared that the prosecutor was present at the examination before the magistrate, and proved that the prisoner made a statement, which was taken down and read over to her by the magistrate, and to which she made her mark, and the magistrate signed it, and the prosecutor knew the examination to be the same, as his own deposition, with the signature to it, was on the same piece of paper; Coltman, J., held that the statement might be given in evidence, without calling either the magistrate or his clerk. (*q*)

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Examinations  
how proved  
under the new  
statute.

But we have seen that by the 11 & 12 Viet. c. 42, s. 18, where a prisoner's examination is returned with the depositions, and is in the proper form, it is admissible without any proof of the prisoner's or magistrate's signature. (*r*)

(*l*) Priestley's case, 1 Lew. 74, 1831.

(*m*) *Supra*, note (*c*), p. 459.

(*n*) *Rex v. Foster*, 7 C. & P. 148. Aug. 20, 1835. It is not stated whether the examination was signed by the prisoner, or whether the witness who proved that it was the examination of the prisoner heard it taken or read over to her. In *Rex v. Spencer*, 1 C. & P. 260, which was an indictment for perjury in an answer in Chancery, Lord Tenterden, C. J., said, 'The courts always give credence to the signature of the magistrate or commissioner; and if his signature to the jurat is proved, that is sufficient evidence that the party was duly sworn.' The distinction between an affi-

davit and an examination of a prisoner consists in this, that the affidavit is prepared by or on the behalf of the party making it; the examination of a prisoner is taken down by the magistrate or his clerk; in the one case, therefore, the correctness of the statement depends on the party making the affidavit; in the other, on the magistrate or his clerk. C. S. G.

(*o*) *Rex v. Rees*, 7 C. & P. 568, July 26, 1836.

(*p*) *Rex v. Reading*, 7 C. & P. 649, Dec. 16, 1836.

(*q*) *Reg. v. Hearn*, C. & M. 109, 1841.

(*r*) *Ante*, p. 440, 442, 443.



But if there be any erasures or interlineations in the examination, the person who took it down ought to be called to explain them. Upon an indictment for murder, it was proposed to prove the prisoner's examination before the coroner, by evidence of the handwriting of the latter, and by calling a person who was present at the examination; but it appearing that there were certain interlineations in the examination, Lord Lyndhurst said he thought that the clerk who had taken down the examination ought to be called, and the evidence was withdrawn. (*s*)

So also where there are erasures or interlineations.

Where the examination of a prisoner has been regularly taken, and is regularly proved, it is read by the officer of the court. But where the written statement of a prisoner before a magistrate is inadmissible by reason of any irregularity in the taking of it, (*t*) or because the prisoner neither assents to the correctness of the examination nor signs it, (*u*) the proper course is for the magistrate, (*v*) or his clerk, (*w*) who took down the statement in writing, to refresh his memory with it, and state what the prisoner said.

As to the mode of giving the examination in evidence.

So where a statement is made before the time for taking the prisoner's examination, the proper course is for the person who took it down to give evidence of what the prisoner said, refreshing his memory with his notes. (*x*)

But if a statement is signed by a prisoner, or he makes his mark to it, it is the proper course for the officer of the court to read it. (*y*)

[888].

Where the examination of a prisoner, put in on the part of the prosecution, expressly refers to the deposition of a witness, the prisoner has a right to have that deposition read in explanation of his examination. On the part of the prosecution, the examination of a defendant, taken before a magistrate, was put in, and in it the defendant stated that the deposition of a witness, which had been taken at the same time, and before the same magistrate, was correct. Patteson, J., held that the deposition of the witness might be put in and read as a part of the defendant's statement, although the witness had been examined on the trial as a witness for the prosecution, and although possibly his deposition might have the effect of contradicting his evidence on the trial. (*z*) But unless the examination of a prisoner specifically refers to the deposition of a particular witness, putting in the examination of the prisoner on the part of the prosecution will not entitle the

Where the examination of a prisoner refers to the deposition of a witness.

(*s*) Brogan's case, Rosc. Cr. Ev. 61, 1834. In *Reg. v. Dwyers* and others, tried for murder, Gloucester Sum. Ass. 1843, the deposition of the deceased was proved, and the name of one prisoner was interlined, and the clerk who proved the deposition explained that the deceased in the first instance did not speak to that prisoner, but after the examination had been all taken down, on his attention being directed to that prisoner, he identified him as one of the persons who had injured him. A stronger instance to show the necessity of the clerk's attending could hardly be conceived. C. S. G.

(*t*) *Rex v. Reed*, M. & M. 403, Tindal, C. J. *Rex v. Bell*, 5 C. & P. 162, *ante*, p. 459.

(*u*) See the cases, *ante*, p. 456.

(*v*) *Rex v. Jones*, Carr. Sup. 13. 7 C. & P. 239, note (*a*), *ante*, p. 456, note (*k*).

(*w*) *Rex v. Watkins*, 4 C. & P. 550, note (*b*), Bosanquet, J.

(*x*) *Rex v. Bell*, 5 C. & P. 162, *ante*, p. 456.

(*y*) *Rex v. Swatkins*, 4 C. & P. 548, Patteson, J.

(*z*) *Rex v. John*, 7 C. & P. 324. The report does not state at whose instance the deposition was put in.

Omissions in the prisoner's statement.

prisoner to have any of the depositions read, although they were all taken before the prisoner made his statement. (*a*)

The circumstance of some part of the prisoner's statement being omitted by the magistrate, would not, it seems, render the examination inadmissible if it had been read over to the prisoner, and he has assented to its correctness. (*b*)

The prisoner is not to be precluded from showing, if he can, that omissions have been made to his prejudice; for the examination has been used against him as an admission, and admissions must be taken as they were made, the whole together, not in pieces, nor with partial omissions. Even the prisoner's signature ought not to estop him from proving, if he can, such omissions; if the truth is, that omissions were made to his prejudice, the fact should be proved, and the prejudice no longer suffered to exist. (*c*)

The prisoner's statement may be put in in reply to evidence given for him.

Where the prisoner calls witnesses whose evidence is inconsistent with his statement before the magistrate, the statement may be put in evidence in reply. On an indictment for robbery the prisoner's coat was proved to have been bloody, and a witness for the prisoner stated that on the day before the robbery he had observed that the prisoner's coat was bloody, and the prisoner gave an account of how it became so; and it was held that the prisoner's statement before the magistrate, in which he accounted for the blood on his coat in a different manner, was admissible in reply to the evidence given by the prisoner. (*d*)

The prisoner's statement is evidence against him, but not for him; and therefore it cannot be put in evidence on his behalf. (*e*)

### SEC. III.

#### *Depositions.*

Depositions before magistrates.

[889]

As examinations and depositions before magistrates originate from the same Acts of Parliament, and are in some respects guided by the same decisions, it may be proper to consider the latter immediately after the former. From what has already been mentioned (*a*) respecting the examinations before magistrates, it has appeared that by the 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10, justices of the peace were enabled and directed to take the depositions of witnesses in cases of felony; and that by the 7 Geo. 4, c. 64, these statutes were repealed and re-enacted with an extension to misdemeanors, and we have seen that the

(*a*) *Rex v. Pearson*, 7 C. & P. 671. Law, Recorder, after consulting Patteson and Williams, Js.

(*b*) Joy, 93, citing *Milward v. Forbes*, 4 Esp. 170, where an examination of the defendant before commissioners of bankrupt was admitted in evidence by Lord Ellenborough, C. J., although it was proved that the defendant had said more than was taken down, the commissioners having taken down only what they considered relevant, upon the ground that

the party, having signed it after he heard it so stated from his own words, and read over to him before he signed it, it must be taken to be a statement of facts admitted by him.

(*c*) 2 Phill. Ev. 85.

(*d*) *Reg. v. White*, 2 Cox, C. C. 192. Pollock, C. B., after consulting Coleridge, J.

(*e*) *Reg. v. Haines*, 1 F. & F. 86, Crowder, J.

(*a*) *Ante*, p. 436, *et seq.*

7 Geo. 4, c. 64, is repealed so far as relates to the taking of the examinations and informations against persons charged with felonies and misdemeanors, by the 11 & 12 Vict. c. 42, s. 34. (*b*)

By sec. 17 of which Act, 'in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement (M.) on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.' (*c*)

As to the examination of witnesses.

Justice to administer oath or affirmation.

Depositions of persons who have died, or who are absent, may, in certain cases, be read in evidence.

'(M.) *Depositions of Witnesses.*

'To Wit. } The Examination of *C.D.* of [Farmer] and  
                   } *E.F.* of [Labourer], taken on [Oath] this  
                             Day of                      in the Year of our Lord  
                             at                              in the [County] aforesaid, before  
                             the undersigned, [One] of Her Majesty's Justices of  
                             the Peace for the said [County], in the Presence and  
                             Hearing of *A.B.*, who is charged this Day before  
                             [me], for that he the said *A.B.* on                      at  
                             [&c., describing the Offence as in a Warrant of Com-  
                             mitment].

'THIS Deponent *C.D.* on his [Oath] saith as follows [&c.,

(*b*) *Ante*, p. 438.

(*c*) The Irish Act, 12 & 13 Vict. c. 69, s. 17, was exactly similar to this section excepting that it omitted the words 'or so ill as not to be able to travel.' The 12

& 13 Vict. c. 69, was repealed by the 14 & 15 Vict. c. 93, and the present clause is sec. 14 of that Act, which is similar to the repealed clause, and omits the same words as it did.



stating the Deposition of the Witness as nearly as possible in the words he uses. When his Deposition is complete let him sign it].

‘And this Deponent *E.F.*, upon his Oath, saith as follows [ &c. ]

‘The above Depositions of *C.D.* and *E.F.* were taken and  
[*sworn*] before me at on the Day and Year  
first above mentioned. *J.S.*’

By sec. 28, ‘the several forms in the schedule to this Act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law.’ (*d*)

Witness dead  
or kept away  
by the pri-  
soner.

Although there was nothing in the former statutes providing that the depositions taken under them should in any case be evidence, (*e*) yet from the construction of the two former by the highest authorities, and upon general principles of evidence, it was considered as a settled rule, that if it were previously proved satisfactorily to the court that the witness was dead, (*f*) or that he had been kept away by the practices of the prisoner, (*g*) his deposition might be given in evidence on the trial of an indictment: provided the deposition were duly taken upon oath (*h*) in the presence of the prisoner, when charged before a magistrate. And it had been said that if a witness was prevented from attending by sickness, or was unable to travel, his deposition might be given in evidence. (*i*) But it was afterwards decided that if a witness were too ill to attend the trial, but there was a probability that he might recover, his deposition was not admissible. The prosecutrix was so near her confinement as to be unable to attend at the assizes, and it was proposed to prove her deposition before the magistrate, and 1 *Hale*, 586, *Kel.* 55, were relied upon: *Patteson, J.*, ‘That has been doubted by *Mr. Starkie*, (*j*) and I think the evidence is not admissible.’ (*k*) The new statute has, however, made the deposition admissible in all cases where the witness is ‘so ill as not to be able to travel.’

Witness ill at  
the time of  
the trial.

Permanent in-  
ability to at-  
tend.

Formerly if there were a permanent inability to attend, (*l*) as if the witness were so ill that there was no probability that he would ever be able to attend, his deposition was admissible. The prosecutrix was an old woman bed-ridden, and there was no

(*d*) See sec. 20, *ante*, p. 441, as to the mode of returning the depositions.

(*e*) *Mr. Starkie* in a very able note to the case of *Rex v. Smith*, 2 N. P. C. 211, observes that the two statutes of Ph. & M. seem to have been passed without any direct intention on the part of the legislature to use the examinations and depositions as evidence upon the trials of felons. But the taking of them having been sanctioned by the legislature, they became, it seems, admissible in evidence upon the rules and principles of evidence already established; and the effect of the statutes in point of evidence seems to consist in removing an objection which would before have occasioned the rejection of such evidence, namely, that the proceeding was *extrajudicial*. ‘The object of taking the depositions is that if any of the witnesses, whose evidence is given before the magistrates, should be unable to attend at the trial, or die, there should not by reason of this be a failure of justice.’ Per *Cresswell, J.*, *Rex v. Ward*, 2 C. & K. 759.

(*f*) 1 *Hale*, P. C. 393. *Bull.* N. P.

242. 2 *Phill. Ev.* 71.

(*g*) *Harrison's case*, 4 St. Tr. 492, 5th Res. in *Lord Morley's case*, *Kelyng*, 55. *Fost. Disc.* 337.

(*h*) The statutes of Ph. & M. did not in terms require the informations to be taken upon oath; though it was considered necessarily incidental to the duty of a magistrate so to take them.

(*i*) 2 *Phill. Ev.* 71. 1 *Hale*, P. C. 305. 2 *Hale*, P. C. 52. However, this was doubted, upon very sensible grounds, by *Mr. Starkie*, 2 *Evid.* 383. In *Lord Morley's case*, *supra*, 6th Res., it was held that it was not sufficient to prove that all endeavours have been used in vain to find the witness.

(*j*) 2 *Stark. Ev.* 383.

(*k*) *Rex v. Savage*, 5 C. & P. 143, and *MSS. C. S. G.* The proper course in such cases was to move to postpone the trial upon an affidavit of the illness of the witness. *Rex v. Osborn*, 7 C. & P. 799. *Bolland, B.*

(*l*) Per *Tindal, C.J.* *Rex v. Edmunds*, 6 C. & P. 164.

probability that she would ever be able to leave her house again, and Gurney, B., allowed her examination to be read, saying, there would be no use in putting off the trial till another assizes, as there was no likelihood of her ever being able to attend; (*m*) and such a case would clearly be within the new statute.

We may next notice the cases which have been decided on the new statute, where the witness is said to be 'so ill as not to be able to travel.' Where on a trial for larceny a surgeon proved that a witness was suffering from bronchitis, and that her life would be endangered if she were brought into court: it was objected that she was not proved to be so ill as not to be able to travel; but it was held that, as it was sworn that her attendance would endanger her life, the deposition was admissible. (*n*)

Where a witness had come to the assize town in order to attend a trial, and about half an hour before it came on was in the building where the court sat, when a medical man advised him to return home, and swore that his remaining to give evidence would, in his opinion as a medical man, have been highly dangerous, and the witness was on his way home while the trial was going on; it was held that his deposition was admissible; for the witness was not able to travel to the place at and in which he was to give evidence. The journey was not over until he arrived at the court, and as in the opinion of the medical man he could not without danger come to this court, he was not able to travel to the place where his evidence must be given. (*o*)

So where upon an indictment for stealing a physician proved that he had seen the prosecutor on the morning of the trial, and that he was not able to attend in consequence of a second attack of paralysis; he could not speak, and could not be made to hear, and if brought he would not be able to give evidence; but he might be brought without danger of his life, though he ought not to be permitted to roam abroad. He had been seen in the street the day before near his shop-door. It was objected that the prosecutor was not so ill as not to be able to travel according to the words of the statute, and that an application ought to have been made to postpone the trial; but the sessions held that, as he was disabled from giving evidence at the trial by an attack of illness not plainly appearing to be temporary, his deposition was admissible; and, upon a case reserved, it was held that this ruling was right. (*p*) So where a witness was suffering from a tendency to softening of the brain, and the surgeon proved that he was not in a condition to give evidence, as the effect of giving evidence would be dangerous to his life; but he could go to the train in a cab and by the train; he was so ill and nervous, however, that if vigorously cross-examined he would soon get confused, and could not be depended upon; and, though he could travel without material injury to his health, he could not complete the object of his journey; the deposition was admitted. (*q*)

Cases since the 11 & 12 Vict. c. 42. Where life would be endangered.

Where a witness came to the building where the court sat, but was sent away by a medical man, as his remaining would be highly dangerous.

Where a witness is too ill to give evidence, though he might attend without danger to his life, his deposition is admissible.

Where a witness cannot give evidence without danger to his life.

(*m*) *Rex v. Hogg*, 6 C. & P. 176. Reg. v. Wilshaw, C. & M. 145, Coltman, J., post, p. 493.

(*n*) Reg. v. Day, 6 Cox, C. C. 55, March 1852. Plait, B.

(*o*) Reg. v. Wicker, 18 Jurist, 252. Channell, Serjt., after consulting Parke,

B. March 1854.

(*p*) Reg. v. Cockburn, D. & B. 203. H. T. 1857.

(*q*) Reg. v. Wilson, 8 Cox, C. C. 453, Jan. 7, 1861. The Recorder on the authority of Reg. v. Cockburn.

Cases where the proof has been insufficient to satisfy the court that the witness was too ill to attend.

A material witness had gone before the grand jury on the first day of the session, and had gone home at night and returned in the morning for two days; but on the morning of the trial she had been seized with a bowel complaint, and when the policeman left Hounslow she was unable to travel; it was held that the deposition was not admissible, as it was not satisfactorily proved that the witness was so ill as to be unable to travel. (*r*) So where a constable proved that he saw a witness in bed at nine o'clock the evening before, and he had a cold and inflammation, and was attended by a medical man, and on inquiry that morning he heard the witness was very bad; it was held that the deposition was not admissible. (*s*)

Generally a surgeon should be called to prove the illness of the witness.

So where a witness had seen another witness, whose deposition was proposed to be given in evidence, in bed and apparently ill on the 18th of March, and she was then attended by a surgeon, and the trial was on the 23rd of March; Patteson, J., said, 'I think that, in order to allow a deposition to be read in evidence under this enactment, the surgeon should be called, if there be one attending the witness. There, no doubt, may be cases where a person may be not in a state of health to be able to be present at a trial, and yet is attended by a surgeon, and in such cases other evidence may be sufficient, especially when the inability of the witness is of such a nature as to prevent even the possibility of his attendance as a witness;' and rejected the deposition. (*t*) So where the attorney for the prosecution proved that he had seen a witness a few days before, and found him ill of a fever; Erle, J., refused to admit the deposition; as the witness, not being a medical man, could not speak as to the nature of the disease. (*u*) So where a police constable proved that he saw King in bed on the morning of the trial. He had fever, and the divisional surgeon was attending him. Yesterday morning he was in bed, and is not able to get up yet. He had heard that King had been confined to his bed about a fortnight; and he produced a certificate. Byles, J., refused to admit King's deposition, saying, 'I am of opinion that, to make this deposition admissible, there should be evidence of a medical man on oath, or other evidence upon oath, which the court might think of equal value to sworn medical evidence. The constable says he has been told King is suffering from fever; how can he know the illness is of such a nature as to render the witness "so ill as to be unable to travel?" A medical man is the proper witness of that fact.' (*v*)

Cases as to the pregnancy and delivery of women.

Where a material witness for the prosecution had been delivered of a child a week before, and was unable to travel; it was contended that the prosecutor knew the state in which the witness was, and ought to have applied to postpone the trial; but it was held that the deposition was admissible, as every requisition of the statute had been complied with. (*w*)

Pregnancy

Where on an indictment for bigamy a surgeon stated that he

(*r*) Reg. v. Harris, 4 Cox, C. C. 440. Aug. 1850. The Common Serjeant. It is not stated who proved the illness.

(*s*) Reg. v. Ullmer, 4 Cox, C. C. 442. Oct. 1850. The Common Serjeant.

(*t*) Reg. v. Riley, 3 C. & K. 116. March 1851.

(*u*) Reg. v. Philips, 1 F. & F. 105. March 1858.

(*v*) Reg. v. Welton, 9 Cox, C. C. 296. Nov. 1862.

(*w*) Reg. v. Harney, 4 Cox, C. C. 441. Aug. 1850. Gurney, Commr.



had found a witness in a very advanced state of pregnancy, and only about a month from the time of her delivery, and not in a fit state to come to the assizes; there was no illness or anything the matter independently of the pregnancy, but that rendered it unsafe for her to travel. Crompton, J., 'I cannot receive the deposition as evidence. The deponent is not ill, and I have already held, whether rightly or wrongly, that mere apprehension of ill consequences is not sufficient. I am not very positive on the point, because I believe a different opinion has been entertained, but I shall adhere to my former opinion, as evidence of this kind ought not be admitted lightly.' (x)

without illness.

Where it was proposed to put in the deposition of a woman, on the ground that she was ill and unable to attend, it being stated that she had been delivered of a dead child; Willes, J., said, 'It must not be supposed that the fact of a woman having been delivered nine days ago constitutes an illness within the meaning of the statute; but we have it in evidence that she was delivered of a dead child, which would tend to produce a morbid state of body, and therefore her deposition may be read.' (y) But where a woman had only just been confined, and she had been seen the day before by the attorney for the prosecution, who stated that she was in bed, but came down stairs to see him, and appeared to be very feeble, and was not able to come to the assizes; Willes, J., held that her deposition was inadmissible, as it should be such a sort of illness as will prevent a person from travelling; but here the facts failed. (z)

Delivery of a dead child.

Illness merely from a confinement.

Where it was proved that a woman was daily expecting her confinement, and her brother stated that she was poorly otherwise, and that she was therefore too ill to travel from her residence to the place of trial, a distance of twenty-five miles; it was objected that the illness ought to have been proved by a medical man, and that the expectation of her confinement was not an illness within the 11 & 12 Vict. c. 42, s. 17; but the sessions admitted the deposition; and on a case reserved on the points raised on behalf of the prisoner, it was held that the deposition was properly admitted. The proposition that an approaching confinement was not such an illness as was contemplated by that section could not be sustained. There might be incidents attending an approaching parturition of such a nature as to bring it within the statute. The question whether the illness proved is or is not within the statute, is a question for the determination of the presiding judge, and if to his mind, exercising his discretion upon the facts proved, the evidence of illness is sufficient, the court above ought not to interfere with his decision. (a)

Pregnancy may constitute illness within the statute, and it is for the court on the trial to decide whether it does or not.

(x) Reg. v. Omant, 6 Cox, C. C. 466, July 1854; but see Reg. v. Stephenson, L. & C. 165, *infra*.

(y) Reg. v. Wilton, 1 F. & F. 309. Sum. Ass. 1858.

(z) Reg. v. Walker, 1 F. & F. 534. Spring Ass. 1859. Willes, J., also said that 'illness from confinement was an ordinary state, and not such an illness as is contemplated by the statute,' and that Crowder, J., agreed with him, but he intended to reserve the point.

(a) Reg. v. Stephenson, L. & C. 165, E. T. 1862. Erie, C. J., thought that the sessions acted rightly in admitting the deposition. In Reg. v. Huddersfield, 7 E. & B. 794, it was held that pregnancy was not necessarily 'sickness' within the meaning of the 9 & 10 Vict. c. 66, s. 4, which forbids the removal of a pauper 'becoming chargeable in respect of relief made necessary by sickness or accident,' unless it will produce permanent disability. Lord Campbell, C. J., said,

**Pregnancy**  
where the woman had suffered from a journey.

Where a husband stated that his wife was pregnant and unable to attend; but he was unable to state how far advanced she was, and she was about the house attending to her household duties as usual, and had prepared breakfast for him that very morning as usual, and had not yet been confined to bed; but a fortnight before she had suffered somewhat in consequence of being driven to the assize town; Bramwell, B., permitted the deposition to be read. (*b*)

A deposition is not admissible merely on the ground that the witness cannot be found after diligent search; but it is, if the absence of the witness has been procured by the prisoner.

A deposition is only admissible against the prisoner procuring such absence.

Notwithstanding the new statute, a deposition of a witness, who has been kept away by the procurement of the prisoner, is admissible. Scaife, Smith, and Rooke were tried for robbery, and the deposition of one Garnett, which had been regularly taken before a magistrate, in the presence of the prisoners, was tendered in evidence. Due search had been made for the witness on the part of the prosecution, but she could not be found, and did not appear on the trial, and there was evidence that she had been kept away by the procurement of Smith; but this evidence did not implicate the other prisoners. The reading of this deposition was objected to on the part of Smith; but the learned judge admitted it, being of opinion that the procurement by Smith was proved; and in summing up he left Garnett's statement, among the other evidence, to the jury, not telling them that the deposition could affect Smith only. Upon a motion for a new trial after a verdict of guilty against Scaife and Rooke, it was held that the deposition was rightly admitted in evidence against Smith; for if it be proved that a witness is kept away by the procurement of the prisoner, the deposition of that witness is admissible; but that the deposition was erroneously left to the jury against the other prisoners; for a deposition is not admissible on the ground that the prosecutor, after using every possible endeavour, cannot find the witness; and the deposition is only evidence against the prisoner who procured the absence of the witness. (*c*)

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Witness insane at the time of the trial.

Where a witness, who was examined before the magistrate, is insane at the time of the trial, he is considered as in the same state as if he were dead, and his deposition may be given in evidence. (*d*) But in such a case it should be shown that he was not insane at the time his deposition was taken. Where on an indictment for murder it was clearly proved that a witness, who had been examined before the coroner, was insane at the time of the trial, and had been so for some time previously, but there was no evidence as to the state of the mind of the witness at the

'It is impossible to say that pregnancy *per se* shows disease: and I think that by "sickness" in the statute is meant "disease." There is nothing to show that the panner was unable to work; the question proposed to the court shows her to be able-bodied. So that we are asked whether an able-bodied woman who is pregnant is sick within the meaning of the section. It cannot be said that she is.' Coleridge, J., 'It does not follow that because pregnancy may produce illness, it must produce it.'

(*b*) Reg. v. Croucher, 3 F. & F. 285.

Sum. Ass. 1862. The prisoner was acquitted, or the point would have been reserved.

(*c*) Reg. v. Scaife, 17 Q. B. 238; 2 Den. C. C. 281. E. T. 1851.

(*d*) Rex v. Eriswell, 3 T. R. 707, per Lord Kenyon, C. J., Ashurst, J., and Grose, J., and there seems no reason to doubt that the deposition of a person who has become insane at the time of the trial would be admissible since the new statute, either on the same ground as Reg. v. Scaife, *supra*, or Reg. v. Cockburn, *ante*, p. 467, was decided.

time when he was examined before the coroner; and it was proposed to give his deposition in evidence, Park, J. A. J., said, 'There is one positive objection, that the witness might be insane when he was examined before the coroner;' and the deposition was rejected. (*e*) But where on an indictment for night poaching and assaulting W. Rickards it appeared that he was suffering from delirium and depression of spirits in consequence of a blow on the head, and his intellects were affected by the injury, but it was probable that he would recover; it was held that if he was actually insane at the time of the trial his deposition taken in the presence of the defendant was receivable in evidence, although the insanity might be temporary; but the medical witness, being unable to state that he was at the time of the trial in a state of insanity, the deposition was rejected. (*f*)

It has been said that the deposition of a witness beyond the sea was admissible, (*g*) but it was held before the new Act that the deposition of a witness, who had been examined before the magistrate, and who had since gone to sea, was inadmissible. (*h*) And since the new Act, where on a trial for larceny it was proposed to put in evidence the deposition of W. Doodt, which had been duly taken in the presence of the prisoner, who had the opportunity of cross-examination, and it was satisfactorily proved that W. Doodt was not absent with any intention of defeating justice, but, being a foreigner, serving on board a foreign vessel at the time the property was stolen, he had, since the committal of the prisoners, returned to his own country, and at the time of the trial was residing in a foreign kingdom. It was contended that, although the cause of absence was not within the 11 & 12 Vict. c. 42, s. 17, the deposition was receivable independently of that statute. But, on a case reserved, it was held that the deposition was inadmissible. Although it was quite possible that cases might occur in which depositions would be receivable in evidence under the old rule, and independently of the statute, yet if the admissibility of depositions was extended beyond the cases provided for by the statute, the rule ought to be carefully and rigidly limited. (*i*) And in this case it was consistent with what appeared that the attendance of the witness might have been obtained, and it was not shown that anything was done by writing or otherwise to procure his attendance. (*j*)

It is a general principle of evidence that, to render a deposition of any kind admissible against a party, it must appear to have been taken on oath in a judicial proceeding, and that the party should have had an opportunity to cross-examine the witness. (*k*) Hence under the former statutes a deposition before a magistrate

Witness at the time of trial at sea or abroad.

Deposition must be duly taken,

(*e*) *Rex v. Charles Wall*, Worcester Sum. Ass. 1830. See this case more fully stated, *post*, p. 480. In *Rex v. Eriswell*, *supra*, the pauper, whose examination was in question, had become insane after the examination was taken.

(*f*) *Reg. v. Marshall*, C. & M. 147, Ludlow, Serjt., after consulting Coltman, J. It is not stated in the report when the blow on the head was inflicted.

(*g*) *Bull. N. P.* 242, and see *ante*, p. 356.

(*h*) *Reg. v. Hagan*, 8 C. & P. 167, Bolland, B., and Coltman, J.

(*i*) Per Alderson, B., who added, 'as it would equally apply to depositions taken before a coroner in the prisoner's absence, and without any opportunity of cross-examination having been afforded.'

(*j*) *Reg. v. Austin*, Dears. C. C. 612, 7 Cox, C. C. 55. Jan. 1856.

(*k*) By Hullock, B., in *Attorney-General v. Davison*, 1 M'Clel. & Y. 169.



and in the presence of prisoner.

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Dingler's case.

Radbourne's case.

must have been shown to have been taken conformably to the statute, for otherwise it would have been extrajudicial, (*l*) and to have been taken in the presence of the prisoner, otherwise he could have had no opportunity for cross-examination. Thus in *Woodcock's case* (who was tried for the murder of his wife), where the magistrate, at the request of the overseers, visited the deceased, who had received a mortal blow, and was then at the poor-house, and there, in the absence of the prisoner, took her examination upon oath, and reduced it into writing; it was held by Eyre, C. B., that such an examination was not admissible as a deposition; for it was not taken as the statute directs in a case where the prisoner was brought before a magistrate in custody; the prisoner therefore had no opportunity of contradicting the facts it contained. (*m*) So in *Dingler's case*, (*n*) where the magistrate, at the desire of the parish officers, went to the deceased at the infirmary, to which she had been taken for the purpose of receiving medical assistance, and there, in the absence of the prisoner, (*o*) took her deposition upon oath, which was reduced into writing, and her mark was set to it; the court, on the authority of *Woodcock's case*, held that the deposition was inadmissible. (*p*) And it was also held, after the 7 Geo. 4, c. 64, that a deposition was inadmissible if it were taken in the absence of the prisoner. (*q*) Where on the trial of an indictment for petty treason and an inquisition for murder it appeared that the deceased having been wounded in the head, a magistrate, in the presence of the prisoner, took the deposition of the deceased in writing, and the whole of the examination was heard by and read over to the prisoner in the presence of the deceased, and it was signed by the deceased and the magistrate; the deposition was admitted, and, upon a case reserved, it was held that the deposition was properly admitted. (*r*) So where the greater part

(*l*) *Rex v. Smith*, 2 Stark. N. P. C. 211, note (*a*).

(*m*) 1 Leach, 500. It was admitted, however, as a dying declaration.

(*n*) 2 Leach, 561.

(*o*) It may be remarked that in these two cases, independently of the absence of the prisoner, the deceased being then alive, the charge of murder could not have been preferred: and as the statutes did not at that time extend to misdemeanors, the depositions might have been objected to as taken extrajudicially.

(*p*) In addition, to these authorities may be mentioned the case of *Rex v. Paine*, 1 Salk. 281. S. C. 5 Mod. 163, cited by Lord Kenyon in *Rex v. Eriswell*, 3 T. R. 722, where upon a conference between the judges of the K. B. and C. P. it was held that the deposition of a deceased witness was inadmissible, 'the defendant not being present when they were taken before the mayor, and so had lost the benefit of cross-examination.' It is remarkable that in the above mentioned case of *Rex v. Eriswell*, Grose, J., and Buller, J., were of opinion that depositions taken by a justice of a person who afterwards died, though taken in the absence of the prisoner, might be read,

and the latter judge said it had been so determined by all the judges in Radbourne's case. But on reference to the report of that case in 1 Leach, 457, it will be seen that the depositions were taken in the presence of the prisoner.

(*q*) Errington's case, 2 Lew. 142, Patten-son, J.

(*r*) *Rex v. Radbourne*, 1 Leach, 457. This case was a peculiar one, and the points reserved were, 1st, 'whether a prisoner can be convicted of murder upon an indictment or inquisition for petty treason? That is, whether an acquittal for the petty treason does not involve in it an acquittal for the murder also? 2nd, whether the information of the deceased, authenticated by one witness only, was legally received in evidence on an indictment for petty treason? 3rd, whether the information of the deceased was admissible in evidence, she not appearing at the time she gave it to be apprehensive of her approaching dissolution?' The Recorder afterwards reported that it was the unanimous opinion of the eleven judges, Lord Mansfield, C. J., being absent, that the learned judge did right in admitting the information to be received in evidence, and that the prisoner was le-

of the deposition of the deceased, in a case of murder, had been reduced into writing in the absence of the prisoner, but the deceased was afterwards resworn in the prisoner's presence, and the deposition read over and stated by the deceased to be correct, and the rest of the deposition taken in the ordinary way, in the presence of the prisoner, who was asked whether he chose to put any questions; it was held by Richards, C. B., that the deposition was admissible, and a great majority of the judges, upon a case reserved, were of opinion that the evidence had been properly received. (s) So where upon an indictment against the prisoner as an accessory before the fact for inciting S. Wormsley to murder herself, it appeared that Wormsley was sworn, and her examination taken in writing in the absence of the prisoner, but that she was afterwards resworn in his presence, the deposition repeated, and she said it was all true, and that she had made her mark to it; the prisoner then put some questions to the deceased, and the magistrate's clerk swore that a memorandum at the foot of the deposition contained the substance of every question put and answer given; and that the memorandum at the foot of the deposition was written on the following morning by the clerk at his office in the presence of the magistrate. The examination was objected to, as inadmissible under the 7 Geo. 4, c. 64, s. 2, being taken upon oath; but Vaughan, B., allowed it to be read, and also the interrogation of her by the prisoner, and her answer, which was also objected to. And, upon a case reserved, the judges were clearly of opinion that the deposition was admissible. (t) So where two prisoners were taken before the magistrates one day, and a deposition of a witness was duly taken and authenticated on that day, and the two prisoners together with a third were taken before the magistrates on the next day, and the deposition of the witness, who was present, was read over to all the prisoners; but the attention of the third prisoner was not particularly called to its contents, nor was it resigned by the magistrates; Erle, J., held that the case fell within the principle of *Rex v. Smith*, (u) and admitted the deposition against the third prisoner. (v) So where a deposition was taken in an ante-room

Smith's case.

Russell's case.

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Hake's case.

Calvert's case.

gally convicted of murder. In 1787, when this case occurred, there was no statute authorizing magistrates to take such a deposition.

(s) *Rex v. Smith*, R. & R. 339. S. C. 2 Stark. N. P. C. 208. Holt, N. P. C. 614. See this case also, *post*, p. 481. In a previous case, *Rex v. Forbes*, Holt, N. P. C. 599, where the constable stated, upon producing the deposition, that the prisoner was not present till a certain part of the deposition, distinguished by a cross, at which period he was introduced and heard the remaining part of the examination; and when it was concluded, the whole of the deposition was read over to the prisoner. Chambre, J., refused to admit that part of the deposition previous to the mark. In *Reg. v. Beeston*, Dears. C. C. 405, Alderson, B., said, in *Rex v. Smith*, 'I contended on the authority of *Rex v. Forbes* that the deposition was not admissible, as the prisoner had not a suf-

ficient opportunity of cross-examination; that he had no opportunity of hearing the witness give his answers, and seeing his manner of answering; and that so much of the evidence as had been taken in the prisoner's absence was inadmissible; and I still think I was right in that objection.'

(t) *Rex v. Russell*, R. & M. C. C. R. 356, *ante*, vol. 1, p. 72. The objection to the deposition was founded upon the fallacy of treating it as an *examination* of a prisoner, and of applying the rule that an examination of a prisoner upon oath is not admissible against *such* prisoner to the deposition of a prisoner taken on oath, and used as evidence against *another* prisoner, in whose presence it was taken. C. S. G.

(u) *Supra*.

(v) *Reg. v. Hake*, 1 Cox, C. C. 226. Sum. Ass. 1845.

Hyde's case.

adjoining to that where the magistrates sat, the prisoners being present when it was taken, but the witness not being sworn, and the witness and the prisoners were then taken before the magistrates, and the witness sworn, and the examination read over, and the prisoners asked whether they had any question to put; it was held that the deposition was admissible. (*w*) But where at the time when the deceased was examined before the magistrate she was in a rapid decline, and she stated the facts of the assault upon her by the prisoner very concisely. On a question being put to her by the clerk, she said, 'I can't answer,' and was evidently in a sinking state. Down to this period she had answered the questions satisfactorily. The clerk then said he should not put any further questions; and it being stated that the prisoner's attorney, who was present, must have an opportunity of cross-examining the witness, he said, 'I shall decline putting any question; the child is evidently not in a fit state to answer.' The deposition was then signed by the witness with her mark. There was no subsequent examination, and the child died soon afterwards. Platt, B., inclined to think the deposition ought not to be received. (*x*)

Depositions taken in the absence of the prisoner and magistrate, and afterwards read over to the prisoner before the magistrate, are irregularly taken.

On an indictment for robbery it appeared that the depositions were not written either in the presence of the magistrate or of the prisoner, but the clerk to the magistrate examined all the witnesses, and took down what they said, neither the magistrate nor the prisoner being present; but that when the magistrate and the prisoner arrived, the depositions were read over to the witnesses in the presence of the magistrate and the prisoner, and the prisoner was then asked if he had any question to put to any of the witnesses; Platt, B., said, 'This is a very irregular and improper mode of taking depositions, and very unfair to the party accused. The prisoner ought to hear all the questions put and answered, for then he may very possibly explain the circumstances; but it is monstrous that he should have a long bead roll of statements read over to him, and then be asked on the sudden if he has any question to put, and then probably, unable on the instant to extract from his accuser or the witnesses an explanation of every apparently criminating circumstance, be told that he is committed. Such a mode of proceeding does not afford to the party accused that fair play which the due administration of the law requires.' (*y*)

Cases since the 11 & 12 Vict. c. 42, s. 17.

Such are the cases which occurred before the passing of the 11 & 12 Vict. c. 42 (August 14, 1848), which has given rise to much discussion. Sec. 17 of that Act requires the oath to be

(*w*) *Reg. v. Calvert*, 2 Cox, C. C. 491. Spr. Ass. 1848, Rolfe, B., after consulting Alderson, B., on the authority of *Rex v. Smith*, K. & R. 332, which the prisoner's counsel contended was distinguishable, as the witness was sworn in that case before the clerk examined him; and see now the new clause, which requires the oath to be administered before the witness is examined.

(*x*) *Reg. v. Hyde*, 3 Cox, C. C. 90. Aug. 4, Sum. Ass. 1848. Platt, B., however, did receive the deposition, and would have re-

served the point; but the prisoner was acquitted. There seems no reason to doubt that if by any insuperable obstacle the prisoner is prevented from having a full cross-examination, the deposition is inadmissible, and the only question in such a case seems to be whether or not in fact the prisoner was prevented from having such full cross-examination.

(*y*) *Reg. v. Johnson*, 2 C. & K. 394, Sum. Ass. 1846. It does not appear whether any deposition was tendered in evidence.



administered to a witness ‘*before such witness is examined*,’ and the statement of the witness to be taken in the presence of the accused, who shall be at liberty to put questions to any witness produced against him; and it cannot be doubted that the only regular course of proceeding is for the justice to swear the witness in the presence of the accused, and then to examine him in the presence of the accused, and then to permit the accused to put any questions he may think fit.

Where mere minutes of what each witness said before the magistrate were taken down, and the minutes were afterwards written out in the shape of depositions by a clerk in the presence of the witnesses, but in the absence of the prisoners and magistrate, and afterwards read over in the presence of the prisoners and magistrate, it was objected that the depositions were not taken according to this section; and Wilde, C. J., observed, ‘So that the prisoner had a right to compare the verbal statements made with the written statements produced, which he could not do unless all the written statements produced had been made verbally in his presence.’ And Maule, J., said, ‘That section makes the depositions receivable in evidence upon its being first proved that they were taken in the presence of the person accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness. Therefore you would say that such full opportunity did not exist in the present case. Suppose a question to be put to the witness in the absence of the prisoner, which question involved two alternatives, and the answer to be “Yes;” the magistrate’s clerk might think the answer applied to a different alternative from that to which the prisoner would have applied it, had he been present, and had an opportunity of fixing it to such alternative by cross-examination; and the magistrate’s clerk might have taken down the answer in such a form as to make it seem applicable to the wrong alternative. You contend that what they call minutes would have been the depositions had they been signed, and that, the minutes not being signed, there are no depositions at all.’ It, however, was unnecessary to decide the point, as the case was determined in favour of the prisoners on another ground. (z)

Where a magistrate’s clerk proved that he had taken down the examination of a witness before the magistrate, and he had no doubt that the attorney, who attended before the magistrate on behalf of the prisoner, had cross-examined the witness, but he had not taken down anything as cross-examination; he had, however, taken down everything the magistrate considered material. Erle, J., held that the deposition was admissible; all the requisites of the statute had been complied with. He did not think it the duty of the magistrate to take down every word; for then it would be necessary to conduct the examination by question and answer. (a)

On a trial for murder Mr. Cooke, a magistrate, produced an

*Scumble*, that since the 11 & 12 Viet. c. 42, s. 17, a deposition is illegal unless it be taken down from the statement of the witness in the presence of the prisoner and the magistrate.

Sufficient opportunity for cross-examination.

A deposition

(z) Reg. v. Christopher, 1 Den. C. C. 536, 2 C. & K. 994. H. T. 1850. The strongest objection to such a proceeding is this, that a witness may state facts in favour of a prisoner, and the clerk may

not take them down, and thus the prisoner may never know what they are. See the case more fully, *post*.

(a) Reg. v. Hendy, 4 Cox, C. C. 243. Spr. Ass. 1850.

rejected where it was taken originally in the absence of the prisoner, and afterwards the deponent was sworn, but not in a satisfactory manner, in the presence of the prisoner.

information, and stated that he went to the house of the deceased, and found him on a pallet in a very weak state, and that the prisoner was brought to the house where the deceased was; in consequence of the state in which the deceased was, he could say but very little at a time, and Mr. Cooke first took his information without the prisoner being present, and swore the deceased to it. Mr. Cooke then had the prisoner, who was handcuffed, brought in, and had the handcuffs taken off. Owing to the exhausted state of the deceased, the prisoner had to be brought close to the bed to hear what he said. Having then slowly read over the information to the deceased in the presence of the prisoner, and asked the deceased if it was true, and having been answered in the affirmative by him, Mr. Cooke then *reswore the deceased to his information* in the presence of the prisoner, and read over the information of the deceased to him, and while he was reading it the prisoner asked him to stop at some statement contained in it; but Mr. Cooke told him he had better read it over to the end, and that he would then read the information paragraph by paragraph distinctly to him, and that the prisoner could then put any question he wished to the deceased on each paragraph as read; that, having so read over the information, he read it over again paragraph by paragraph to the prisoner in the hearing of the deceased, and that part of it was read a third time to the prisoner; that the prisoner, having been previously duly cautioned by him, asked several questions with reference to the matters sworn in the information, and Mr. Cooke took down each question and answer as nearly as possible in the very words of the parties. The deposition was received in evidence; but, upon a case reserved, it was held that it ought not to have been received. (b)

The deposition

Where it appeared that a witness had been examined before a

(b) *Reg. v. Walsh*, 5 Cox, C. C. 115, M. T. 1850. There was considerable difference of opinion among the judges in this case. Monahan, C. J., was of opinion that 'what the Act of Parliament requires is, not that a witness shall depose to a written statement, but shall, in the presence of the accused, give a statement on oath, which the magistrate shall afterwards reduce into writing, and that the accused shall have an opportunity of cross-examining him, under the sanction of the same oath, whereby he swears to the information;' that the present case and *Rex v. Smith* agreed in this point, that in both the witness was originally sworn in the absence of the accused; but the place where the present case failed was that, when the prisoner was brought in, the information was not taken on oath in his presence. Secondly, on the evidence of Mr. Cooke, the inference plainly arose that the oath was merely an oath to the truth of the information which had been sworn, and therefore did not extend to the answers given on cross-examination. Perrin, J., agreed with Monahan, C. J., on the first point; but added, 'The prisoner was kept handcuffed in another place, and here, deliberately and de-

signedly, the magistrate proceeded, contrary to the fair import of the statute, to take the deposition of a party not on his oath, in the absence of the prisoner, who was within call, and who was designedly kept back and not called.' Ball, J., gave no opinion on the first point, but agreed with Monahan, C. J., on the second. If the magistrate had been silent as to the form of the oath which he administered, it would have been assumed that the oath was in the usual form; but here the magistrate stated that he reswore the deceased to the truth of his information; thus confining the oath to the truth of the information; and, if this were so, the subsequent questions and answers were not under oath. Torrens, J., was of opinion that *Rex v. Smith* governed the first point, and that the oath extended to the whole, and therefore the deposition was rightly admitted. Pennfather, B., agreed with Torrens, J., on the first point, but entertained very serious doubts upon the second point. This case was tried in 1850, after the 12 & 13 Vict. c. 69, had come into operation, though Perrin, J., states that the 9 Geo. 4, c. 54, was then in operation.

magistrate, who had asked the prisoner whether she had any questions to put, but it seemed uncertain whether she was so asked with reference to the particular examination of the witness, or after all the depositions had been read over; and it also appeared that the examinations of the witnesses had been taken in writing before the arrival of the magistrate; and that they were then read over in the presence of the prisoner, when the prisoner was asked if she had any questions to put. It was held that the deposition was not admissible; 1st, because it was the duty of the magistrate to ask the prisoner whether she would put any questions with reference to the particular witness. 2ndly, the examination of the witness having been put in writing before the arrival of the magistrate, the reading it over in her presence did not give the prisoner a proper opportunity of cross-examination; she had a right to hear the evidence given step by step, and so to have time to consider what questions to put. (c)

Where the prisoner and prosecutor were present before the magistrate, and the prosecutor made a statement to the magistrate, which was not taken down in writing, and the prisoner's attorney asked the prosecutor a few questions in cross-examination, and these were not taken down in writing. The case was then adjourned to the next day, when the prisoner was brought up before the same magistrate; the prosecutor was again sworn, and the magistrate's clerk read over to him a written deposition which had been taken previously to the second hearing. The prisoner's attorney cross-examined the prosecutor, and that cross-examination, or some part of it, was taken down by the clerk, and from his notes afterwards a fair copy of the cross-examination was taken down on the copy which had been previously read. Hill, J., held the deposition admissible. (d)

Where it was proved that the deposition was taken in accordance with the invariable and long-established practice of the magistrate's court at Liverpool, and when the prisoner was before the magistrate, he was defended by an attorney, who had a full opportunity of cross-examining, and did cross-examine, the witnesses; a note of the evidence given before the magistrates, consisting of the names of the witnesses, and the heads of what each could prove, was taken by the magistrate's clerk; afterwards the prisoner and the witnesses were taken into a room, and there another clerk, who had not been present at the examination before the magistrate, examined the witnesses from the aforesaid note, and there wrote down the answers, and the witnesses then signed the papers so written by the last-mentioned clerk; the prisoner's attorney was not there, though he might have been if he liked; and the prisoner was not asked if he would then cross-examine the witnesses, and did not cross-examine them; after-

ought to be taken in the presence of the prisoner, who ought to be asked with reference to the particular witness whether he has any question to ask.

Deposition written in the absence of the prisoner, afterwards read in his presence, and cross-examination by his attorney and notes of it written out at length.

Where notes of the evidence were taken before the magistrate, from which the witnesses were re-examined by a clerk in the absence of the magistrate, and the examinations written out in full, and afterwards signed by the magistrate, the examinations were held to be improperly taken.

(c) Reg. v. Day, 6 Cox, C. C. 55. Platt, B. March 1852.

(d) Reg. v. Bates, 2 F. & F. 317. Wint. Ass. 1860. Hill, J., said, 'In the London Police Offices, where a great number of charges were daily heard, it was the constant practice to have the abbreviated notes taken during the examination of a witness by the magistrate's clerk, fair copied in full in

an adjoining room, and that copy afterwards read over in the presence of the prisoner and signed by the witness. He thought such a practice not only convenient, but within the spirit and intention of the Act, as the prisoner had full opportunity as well as the witness of objecting if the evidence were put down incorrectly.'



wards the prisoner and the witnesses were again taken before the magistrate, and the evidence so taken down by the clerk in the room in the absence of the magistrate was read over to them; the prisoner was not then asked if he would cross-examine the witnesses, and his attorney was not then there, though he might have been if he had liked: the magistrate then cautioned the prisoner, who then signed his own statement, and the magistrate then signed the papers so written as last aforesaid. It was objected that the deposition was not taken in accordance with the 11 & 12 Vict. c. 42, s. 17, but the deposition was admitted; but, upon a case reserved, it was held that the depositions in this case were bad. The statute requires that they should be taken in the presence of the magistrate, and in the presence of the prisoner, and that the prisoner should have an opportunity of cross-examining the witnesses in the presence of the magistrate. In this case these provisions had not been complied with, and these depositions were taken improperly. (*e*)

Different rule  
as to deposi-  
tions before a  
coroner.

In this respect there is a very striking difference between depositions before a magistrate and before a coroner; for not only has it been settled that if any witnesses who have been examined before the coroner are dead or unable to travel, or kept out of the way by the means and contrivance of the prisoner, their depositions may be read on the trial of the prisoner, (*f*) but the prevailing opinion seems to have been that they are equally admissible, *though the prisoner may have been absent at the time of taking the inquisition.* (*g*) The reasons given for this distinction usually are, that the examination before the coroner is a transaction of notoriety to which every one has right of access, (*h*) and that the coroner is an officer appointed on behalf of the public to make inquiry about the matters within his jurisdiction, and therefore the law will presume the depositions before him to be duly and impartially taken. (*i*) But these reasons and the authorities for the doctrine are certainly not at all satisfactory, and (as it has been remarked by a very sensible writer, (*j*) who has collected and commented on the cases) since the distinction is not warranted by the language of the legislature, and is unfounded on principle, it may, when the question arises, be a matter of very grave and serious consideration whether it ought to be admitted; (*k*) and another learned writer, having formerly

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(*e*) Reg. v. Watts, L. & C. 339, Nov. 1863.

(*f*) Lord Morley's case, Kel. 55. Thatcher's case, Sir T. Jones, 53. Bromwich's case, 1 Lev. 180. Gilb. Ev. 124. Rex v. Stockley, 1 East, P. C. c. 5, s. 78, p. 310, *ante*, vol. 1, p. 832.

(*g*) 1 Phill. Ev. 372. 7th ed. Bull. N. P. 242. See per Alderson, B. Reg. v. Austin, Dears. C. C. 612, *ante*, p. 471, note (*cr*), which, however, was a mere *obiter dictum*.

(*h*) 3 T. R. 722. 1 Phill. Ev. 373, 7th ed.; but in the case of Garnett v. Ferrand, 6 B. & C. 611, the court expressed an opinion that the coroner might exclude particular persons, if he thought it necessary and proper so to do.

(*i*) Bull. N. P. 242.

(*j*) 2 Stark. Ev. 385.

(*k*) The 1 & 2 Ph. & Mary, c. 13, s. 5, enacted, 'that every coroner, upon any inquisition before him *found*, whereby any person shall be indicted for murder or manslaughter, or as accessory before the murder or manslaughter, shall put in writing *the effect of the evidence* given to the jury before him, being material: and shall certify the same evidence, together with the inquisition or indictment before him taken and found, at or before the time of the trial thereof to be had.' And by the 7 Geo. 4, c. 64, s. 4 (repealing the above mentioned statute), it is enacted, 'that every coroner, upon any inquisition before him *taken*, whereby any person shall be indicted for manslaughter or murder, or as an accessory

expressed a different opinion, observes, in his last edition, that 'there appears to be no satisfactory reason why such a deposition should at the trial be received in evidence, under circumstances which would render every other kind of judicial depositions inadmissible. And it seems an unreasonable and anomalous proposition to hold that, on a trial for murder upon the coroner's inquest, a deposition taken before him in the absence of the prisoner is receivable in evidence; but that if the trial take place on a bill of indictment, a deposition so taken before a magistrate is not receivable. The same principle which excludes in the one case ought, if it is just and sound, to exclude also in the other.' (1)

A marked distinction exists between the situation in which a prisoner stands, when he is before a magistrate on a charge of felony or misdemeanor, and when he is present during the time a coroner is holding an inquest; and this distinction seems to have been acted upon in the following case. Upon an indictment for murder it was proved that a witness who had been examined before the coroner was insane at the time of the trial, and had been so for some time previously; part of his deposition had been taken in the absence of the prisoner, and part in his presence, but the whole was read over in his presence; and it was proposed to give this deposition in evidence, and 1 *Phill. Ev.* 369, 373, referred to, in order to show that the deposition was admissible where the witness had become insane; and *Rex v. Smith*, (m) to show that reading the whole over in the presence of the prisoner rendered it admissible. Park, J. A. J., 'There is one positive objection, that the witness might be insane

Distinction between the position of a prisoner before a coroner and a magistrate.

before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material: and shall have authority to bind by recognizance all such persons as know or declare any thing material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged, and every such coroner shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court.' It will be observed that the principal alterations enacted by the latter statute are, that the coroner is to put in writing the evidence instead of the effect of the evidence, as directed by the former, and that he is required to subscribe the evidence when taken. A doubt has been raised whether sec. 4 of the 7 Geo. 4, c. 64, is not repealed by the 11 & 12 Vict. c. 42, s. 34, but there seems no sufficient ground for this doubt; see *ante*, p. 352, note (h).

(1) 2 *Phill. Ev.* 75. In the 7th ed., vol. 1, p. 372, *et seq.*, the learned author had contended for the admissibility of such depositions. Where in an action brought

by the plaintiff against the defendant for running down his barge on the Thames, it appeared that a witness had been examined before the coroner on the inquiry concerning the death of the plaintiff's son, and since his examination had gone abroad; it was proposed on the part of the defendant to read his deposition, taken on oath, before the coroner; and this was objected to on the part of the plaintiff; Coleridge, J., was of opinion that under the circumstances the deposition ought to be admitted, and being properly proved, it was read in evidence. *Sills v. Brown*, 9 C. & P. 601. The report does not state whether the deposition was taken in the presence of the plaintiff, but probably it was, as he was the father of the deceased. It is probable, also, that the witness was produced by the father as prosecutor; but even if that were so, it is conceived that that would not make his deposition evidence against the father, the distinction being that an affidavit used by a party is evidence of the facts contained in it against such party, but neither the deposition nor the *viva voce* evidence of a witness is evidence against the party calling the witness. *Brickell v. Hulse*, 7 A. & E. 454. *Gardner v. Moulton*, 10 A. & E. 464. *Pritchard v. Bagshawe*, 11 C. B. 459. *Boileau v. Rutlin*, 2 Exch. R. 665. *Richards v. Morgan*, 4 B. & S. 641. C. S. G.

(m) *Infra*, note (u).

when he was examined before the coroner. Secondly, the 7 Geo. 4, c. 64, makes a strong distinction between magistrates and coroners. There is a charge made before a magistrate; but I cannot call it a charge before a coroner. In *Rex v. Smith* the deposition was taken in a common felony, and there the question was, whether a deposition taken on one charge could be evidence on another. I will not receive this deposition. I think it safer not to do so.' (*n*)

The objection to the admission of a deposition taken by a coroner in the absence of a prisoner is fortified by the 11 & 12 Vict. c. 42, s. 17, expressly requiring the deposition before a magistrate to be taken in the presence of the prisoner, and giving him a full right of cross-examination.

Coroner's  
duty in taking  
examinations.

It is the duty of the coroner to take down the statement of each witness, to read it over to him, and to procure his signature to it, (*o*) and then the depositions are admissible; but a coroner's note of the evidence, which has not been read over to the witness, is not evidence. (*p*)

Doubts as to  
the admissi-  
bility of de-  
positions be-  
fore a coroner  
since the  
11 & 12 Vict.  
c. 42.

Where two witnesses who had been examined before the coroner were too ill to attend the trial, and an application was made to lay their depositions before the grand jury; Wightman, J., having referred to the Act authorizing the use of depositions where witnesses are too ill to attend, said he was of opinion that it gave him power to treat depositions that were taken before a coroner in the same way as those taken by a magistrate. (*q*) Where it was proposed to put in the deposition of a witness before the coroner, Erle, C. J., doubted whether the deposition was admissible under the 11 & 12 Vict. c. 42, s. 17, and after consulting Wightman, J., said he should admit the deposition under the statute of Philip and Mary, subject to the doubt whether that statute was not repealed by Jervis's Act. (*r*) So where in a case of manslaughter an application was made that the deposition of a witness, who had been examined before the coroner, but was too ill to travel, might be laid before the grand jury; Willes, J., said that depositions taken before a coroner were not governed by the 11 & 12 Vict. c. 42, and, having taken time to consider, told the prisoner of the application that had been made, and asked her if she had any objection to her trial being postponed, and, upon her saying that she had, the deposition was allowed to be read before the grand jury. (*s*)

(*n*) *Rex v. Charles Wall*, Worcester Sum. Ass. 1830, MSS. C. S. G. The distinction taken by the learned judge seems to deserve much consideration. The ground on which a deposition before a magistrate is admissible is that the prisoner, being there to answer a charge, has the *right* to cross-examine the witnesses. In many cases before coroners, even if the prisoner be present, there is no charge, and perhaps no suspicion, against him, and it may be doubted, whether in strictness under any circumstances he has a *right* to cross-examine the witnesses; and if there were no charge in fact made against him, his interference would be an unwarranted interruption of the proceedings. See the observations of Parke, B. in *Melen v. Andrews*, *ante*, p. 423. C. S. G.

(*o*) Per Gurney, B., *Reg. v. Plummer*, 1 C. & K. 600. Sum. Ass. 1844.

(*p*) Per Gurney, B., *ibid*. The Act only requires the coroner's signature.

(*q*) *Reg. v. Hazell*, 8 Cox, C. C. 443. Spr. Ass. 1861. But the trial, being for murder, was postponed, Wightman, J., doubting whether in so serious a case the power ought to be exercised, and the counsel on both sides assenting to that course. The 11 & 12 Vict. c. 42, has nothing to do with coroners, and no doubt this report is incorrect.

(*r*) *Reg. v. Cleary*, 2 F. & F. 850, Spr. Ass. 1862. The deposition was not pressed. The statute of Philip & Mary was repealed by the 7 Geo. 4, c. 64, and the doubt is whether sec. 4 of that Act is repealed by the 11 & 12 Vict. c. 42, s. 34. See note (*h*), *ante*, p. 352.

(*s*) *Reg. v. Mooney*, 9 Cox, C. C. 411. The point would have been reserved, but the bill was thrown out.



There really is no ground for these doubts. The 11 & 12 Viet. c. 42, only applies to depositions before magistrates. The 7 Geo. 4, c. 64, s. 4, regulates depositions before coroners, and is not repealed by the 11 & 12 Viet. c. 42; and it has never been doubted that under the 7 Geo. 4, c. 64, s. 4, depositions taken before a coroner in the presence of the prisoner were admissible. (*t*)

If the depositions were duly taken before the new statute, they were receivable in evidence, after the death of the deponent, not only upon the trial of the prisoner for the offence with which he was charged at the time they were taken, but upon an indictment for another offence. Thus a deposition was held admissible in a case of murder, although it was taken when the prisoner had been brought before two magistrates upon a charge of an assault upon the deceased, and also upon a charge of robbing a manufactory which the deceased had been employed to guard. (*u*)

But the particular wording of the 11 & 12 Viet. c. 42, s. 17, has led to much doubt upon this subject. (*v*)

Upon an indictment for wounding T. Goode with intent to do him grievous bodily harm, it appeared that at the time of the trial T. Goode was too ill to attend, and that his deposition had been taken before the committing magistrate according to the 11 & 12 Viet. c. 42, s. 17, on a charge of assault against the prisoner, which was founded on the same identical evidence as was offered in support of the present indictment: and it was held that this deposition was not admissible in evidence upon this indictment. Where a prisoner was taken before a magistrate on any charge, his attention would necessarily be directed to that particular charge, and his cross-examination would probably be directed to meet such charge alone; in addition to which cases might well be supposed in which the justice might prevent the prisoner from cross-examining as to anything which did not appear to him relevant to the particular charge then pending before him. Upon these grounds it would be very unreasonable to permit a deposition taken on a charge for one offence to be admitted against a prisoner on a trial for a different offence. Then, if the words of the section itself were carefully examined, it was plain that they only authorized the giving in evidence of a deposition upon an indictment for the very same offence as was 'charged' before the justice. The section commences by directing the manner in which a deposition is to be taken against any person 'charged with any indictable offence,' and afterwards provides that 'if upon the trial of the person *so accused*' certain

No ground for such doubts.

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Depositions admissible upon trial of a different offence.

Since the 11 & 12 Viet. c. 42.

A deposition taken on a charge of assault held not admissible on an indictment for cutting with intent to do grievous bodily harm.

(*t*) See *ante*, p. 352, note (*h*)

(*u*) *Rex v. Smith, R. & R. C. C. R.* 339. S.C. 2 Stark. N. P. C. 208. Eleven of the judges met. Abbott, J., thought the evidence ought not to have been received. Dallas, J., Graham, B., Richards, C. B., and Lord Ellenborough stated that they should have doubted of the admissibility of the evidence but for the case of *Rex v. Radbourne*, 1 Leach, 457. See *supra*, p. 472, note (*r*).

(*v*) In *Caudle v. Seymour*, 1 Q. B. 889, where a clerk went upstairs and took the information of a girl as to an assault, on oath, whilst the magistrate remained in his kitchen, and it did not appear that he

heard what the girl said, it was held that the information was illegally taken, as it was not taken in the presence of the magistrate. Coleridge, J., said, 'It is far too common a practice for the clerk to examine the witness apart, and take down the answers, and then read them over in the magistrate's presence;' and again, 'A magistrate taking depositions has a discretion to exercise; he is to examine the witness, hear his answers, and judge of the manner in which they are given. If he does not, how is he in a condition, supposing the charge were felony, to decide whether or not bail shall be taken?'

proof be given, such deposition may be read 'as evidence in *such* prosecution.' Now that must mean a prosecution for the very offence 'charged' before the justice. (*w*) Whether, therefore, the reason of the thing or the words of the section were considered, a deposition could only be admissible where the indictment was for the same identical offence as that 'charged' before the justice, and upon which such deposition was taken, and consequently this deposition must be rejected. (*x*)

Deposition on a charge of feloniously wounding admitted on a trial for manslaughter.

But where the prisoner was indicted for manslaughter, and the deposition of the deceased had been taken on a charge that the prisoner did feloniously stab, cut, and wound the deceased, of which stabbing, cutting, and wounding the deceased was likely to die, and the preceding case was cited; *Wightman, J.*, received the deposition, saying, 'There is no decision precisely in point. The case cited differs in one respect from this. There the original charge was an assault; here there is something more.' (*y*)

A deposition on a charge of wounding with intent to do grievous bodily harm admissible on a trial for murder.

On a trial for murder it appeared that between the blow and the death the deposition of the deceased had been duly taken before a justice, in the presence of the prisoner, on the charge of wounding the deceased with intent to do some grievous bodily harm to him, and the admission of this deposition was objected to on the ground that the deposition was not taken on the same charge for which the prisoner was on his trial, and the two preceding cases were cited; but the deposition was received, and, on a case reserved on the question whether the deposition taken on the charge of maliciously wounding with intent, &c., was properly received in evidence, it was held that it was. Before the passing of the 11 & 12 Vict. c. 42, the deposition would have been admissible, (*z*) and there was nothing in the 11 & 12 Vict. c. 42, to render it inadmissible, or to restrict the rule, which had been established by practice since the statutes of Philip and Mary. The legislature has provided 'that the persons whose evidence is to be taken shall be "those who shall know the facts and circumstances of the case," not of the particular technical charge on which the prisoner is afterwards tried; and then it says that if the witness be dead the deposition may be admissible "on the trial of the person so accused," not on his trial for the particular offence with which he was charged before the magistrate; and though the charge at the trial be not identically the same as that made when the deposition was taken, no harm can result from holding it admissible; because it would always be matter for inquiry by the judge trying the case whether the prisoner had had a full opportunity for cross-examination; if the charge on which the deposition was taken was not identical with that stated in the in-

(*w*) Sec. 20 also shows that this is the meaning of this section, for, if a party be bound by recognizance to give evidence against a prisoner for one offence (an assault), he clearly would not forfeit his recognizance by failing to give evidence against such prisoner for another offence (feloniously wounding).

(*x*) *Reg. v. Ledbetter*, 3 C. & K. 108. Sum. Ass. 1850. *Graves, Q. C.*, after consulting *Lord Campbell, C. J.*, and *Williams, J.*, and referring to *Rex v.*

*Smith, supra*. *Lord Campbell, C. J.*, thought that the authority of *Rex v. Smith* was very much impaired by the dissent of *Lord Tenterden*, and all agreed that that case was not binding under the 11 & 12 Vict. c. 42, s. 17.

(*y*) *Reg. v. Dilmore*, 6 Cox, C. C. 52, March 1852. The point would have been reserved, but the prisoner was acquitted.

(*z*) *Rex v. Radbourne, ante*, p. 472. *Rex v. Smith, ante*, p. 481.

dictment.' (a) 'The question is not whether the charge made on the inquiry before the magistrate was exactly the same as that made on the trial, but whether the inquiry was such as afforded to the party accused a full opportunity of cross-examination?' (b) 'In *Reg. v. Ledbetter* it might very well have been that a full opportunity of cross-examination was not afforded. On a charge for a common assault, the wounding subsequently charged in an indictment might not have been material; (c) but here the whole of the circumstances which came before the court at the trial were before the magistrate, with the single exception of the death of the deceased; and the prisoner's opportunity of cross-examining was so complete, that his counsel's ingenuity could not suggest a question on the one inquiry which would not have been so on the other.' (d) If this construction were not the true one, the deposition of a person, who afterwards died, could never be used on a trial for the murder or manslaughter of that person. (e)

But this case by no means decides that a deposition would be admissible if the charges on the two occasions were substantially different. (f)

Where on an indictment for murder by administering poison with intent to procure abortion, the deposition of the deceased had been taken on a charge against the prisoner of having administered, or caused to be taken, poison in order to procure abortion; Cockburn, C. J., admitted the deposition, being disposed to think that, the transaction being the same, the evidence was admissible, although, in consequence of the death of the woman having supervened, the charge had assumed a different shape and character. (g)

Where on a trial for murder it appeared that the prisoners had been originally apprehended on a charge of robbing the deceased with violence, and the death was alleged to have been caused by that violence; Pollock, C. B., admitted the deposition of the deceased, which had been made, on the charge of robbery with violence, in the presence of both prisoners, with a full opportunity of cross-examination. (h)

Where a charge of wounding with intent to murder was made before a magistrate at Bow Street, but, in consequence of the illness of a witness, the prisoner was taken to Twickenham, and the deposition of the witness taken in the presence of the prisoner by two county magistrates, and signed by them, and after a further investigation at Bow Street the prisoner was committed; it was held that the deposition was admissible; for the 11 & 12 Vict. c. 42, ss. 17, 18, does not confine the admissibility of a deposition to the case of a person examined before the magistrate before whom the charge was made, and who committed the prisoner. (i)

(a) Per Jervis, C. J.

(b) Per Alderson, B.

(c) Alderson, B., added, 'I therefore do not say whether Mr. Greaves was or was not wrong in rejecting the deposition in that case.'

(d) Per Alderson, B.

(e) *Reg. v. Beeston*, Dears. C. C. 405, M. T. 1854.

(f) In *Reg. v. Beeston*, Jervis, C. J., said, 'I do not mean to say that a deposition would be admissible if the charges

on the two occasions were substantially different.'

(g) *Reg. v. Fretwell*, L. & C. 161, E. T. 1862. The point was reserved together with another, which being decided in favour of the prisoner, this point was not noticed.

(h) *Reg. v. Lee*, 4 F. & F. 63. Spr. Ass. 1864.

(i) *Reg. v. De Vidil*, 9 Cox, C. C. 4. Blackburn, J.

Where the charges are substantially different.

Deposition on a charge of administering poison with intent to procure abortion admitted on a trial for murder.

Deposition on a charge of robbery with violence admitted on a trial for murder.

The Act is not confined to depositions taken before the magistrate before whom the charge was made.



An information for rape and recognizance of the accused to answer the charge admitted in order to prove a motive for the murder of the informant.

On a trial for murder it appeared that the deceased had sworn an information for rape against the prisoner in his presence, and had subscribed it with her mark, before a magistrate, and the prisoner had executed a recognizance, with sureties, to appear to the charge at the ensuing assizes; before which however he married the deceased, but they never lived together after the marriage; and statements of the prisoner were proved tending to show that he married her to prevent the prosecution, and he had said that he would give her a short life. Christian, J., received the information and recognizance; but he told the jury that they were not to regard them as evidence of anything, save simply of the facts that, before the parties married, such a charge had been made, and the prisoner placed under recognizances to stand his trial for it; that they had nothing whatever to do with the question whether the charge was true or false, but that the facts evinced by the mere existence of these documents might be taken into their consideration, along with the other circumstances, specially as bearing upon the question of the existence of a motive, which might have prompted the prisoner to the commission of the murder. And, on a case reserved, it was held that this evidence was properly admitted. It was not offered as evidence of an information taken under the statute, but was given in evidence as a charge found to be in writing, and which happened to be in writing, because the information was made upon a certain occasion. The recognizance of the prisoner was taken upon the same occasion as that on which the charge was made, and was also in writing, and was no more to be regarded than if the statute had never been made. If the charge rested on parol evidence, and the party by whom it had been made had used expressions equivalent to what appeared in the information, all that might have been given in evidence: but nothing of the sort could here be given in evidence, as all of it was in writing, and the only proper evidence of the writing was the documents containing the matters which had been so committed to writing. The documents were not given in evidence to substantiate the truth of the charge, but merely as to the fact that they had been made, and that the prisoner had entered into the recognizances. (*j*)

Depositions admissible before the grand jury.

Where a witness is too ill to travel, his deposition may be read by the grand jury upon proof that it was duly taken in the presence of the prisoner, who had an opportunity of cross-examining the witness, and that the witness is too ill at the time to attend. (*k*)

Deposition must be signed by deponent.

The new statute requires the deposition to be signed by the person making it; such signature was not necessary formerly for its admissibility. Upon an indictment for a rape, all the judges were of opinion that the deposition of a girl, since deceased, upon whom the offence had been committed, taken on oath before the committing magistrate, might be read in evidence, although it was not signed by her. (*l*)

The magistrate himself, however, by the 11 & 12 Vict. c. 42,

(*j*) Reg. v. Lydane, 8 Cox. C. C. 38.

(*k*) Reg. v. Clements, 2 Den. C. C. 234. The decision turned on a forced construction of the 11 & 12 Vict. c. 42, s. 17. But there is no doubt that at common law the deposition might be proved

before the grand jury; e. g., where a witness is kept away by the procurement of the prisoner.

(*l*) Rex v. Flemming, 2 Leach, 854, and see Rex v. Russell, *ante*, p. 473.

s. 17, is required to subscribe the examinations and informations taken by him: and this he ought to do at each examination, and not to defer it till he determines on committing. (*m*)

Must be by  
magistrate.

Where the deposition of a prosecutor was regularly taken and read over in the presence of a prisoner, and he had an opportunity of cross-examining the prosecutor, and two other witnesses were examined at the same time, and the depositions of all three were on the same sheet of paper, the prosecutor's being first, and there was only one signature of the magistrate, which was at the end of the last deposition, but not in terms confined to it, being 'sworn before me;' it was held that, after the proof by the magistrate's clerk of the manner in which it had been taken, the deposition of the prosecutor was admissible. (*n*) But where one Winter, who had been examined and cross-examined before the magistrates, died before the trial, and his deposition was duly signed by the magistrates, but the cross-examination, which had taken place on a subsequent day, was not signed by the magistrates, but the depositions of two other witnesses on the prisoner's behalf, which had been taken at the same time with the cross-examination of Winter, were pinned up along with it, and the last sheet of the whole was signed by the magistrates; Alderson, B., after consulting Parke, B., said, if the magistrates' clerk could state that the sheets were all pinned together at the time the magistrates signed the last sheet, he thought he must receive the whole in evidence, but neither the magistrates' clerk nor one of the magistrates being able so to state, the deposition as well as the cross-examination was rejected, although the magistrate stated that all the sheets were lying on the table when he signed them. (*o*)

One signature  
to several de-  
positions on  
the same sheet  
of paper.

On different  
sheets.

And where since the new statute, on an indictment for felony, it appeared that H. Seedhouse had been duly examined before the committing magistrate according to the 11 & 12 Vict. c. 42, s. 17, and that she was unable through sickness to attend the trial, and thereupon her deposition was tendered in evidence. The depositions of all the witnesses had only one caption as follows: 'The examinations of [here the names of H. Seedhouse and the other witnesses were set out], taken on oath before the undersigned, one of Her Majesty's justices,' &c. The statement of each witness began, 'This deponent H. S. on her oath saith,' &c.; and each witness had signed his own statement; but at the foot of the statement of each witness there was no signature by the magistrate. At the end, however, of all the statements was as follows: 'The above depositions of [here the names of all the witnesses were repeated] were taken and sworn before me at, &c.—Thomas Entwisle;' and the depositions were all annexed together. It was objected that the statement of each witness ought to have been signed by the magistrate; but it was held that, although the 17th section required the depositions to be *respectively* signed by the witnesses, and therefore each witness

One signature  
of the magis-  
trate to several  
depositions  
which are at-  
tached to-  
gether is  
enough, since  
the new sta-  
tute.

(*m*) Reg. v. Mayor of London 5 Q. B. 555, 1 Sess. Cas. 40.

(*n*) Reg. v. Osborne, 8 C. & P. 113. Coleridge, J., after consulting Lord Abinger, C. B., said, 'If it had been the case of an affidavit, it would have been bad, but that is on account of an arbitrary rule.'

(*o*) Reg. v. France, 2 M. & Rob. 207. The whole of the examinations and cross-examinations were afterwards read at the instance of the prisoner, and *quære* whether any one present might not have proved their contents, refreshing his memory by them.

must sign his own deposition, yet the section only required the depositions to 'be signed by the justice,' omitting the word 'respectively,' and therefore a single signature of the justice, in the manner adopted in this case, was sufficient. (*p*) And so where the caption was 'Examination of J. J. Hill and others, in the presence of, &c., and the depositions were on separate sheets originally, but the magistrate's clerk had attached them together as they were when produced at the trial, and the magistrate had signed them at the end; Pollock, C. B., held that that was sufficient, and admitted one of the depositions, which had not the signature of the magistrate upon it. (*q*)

Several depositions may have only one caption.

A deposition of a witness who is too ill to travel is admissible, if it refer distinctly to the charge on which the prisoner is being examined, and the prisoner was present when it was taken, had an opportunity of cross-examining, and the same charge was made against him before the justice, although the caption does not charge an offence. Semble that no caption is necessary.

Where upon an indictment for murder the deposition of a witness, examined before the committing magistrate, and since dead, was tendered in evidence: there was a caption or heading at the commencement of the body of the depositions, but there was no caption at the head of this particular deposition; and it was objected that the deposition was, on this account, inadmissible. Alderson, B., 'All that is necessary in this case is to show that the deposition in question was regularly taken under the statute; the heading applies to all the depositions.' And the deposition was admitted. (*r*)

The prisoner was indicted for obtaining by false pretences a promissory note for £50. Upon the trial the deposition of Mary Rowe was put in, after proof that it was taken by the committing justice in the presence of the prisoner, and that she had a full opportunity of cross-examining M. Rowe; that it was signed by the said justice, and that M. Rowe was, at the time of the trial, so ill as not to be able to travel. The charge preferred before the said justice was that the prisoner had obtained the promissory note and other valuable securities by means of false pretences, and of this charge the prisoner was informed by the said justice. The caption of the deposition of M. Rowe was 'Devon, to wit. The examination of M. Rowe, wife of W. S. Rowe, of, &c., taken on oath this 14th day of February, A.D. 1849, at, &c., before the undersigned, one of Her Majesty's justices of the peace for the said county, in the presence and hearing of H. L. (the prisoner), who is now charged before me this day for obtaining money and other valuable security for money from the said M. Rowe,' &c. It was objected that the charge set forth in the caption is obtaining money and valuable securities, but whether legally or illegally is not stated; and no offence was therefore shown, and the said deposition consequently was not receivable in evidence. The objection was overruled; and, upon a case reserved, Wilde, C. J., delivered judgment as follows: 'The judges are unanimously of opinion that the objection is not valid, and that the deposition was properly received in evidence. The objection is not that the evidence as set forth in the examination did not sufficiently appear to relate to the charge, upon which the prisoner was being tried, so as to warn and apprise her of the matter to which her cross-examination should be directed, but only

(*p*) Reg. v. Young, 3 C. & K. 106. Greaves, Q. C., after consulting Williams, J.

(*q*) Reg. v. Lee, 4 E. & F. 63. It is trusted that the text represents the facts of this case; but the report neither states

in terms where the magistrate's signature was, nor when the depositions were attached together.

(*r*) Reg. v. Johnson, 2 C. & K. 354. A.D. 1847.



that the title of the examination did not with sufficient distinctness state the charge against her. The title of the deposition states the occasion of its being taken, and the matter to which it refers, and *there is no authority requiring any title, or as it is called caption, to the examination*; and it is sufficient if it be described as the examination of the witness, and the evidence refers to the charge upon which the prisoner may be upon his trial; and as no objection was raised that the deposition was defective in that respect, we think the deposition was properly received in evidence. It may, however, not be improper to observe that the case states that the charge preferred against the prisoner was that of obtaining the promissory note and securities by means of false pretences, and that the prisoner was informed of that charge by the committing justice, and that she had a full opportunity of cross-examining the witness.' (s)

Where a deposition had 'Kent to wit' in the margin, and purported to be 'taken on oath before us of Her Majesty's justices of the peace for the said county,' and concluded, 'This examination was taken before us in the presence of (the prisoner) at Dartford, on the day and year first above mentioned — HUGH JOHNSON;' Maule, J., was of opinion that this document was inadmissible under the 11 & 12 Viet. c. 42, s. 17, as it did not purport to be signed by, or to have been taken before, any justice of the peace for the county in which the prisoner was examined, although it was offered to be proved that Hugh Johnson was a magistrate, and acting as such when the examination was taken; for such proof would not make the deposition purport to be signed otherwise than it did purport. (t)

Where a woman having been violated cut her throat, and a magistrate was sent for, and in the presence of the prisoners, who were brought into her room, she made a statement on oath, which was taken down, read over, and signed by her. The prisoners did not in fact cross-examine her. The depositions of the other witnesses were taken before another magistrate on a charge of rape on the deceased a few days afterwards. There was no caption to the deposition of the deceased; but it was found attached to the depositions of the other witnesses, and there was a caption to these depositions, stating them to have been taken before the other magistrate. It was urged that the want of a proper caption could be supplied by parol evidence; but it was held that the 11 & 12 Viet. c. 42, s. 17, authorized taking depositions in a particular way; and unless it appeared upon the caption that the prisoners were charged with an indictable offence, the document was inadmissible. (u)

On a trial for murder it appeared that the statement of the de-

A deposition is bad which does not state that the person signing it is a magistrate.

A deposition without any caption.

Deposition on

(s) Reg. v. Langbridge, 1 Den. C. C. 448. 2 C. & K. 975. A.D. 1849.

(t) Reg. v. Miller, 4 Cox, C. C. 166. March 1850. This decision may be right if it be confined to deciding that such an informal document is inadmissible as a regular deposition; but it ought to have been proved that the deposition was in fact regularly taken, and the informal document might then have been used to refresh the memory of the justice's clerk, and so the evidence might have been admitted; but no such attempt was made.

Reg. v. Langbridge, *supra*, was not cited in this case.

(u) Reg. v. Newton, 1 F. & F. 641. Sum. Ass. 1859. Hill, J., after consulting Watson, B. Reg. v. Langbridge, *supra*, was not cited in this case, and the judgment in that case is directly contrary to this decision; and even if the document were held to be inadmissible as a deposition, it might be used to refresh the memory of a witness, and he might prove what the deceased stated. Even if there were no writing at all, the evidence given

a charge of wounding attached to depositions on a charge of murder.

ceased had been taken down as a dying declaration, and the next day, in the presence of the prisoner, this statement was read over to him, and the deceased said it was correct, as a dying man. The deceased died two days afterwards; and after his death the witnesses made their depositions before the magistrates on a charge of murder against the prisoner, and the deposition of the deceased was included, as having been taken on that day, under the same caption. It was objected that it was taken on a charge of a different offence, viz. cutting and wounding the deceased. Wightman, J., said, 'The caption shows that the examination was taken on a charge of murder, and the caption shows that it is the examination of the man charged with being murdered for the murder of himself,' and rejected the deposition. (c)

A prisoner's name affixed to the mark of a witness by mistake.

On a trial for manslaughter, the deposition of the deceased purported to have been made in the presence of the prisoner, and was signed by the deceased with a cross, he being a marksman. By mistake the clerk wrote the prisoner's name to the mark, so that it *prima facie* appeared to be the deposition of the prisoner. On a case reserved it was contended that this was a patent ambiguity, which could not be explained by oral testimony. It was answered that the document was complete when the deceased put his mark to it, and that signature could not be vitiated by what another person wrote: and it was held that the deposition was properly received in evidence. (w)

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Parol evidence of a deposition is not admissible unless it be clearly proved that it was not taken in writing.

And since, as in the case of examinations, it will be intended that the magistrate, according to his duty, took the deposition in writing, parol evidence of the information is inadmissible, till it is shown that it was not reduced to writing. (x) Thus where the plaintiff had been arrested on a charge of felony and taken before a magistrate, who discharged him, and there was no positive evidence whether the examinations of the witnesses had been taken in writing, and it was urged that, as no case had been made out against the plaintiff, it was to be presumed that no depositions had been taken in writing; Jervis, C. J., said, 'The statute positively requires every examination before justices to be taken down in writing. I know this is frequently neglected under the circumstances mentioned, but it is a practice quite illegal and highly improper. I cannot in any case presume that the law has been violated, and therefore, without positive evidence that in this case the examinations have not been taken down, I cannot admit parol evidence.' (y)

Evidence on the part of the

It has been said that 'if the magistrate took the information regularly upon oath, in the presence of the prisoner, and sub-

by the witness in the presence of the prisoner, might be proved; for the general rule is, that 'where a witness already examined in a judicial proceeding between the same parties is since dead, his former examination is admissible as secondary evidence;' 1 Stark. Evid. 61; and although the new statute clearly makes a deposition taken in pursuance of it the best evidence of what the witness stated, yet, if through the neglect of the justice or his clerk no deposition, or an irregular deposition, be taken, there is nothing in

that statute to exclude the proof of the statement of the witness by other means.

(v) Reg. v. Clarke, 2 F. & F. 2. Sum. Ass. 1859. But the statement was admitted as a dying declaration. See the preceding note.

(w) Reg. v. Mullen, 9 Cox, C. C. 339. The deposition was headed, 'Deposition of James Brennan,' and began, 'Taken in the presence and hearing of Peter Mullen.'

(x) Rex v. Fear-hire, 1 Le. ch. 202.

(y) Parsons v. Brown, 3 C. & K. 295.

scribed it, but instead of taking all that was material, as he ought to have done in pursuance of the statute, omitted some material parts of the witness's statement, parol evidence of the parts omitted cannot be received; for the statement which has been omitted, though upon oath, and open to cross-examination, cannot be received as part of a judicial proceeding, the magistrate not having proceeded in conformity with the statutes; nor can such supplementary evidence be received upon general principles. (z) In the case of *Rex v. Thornton*, (a) on a trial for murder, Mr. J. Holroyd ruled that parol evidence could not be admitted, either to add to or vary a deposition. (b)

Crown is admissible to add to or vary a deposition.

Where on an indictment for perjury, alleged to have been committed on the hearing before a magistrate of an information for sporting without a game certificate, to prove what the defendant swore before the magistrate, his deposition taken in writing before the magistrate was put in; Park, J. A. J., held that a witness could not be called to depose to other things stated by the defendant when he was examined as a witness before the magistrate, but which were not contained in the written deposition. (c)

(z) 2 Phill. Ev. 72. This paragraph was not in the 7th ed., where *Rex v. Thornton* is cited in the same brief manner as in the last ed. C. S. G.

(a) Warwick Sum. Ass. 1817. No such point appears to have occurred on this trial as reported by Mr. E. Holroyd.

(b) 2 Phill. Ev. 72. The case of *Rex v. Thornton* is so briefly stated that it is hardly possible to ascertain with precision what the ruling of the very learned judge was. If the evidence were offered to contradict the deposition, it would seem to be properly rejected. If it were to add matters not contained in it, the decision seems questionable after the decision of *Rex v. Harris*, ante, p. 451, which is a stronger case. As the magistrate in taking depositions was at liberty to put only so much in writing as shall be material, there was no presumption that he has put down everything that the witness may have said; and instances so frequently occur, in which many things which appeared before the magistrates perfectly immaterial prove very important on the trial, that it may well deserve further consideration if such a question were to arise, whether evidence were not admissible on the part of the prosecution to add to a deposition. C. S. G.

(c) *Rex v. Wylde*, 6 C. & P. 380. See ante, p. 101, note (g), and *Rex v. Edmunds*, 6 C. & P. 164, ante, p. 424. With reference to cases where the magistrate has not taken the evidence of a witness in writing, Mr. Philipps observes, 'If the magistrate has not taken in writing the information of a witness, it is clear that no proof can be admitted after his death of what he said before the magistrate; or if the magistrate took the information in writing

but irregularly, as, for instance, if the witness was not sworn, or the magistrate did not subscribe, it is equally clear that after the witness's death parol evidence of his information will not be admissible; for such evidence would not have been admissible except by virtue of the statute, nor is it admissible since the passing of the statute, the statutory regulations not having been complied with; the written information is the primary and best proof of the information, and the irregularity of that primary evidence is not a sufficient ground for receiving evidence of a secondary or inferior nature.' In this passage (which does not appear in the 7th edition), the observations must be taken to apply to 'an examination taken in the presence of the prisoner;' and taking them so to apply, it may admit of considerable doubt whether they are well founded. The deposition of a witness is not admissible because it is in writing under the statute, but because it is taken in the presence of the prisoner, and he has had an opportunity of cross-examining the witness; and it is conceived that at common law the rule is well established, that the testimony of a deceased witness, who has been examined upon oath on a former occasion in a proceeding between the same parties, on the same subject-matter, is admissible in a subsequent proceeding between the same parties, and may be proved by any one who heard the evidence given. And this rule extends to criminal as well as civil proceedings. See ante, p. 249. Now in all criminal prosecutions the Queen is considered as the prosecutrix, both before the magistrate and on the trial. The parties, therefore, before the magistrate and on the trial are the same,



Evidence is admissible to explain or add to a deposition.

But this can no longer be considered as the law. Where in an action for maliciously laying an information before a magistrate that he, the defendant, apprehended danger to his life or bodily harm from the plaintiff, the information of the defendant, taken in writing by the magistrate's clerk, was put in, after being proved by the clerk, and after it was read the counsel for the defendant asked the clerk in cross-examination whether the defendant had not, in addition to what appeared in the information, stated that, on the occasion deposed to, the plaintiff had used a certain threat; and the question was objected to on the ground that it went to explain or add to the written information; Gaselee, J., as the point was a difficult one and of frequent occurrence, consulted the other judges of the Court of Common Pleas, and stated that they all were of opinion that evidence was admissible to prove anything the party had said as part of his information, beyond what was put in writing, either for the purpose of explanation or addition. (*d*) Upon an indictment for obtaining money by false pretences, a witness was examined for the prosecution, who had been examined before the magistrates, *on the application of the prisoner*, touching the present charge, and the prisoner's counsel now asked him whether, when he was before the magistrate, he did not say, *whilst under cross-examination by the prisoner's attorney*, that he knew the prisoner was collecting rates after the 24th of June. This question was objected to on the ground that the depositions, being referred to, contained no note of any such cross-examination. But Erle, J., was of opinion that the question must be allowed. There did appear to have been decisions the other way, (*e*) but he had always been of opinion that in principle these decisions were wrong. (*f*)

Parol evidence of what took place at a preliminary examination of a prisoner is admissible.

Where on the trial of an action for a malicious prosecution it appeared that the defendant had made a charge against the plaintiff before a magistrate, the hearing of which was in the first instance adjourned, and on a subsequent occasion the case was heard, and the depositions were gone through, taken down, and the plaintiff committed for trial. A magistrate's clerk attended

and consequently the evidence of a deceased witness examined in the presence of the prisoner before the magistrate might, at common law, be proved by parol on the trial of the prisoner. But the statute having required the magistrate to put the evidence in writing, such writing is the best evidence of what the witness said. It is submitted, however, that in case no part of the evidence were taken down, parol evidence would be admissible of what the witness said. The statute has directed the examination of a prisoner to be taken in writing, and yet if that be not done, parol evidence is admissible, because such parol evidence was admissible at common law. *Lambe's case*, 2 Leach, 552. The observations of the judges in this case furnish a strong argument by analogy in support of the view here contended for. It might be further contended that what was said by a witness in the presence of a prisoner before

a magistrate was admissible at common law, as a statement made in the prisoner's presence, to which he not only might reply, but which he was called upon expressly to answer. See *Rex v. Edmunds*, 6 C. & P. 164, where Tindal, C. J., admitted evidence of what a deceased prosecutor swore in the presence of the prisoner on an examination before a magistrate for committing the assault, from the effects of which the deceased died, 'as producing an answer, and like any other conversation.' And see the observations of Parke, B., in *Melen v. Andrews*, *ante*, p. 423. C. S. G.

(*d*) *Venafrá v. Johnson*, 1 M. & Rob. 316. See *Rowland v. Ashby*, R. & M. N. P. C. 231, *ante*, p. 450; *Rex v. Harris*, R. & M. C. C. R. 338, *ante*, p. 451, and *Rex v. Reed*, M. & M. 403, *ante*, p. 457.

(*e*) 2 Russ. C. & M. 895, last ed.

(*f*) *Reg. v. Curtis*, 2 C. & K. 763.

on the first occasion, and took down what the defendant said, but neither the defendant nor the magistrate signed it; it was objected that parol evidence of what the defendant said on the first occasion was inadmissible, and that the writing must be produced. Cresswell, J., 'I know from the depositions returned to me at the assizes, that in practice, when a case is adjourned, the depositions are not regularly reduced to writing under the statute; and I think that parol evidence is admissible here of what was said on the first occasion. If two persons are present on the examination of a witness, and one takes a note of what the witness says, and the other does not, the latter is as competent as the former to prove what he heard.' (g)

The 11 & 12 Vict. c. 42, s. 17, has extended the admissibility of depositions, taken before a justice, so as to include those taken on a charge of high treason, and, therefore, on an indictment for treason they are now admissible.

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Depositions  
in cases of  
treason.

Where a witness was gone to sea, his deposition was held inadmissible, but it was held that, with the consent of the counsel for the Crown, it might be read; (h) and on the authority of this case, where a witness was too ill to attend the trial, Erle, J., allowed his deposition to be read, as the counsel for the Crown offered no opposition. (i)

Deposition  
read by con-  
sent of the  
Crown.

Where on an indictment for forging a bill of exchange an application was made that the deposition of a witness might be laid before the grand jury, as he was too ill to travel, and the prisoner's counsel objected, as it was most important that the witness should be cross-examined, and it did not appear that the illness was more than temporary; Crompton, J., held that he had a discretion either to permit the deposition to be read or to postpone the trial, and postponed the trial. (j)

The judge  
may either  
allow the de-  
position to be  
read or post-  
pone the trial.

One of the objects of passing these statutes was to enable the judge and jury before whom the prisoner is tried to see whether the evidence of the witnesses at the trial is consistent with the account given by them before the committing magistrate; (k) and therefore an information, when judicially and regularly taken, may be used on the part of the prisoner, when the informant gives his evidence at the trial, to contradict his testimony. Thus it was admitted in *Lord Stafford's case*, (l) that the deposition of a witness, taken before a justice of the peace, might be read at the desire of the prisoner, in order to take off the credit of the witness, by showing a variance between the deposition and the evidence given in court *vivâ voce*. And not only on the part of the prisoner, but of the Crown, depositions may be so used, even for the purpose of impeaching the credit of a witness called for the prosecution. Thus in *Oldroyd's case*, (m) where the counsel

Deposition  
may be used  
to contradict  
witness by the  
prisoner;

and by the  
Crown with  
the permission  
of the court.  
Oldroyd's  
case.

(g) *Jeans v. Wheedon*, 2 M. & Rob. 486. See the reporter's note there. See also *Reg. v. Christopher*, 1 Den. C. C. 536, *post*, p. 558.

(h) *Reg. v. Hagan*, 8 C. & P. 167, Bolland, B., and Coltman, J., *ante*, p. 471.

(i) *Reg. v. Hunt*, 2 Cox, C. C. 261.

(j) *Reg. v. Tait*, 2 F. & F. 553.

(k) See the judgment delivered by

Grose, J., in *Lambe's case*, 2 Leach, 558. 2 Phill. Ev. 76.

(l) 3 St. Tr. p. 131. 2 Phill. Ev. 76.

(m) R. & R. 88. In *Wright v. Bckett*, 1 M. & Rob. 414, Lord Denman, C.J., after citing this case, observed, 'This decision does not incur the danger of conclusion, as the parties who conducted the prosecution neither called nor contradicted the witness. But it proves that a

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for the Crown, by the direction of the judge, unwillingly called the prisoner's mother (her name being on the back of the indictment as having been examined by the grand jury), and her evidence was in favour of the prisoner; Graham, B., ordered her deposition before the coroner to be read, for the purpose of affecting the credit of her testimony by showing its variance from the deposition. And the twelve judges held that it was competent for the judge to do so; and Lord Ellenborough, C. J., and Mansfield, C. J., thought the prosecutor also had the same right.

Boyle's case.

And where a witness for the prosecution, on being examined, gave a different account of the transaction from what he had deposed to before the committing magistrate, and the counsel for the prosecution proposed to contradict him by proving the deposition, which was objected to on the part of the prisoner; Bayley, J., after consulting Holroyd, J., admitted the proposed contradiction. (*n*) And so where a witness on the trial gave a different account of the transaction from that which she gave before the magistrate, Coleridge, J., on the application of the counsel for the prosecution, allowed the two depositions made by the witness before the magistrate to be identified as such, and then read to the witness, and she was examined upon them by the learned judge. (*o*)

Williams' case.

On a trial for manslaughter one of the witnesses for the prosecution having replied in the negative to the question, whether he saw anything done to the deceased after he was on the ground, the counsel for the prosecution proposed to put the deposition of the witness into his hands, and it was objected to; Williams, J., 'This very point was raised before me on the Welsh Circuit, where a witness gave evidence different to what was expected. I permitted it to be done on the ground of refreshing the memory of the witness, and the Court of Queen's Bench afterwards held that I was right.' The deposition was then put in the hands of the witness, who looked at it, and the same question being repeated, he said, 'I did not.' Williams, J., 'You cannot get any further.' The counsel for the Crown then asked, 'After the deceased fell, did you see persons kicking and beating him?' and Williams, J., held that this question might be put. (*p*)

Tunncliffe's case.

But where a witness, who had been examined before a magistrate, gave a statement in court more favourable to the prisoners

former declaration may be given in evidence to contradict what the same witness has sworn to on the trial, notwithstanding the danger of that declaration being believed, and acted on as evidence in the cause; and it prepares the mind for considering the very question now before us. For the prosecutor would have undoubtedly been justified in expecting the evidence in court to agree with that given before the coroner, and in summoning the witness into the box with that expectation. If he had done so, and had heard her with astonishment gainsay the deposition from which he examined her, could he have been prevented from neutralising the evidence, and defeating the attempted fraud by laying that deposition before the jury? See the cases collected in the

section 'of impeaching the credit of witnesses.'

(*n*) *Rex v. Boyle*, cited in *Wright v. Beckett*, 1 M. & Rob. 422, by Lord Denman, C. J., who added, 'I am bound to add that that eminent judge has no remembrance of this decision, and find, on debating the matter with him, that his present opinion is against it. But I cannot help thinking that *Rex v. Oldroyd* appeared to him when cited, as it does to me, a conclusive authority for the principle now under controversy.'

(*o*) *Reg. v. Hallett*, 9 C. & P. 748.

(*p*) *Reg. v. Williams*, 6 Cox, C. C. 343. Williams, J., afterwards referred to the preceding authorities as having settled the practice in such cases.



than that which he had made before the magistrate, and it was proposed on the part of the prosecution to put in his deposition; and *Oldroyd's case* was relied upon; it was objected that the opinion there expressed was extrajudicial, and that the counsel for the prosecution had no right to call a witness, and, in case he gave evidence against the prosecution, to discredit him. Bol-land, B., said, 'I do not think the case cited is an express authority. I agree that I can only look at the deposition as destroying the credit of the witness, and therefore I shall not allow the deposition to be read.' (q) So where a witness called for the prosecution contradicted the prosecutor as to the fact of the prisoner having been at her house as stated by the prosecutor, and in order to do away with the effect of the evidence of the witness, which, if believed, disproved the whole case for the prosecution, it was proposed, on the part of the prosecution, to prove that the statements made by the witness before the magistrate were wholly inconsistent with the account given at the trial; the evidence was rejected; and per Erskine, J., 'You cannot put in evidence for the purpose of discrediting your own witness. You may call other witnesses to prove the facts denied by this witness, and incidentally contradict her, and show her to be unworthy of credit; but you cannot call a witness or give evidence not otherwise admissible for the purpose of discrediting your own witness.' (r)

Ball's case.

Before depositions could be read against the prisoner under the former statutes, it was said, that it must be proved by the justice or coroner who took them, or the clerk that wrote them, that they were truly taken. (s)

Depositions before justice of peace, how proved under the former statutes.

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But it was held that a deposition might be proved by any person who was present and saw it taken. The depositions in a capital case were proved to have been signed by the magistrate, but it appeared that, not having any clerk, he took them himself; and it being necessary to read them in evidence to contradict a witness, Parke, B., said, that in so serious a case it was very desirable that the magistrate himself should be present to prove the correctness of what he took down, although in point of law it was not absolutely necessary. (t) So where the prosecutor, being quite infirm and bedridden, and not likely ever to bear a journey to the assizes, a constable proved that he saw the magistrate take down what the prosecutor said in the presence of the prisoner, and that the deposition was all in the handwriting of the magistrate, except the cross at the bottom of it, which the constable saw the prosecutor make; and it was objected that the deposition ought not to be read without calling either the magistrate or his clerk; Coltman, J., 'It is very proper, as a matter of caution, that the magistrate or his clerk should be called in all cases where it can be conveniently done, but I think it is not necessary in point of law.' (u)

(q) *Rex v. Tunnicliffe*, Stafford Spr. Ass. 1830, MSS. C. S. G. The learned Baron also refused to permit the clerk to the magistrate to prove that the deposition was correctly taken, in order to give the learned Baron himself grounds for cross-examining the witness.

(r) *Reg. v. Ball*, 5 C. & P. 745, Erskine,

J., after consulting Patteson, J. See the 28 & 29 Vict. c. 18, s. 3, *post*, p. 570. †

(s) 2 Hale, P. C. c. 38, p. 284. See *England's case*, 2 Leach, 770, as to proof of depositions before coroners.

(t) *Reg. v. Pikesley*, 9 C. & P. 124.

(u) *Reg. v. Wilsbaw*, C. & M. 145.

Under the  
11 & 12 Vict.  
c. 42.

By the 11 & 12 Vict. c. 42, s. 17, (v) after it has been proved that the witness is 'dead or so ill as not to be able to travel,' it must be proved, 1st, that 'the deposition was taken in the presence of the person so accused;' and, 2ndly, 'that he or his counsel or attorney had a full opportunity of cross-examining the witness;' and then, 'if such deposition purport to be signed by the justice' or justices by or before whom the same purports to have been taken, the deposition may be read as evidence without further proof, unless it shall be proved that the deposition was not in fact signed by the justice purporting to sign the same.

Deposition  
before a  
coroner.

A deposition taken before a coroner may be proved by the coroner, or by any person who can prove the signature of the coroner, and that the witness was sworn, and that the deposition contains the evidence given by the witness, and that the prisoner was present and had an opportunity of cross-examining the witness. The deposition in this case need only contain so much of the evidence as is material. (w)

Proof of depo-  
sition in order  
to examine  
upon it.

Where it was proposed to prove the deposition of a witness in order to cross-examine her upon it, and neither the magistrate nor his clerk were at the assizes, and the witness denied her mark to the deposition; but a constable, who was present before the magistrate when the witness was examined, proved the signature of the magistrate, but was not sure that he saw the witness make her mark to it, though he recollected seeing the pen in her hand, and heard her deposition read over to her, and believed the deposition to be the same that was read over to her, and his own deposition immediately followed it; Coleridge, J., held that the deposition might be read to the witness to examine her upon it. (x)

Deposition of  
a person of  
weak intel-  
lect.

Upon an indictment for ravishing Sarah Higgins, it appeared that she was a person of very weak intellect; but her deposition before the magistrate was in the usual form, and did not show anything as to any inquiry into the competency of the witness in point of intellect; and when she was called as a witness, she appeared not at all to understand the nature of an oath, and to have no idea of a future state; upon which Wilde, C. J., observed, 'It would be always desirable, where a person of weak intellect is examined before a magistrate in a case of felony, that the magistrate's clerk should take down in the depositions the questions put by the magistrate, and the answers given by the witness as to the witness's capacity to take an oath.' (y)

As to the  
manner of  
taking down  
the evidence  
of the wit-

The 7 Geo. 4, c. 64, s. 2, provided that magistrates shall take 'the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing.' Consequently a

(v) *Ante*, p. 439.

(w) See the 7 Geo. 4, c. 64, s. 4, *ante*, p. 478, note (k).

(x) *Reg. v. Hallett*, 9 C. & P. 748. Coleridge, J., said, 'Suppose there was no mark at all, why should not a third person say that this was the paper that was read over to the witness?'

(y) *Reg. v. Painter*, 2 C. & K. 319. With all deference, such questions and

answers are preliminary to the swearing of the witness, and cannot therefore form any part of the deposition. It might be well, however, to make a note of the questions and answers either on another paper, or separately from and so as to form no part of the deposition. In a confession, such as *Reg. v. Dingley*, 1 C. & K. 637, of course anything the prisoner says may be inserted.

magistrate was not bound by law to return all that was stated, but only all that was material to the felony. (z) However, after the passing of the Prisoner's Counsel Bill, it became of great importance that the depositions of witnesses should be as fully and accurately taken as they conveniently might, in order that the witnesses might neither be liable to the imputation of having made a different statement in court from what they made before the magistrate, nor of having stated facts in court which were not mentioned before the magistrate. In a case where several witnesses were cross-examined as to minute variances between their testimony in court and their depositions taken before the magistrate, Parke, B., observed, 'Magistrates are required by law to put down the evidence of witnesses, or so much thereof as shall be material. They have hitherto in many cases confined themselves to what they deemed material, but, in future, it will be desirable that they should be extremely careful in preparing depositions, and should make a full statement of all the witnesses say upon the matter in question, as the experience we have already had of the operation of the Prisoner's Counsel Bill has shown us how much time is occupied in endeavouring to establish contradictions between the testimony of witnesses and their depositions, in the omission of minute circumstances in their statements made before the magistrates, as well as in other particulars.' (a)

nesses by magistrates.

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Where a policeman stated a conversation between himself and a prisoner, which was material to the charge, and made against the prisoner, and stated that he had told the magistrate the same conversation, though it did not appear in the depositions; and the counsel for the prisoner complained of this as unfair, as it did not give the prisoner what the law intended it should, viz. an account of the whole evidence against him given before the magistrate; Lord Denman, C. J., said, that he thought the observation well founded, with respect to the omission in the depositions, and that the magistrate ought to have returned all that took place before him with respect to the charge, as the object of the legislature, in granting prisoners the use of the depositions, was to enable them to know what they had to answer on their trial. (b)

And now by the 11 & 12 Vict. c. 42, s. 17, the magistrate is to take 'the statement' of the witness in writing, and the form in the schedule directs the deposition to be taken as nearly as possible in the words the witness uses. And there can be no doubt that this change in the terms of the new Act was introduced in order that the depositions should be taken more fully and accurately than was previously the practice; still it cannot be necessary to take down immaterial and wholly irrelevant statements. (c)

The statement is to be in the words of the witness since the 11 & 12 Vict. c. 42.

If the prisoner or his counsel cross-examine the witnesses when before the magistrate, the answers of the witnesses to the cross-examination ought to be taken down by the magistrate, and returned to the judge. (d)

(z) Per Alderson, B., *Rex v. Coveney*, 7 C. & P. 667.

(a) *Rex v. Thomas*, 7 C. & P. 817.

(b) *Rex v. Grady*, 7 C. & P. 650. Reg. v. Weller, 2 C. & K. 223. Platt, B.

(c) See per Erle, C. J. *Reg. v. Hendy*, 4 Cox, C. C. 243, *ante*, p. 475.

(d) *Rex v. Potter*, 7 C. & P. 650, note. Gaselee, J., and Vaughan, B.



Every deposition taken by a magistrate ought to be returned, whether the witness be bound over or not.

It is the duty of magistrates to return to the court at which the prisoner is to be tried all depositions that have been taken at all the examinations that have taken place respecting the offence which is to be the subject of the trial. Where a witness was examined before a magistrate several times—at the first examination no person was specifically charged with the offence, but what was said was taken down in writing; and this witness was taken into custody, and while in custody as an accused person he made another statement, which was also taken down by the same magistrate; and on a subsequent day, the present prisoner having been apprehended, the witness was again examined as a witness; Alderson, B., observed, ‘I have none of these depositions but the last. Every one of them ought to have been returned to me, as it is of the last importance that the judge should have every deposition that has been made, that he may see whether or not the witnesses have at different times varied their statements, and, if they have, to what extent they have done so. Magistrates ought to return to the judge all the depositions that have been made at all the examinations that have taken place respecting the offence which is to be the subject of the trial.’ (e)

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And it is equally the duty of the magistrate to return the depositions of witnesses who are not bound over; (f) as, for instance, the depositions of witnesses called by the prisoner to prove an *alibi*. (g) But if the deposition of a witness has been taken after the prisoner has been committed, and in his absence, such examination ought not to be returned *as one of the depositions*; for nothing should be returned *as a deposition* against a prisoner unless the prisoner had an opportunity of knowing what was said, and an opportunity of cross-examining the person making the deposition. (h)

Of the expediency of taking and returning the examination of the prisoner's witnesses.

It is highly expedient to the furtherance of the ends of justice that whenever prisoner's offer to produce witnesses before the magistrate, in answer to the charge made against them, such witnesses should be regularly examined on oath, and their statements taken down in writing, and returned with the depositions. Whether the evidence so adduced be true or false, it is very important that it should be received and taken down. If it be true, it may be so clear, positive, and distinct as to explain or contradict the evidence adduced in support of the charge, in such a manner as completely to satisfy the magistrates that ‘it is not sufficient to put such accused party on his trial;’ in which case he ought to be discharged; or the evidence adduced on behalf of the

(e) *Rex v. Simons*, 6 C. & P. 540.

(f) *Rex v. Smith*, 2 C. & K. 207. Lord Denman, C. J.

(g) *Rex v. Fuller*, 7 C. & P. 269. Vaughan, J.

(h) Per Lord Denman, C. J., *Reg. v. Arnold*, 8 C. & P. 621. Strictly speaking, the words of the very learned Chief Justice only show that such an examination should not be returned *as a deposition*, and it may perhaps be going too far to infer from them that such a statement should not be returned at all. It is conceived, if the examination, however irregularly taken, were signed by the witness,

it might be used for the purpose of contradicting him in the same way as any other instrument signed by him. It is conceived that magistrates have no jurisdiction to administer an oath *after a prisoner has been committed*, and in his absence, and that it may admit of doubt whether the administering such an oath would not render a magistrate liable to indictment under the 5 & 6 Will. 4. c. 62, s. 13. See *Reg. v. Nott*, C. & M. 288, *ante*, p. 113. Woodcock's case, 1 Leach, 500, and the judgment of Grose, J., in *Rex v. Eriswell*, 3 T. R. 707. C. S. G.

party charged may, in the opinion of the magistrates, weaken the presumption of the party's guilt, but the evidence may notwithstanding be sufficient to put the accused party on his trial; in which case the magistrates may admit the prisoner to bail. (*i*) And even if the evidence so adduced should not produce either of these results, still it is important, for the sake of the prisoner, that his witnesses should be examined, and their depositions returned, as he is thereby freed from the suggestion often made at the trial, that the case endeavoured to be proved before the jury has been concocted since the examination before the magistrate; and if, as has been suggested, (*j*) the deposition of a witness, examined on behalf of a prisoner before the magistrate, would be admissible in evidence for the prisoner on his trial, in case of the death of such witness, it is but reasonable that the prisoner should have the depositions of his witnesses taken, in order to be used in case of such an event. On the other hand, if the evidence adduced be false, it is essential for the ends of justice that it should be heard and taken down, in order that the prosecutor may have the means before the trial of investigating the facts deposed to, and the opportunity of testing the statements of the witnesses, by comparing those made on the trial with those made before the magistrate; and, moreover, the taking the depositions would serve as a check upon the prisoner against setting up a different defence on the trial, and upon the witnesses against improving their tale between the time of their examination before the magistrate and the trial. (*k*)

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The preceding remarks have since been fully confirmed by Lord Denman, C. J., who in his charge to the grand jury at Taunton in 1849 (*l*) said, 'In all cases in which prisoners charged with felony have witnesses, and those witnesses are in attendance at the time of the examination before the magistrate, I should recommend that the magistrate should hear the evidence of such witnesses as the prisoner, on being asked, wishes to be examined in his defence. If such witnesses merely explain what has been proved in support of the charge, and are believed, they will actually have made out a defence on behalf of the accused, and there would of course be no necessity for any further proceedings; but if the witnesses so called contradict those for the prosecution in material points, then the case would be properly sent to a jury to ascertain the truth of the statements of each party; and the

Lord Denman's opinion.

(*i*) See the 11 & 12 Vict. c. 42, s. 25, which shows what the duties of magistrates are in these circumstances.

(*j*) See the Reporters' note, 7 C. & P. 270.

(*k*) Among the numerous cases which have given rise to these remarks, the following may be mentioned: A prisoner was indicted for stealing a number of watches at Cheltenham; when taken before the magistrates, he produced a number of witnesses from London, and proposed to have them examined; this was refused; and upon the trial he produced the same witnesses, and their evidence, if true, proved that at the time the watches were stolen the prisoner and the witnesses

were dining at a particular house in London, keeping the wedding day of the occupier of the house; on the part of the prosecution nothing was known of the witnesses or of the house, and consequently there was little means for testing their credibility; the result was that the prisoner was acquitted; and in a short time afterwards it was well ascertained that the whole story was a fabrication, and might easily have been proved on the trial to have been such, if it had been known that such a defence had been intended, and that must have been known if the witnesses had been examined before the magistrates. C. S. G.

(*l*) 2 C. & K. 845.

depositions of the prisoner's witnesses being taken and signed by them, should be transmitted to the judge, together with the depositions in support of the charge.' (*m*)

What witnesses ought to be examined by the magistrates.

Magistrates should examine and take the depositions of all such persons as may be able to throw any material light upon the transaction under investigation, and 'if a person in whose possession stolen property is found give a reasonable account of how he came by it, and refer to some known person, as the person from whom he received it, the magistrate should send for that person and examine him, as it may be that his statement may entirely exonerate the accused person, and put an end to the charge, and it also very often may be that the person thus referred to would become a very important witness for the prosecution, by proving, in addition to the prisoner's possession of the stolen property, that he has been giving a false account of it.' (*n*) 'But it certainly cannot be necessary for a magistrate to bind over every witness who is examined before him in support of a charge of felony; because it must often happen that some of the witnesses who are examined before the committing magistrate really know nothing of the case, and on inquiry the whole of what they state may be hearsay only. The magistrate is only to bind over those whose evidence is material to the case.' (*o*)

Depositions upon interrogatories by consent.

Depositions are also sometimes taken in criminal cases, by the consent of the prosecutor and defendant, when a material witness is about to leave the country, or resides abroad. (*p*) But if the

(*m*) The 11 & 12 Vict. c. 42, passed in August, 1848, and therefore these observations were made after the passing of that Act. In *Reg. v. Clark*, 5 Cox, C. C. 230, Pollock, C. B., is reported to have said that 'where a prisoner was clearly spoken to by one or more persons as the person by whom a crime had been committed, it would be the duty of the magistrates to commit, and it would be quite useless to call witnesses on the part of the prisoner either to prove an *alibi* or anything else in his favour; it would be a useless expense to call them twice to prove the same thing, and a thing which no discreet attorney ought to advise his client to incur.' These observations were made in answer to a remark by the prisoner's counsel that observations might be made by the prosecution because the witnesses had not been called before the magistrate; though they had been present, but had not been called under the advice of the prisoner's attorney. No remark need be made as to the exercise of the discretion in calling the prisoner's witnesses before the magistrate; but with all deference to the learned Chief Baron, the case where a prisoner has witnesses prepared to prove an *alibi* is the very case of all others where the witnesses ought to be examined. Cases of mistaken identity are of daily occurrence, and the prisoner's witnesses may so clearly establish the mistake as to warrant his instant discharge, or raise so much doubt as to make it proper to admit him

to bail. The following case will prove the expediency of such a course, both as a mere act of justice to the prisoner, and as tending to bring the real offender to justice:—One Yarworth was shot near Cheltenham, and lingered for a long time before he died of the wound; Bowen was charged before the magistrates with having shot him, and after the witnesses had been heard against him, he offered to prove by several witnesses that he was at Worcester when the shot was fired; the magistrates refused to hear the witnesses, and committed him; but his trial was postponed once, if not twice, in consequence of Yarworth's surviving, and when his trial came on, his witnesses not only established so clear an *alibi* that Colebridge, J., stopped the case before they had all been examined, but they proved who the real murderer was. Unfortunately, owing to the delay, he had escaped, and never was taken. So that the effect of the magistrates refusing to examine Bowen's witnesses was to cause the escape of the murderer, and the lengthened imprisonment of a man who was perfectly innocent of the crime.

(*n*) Per Lord Denman, C. J. *Reg. v. Smith*, 2 C. & K. 207.

(*o*) Per Lord Denman, C. J. *Ibid.*

(*p*) *Rex v. Mophew*, 2 M. & S. 602. The Court of K. B. allowed them to be read, on an indictment for perjury, by the consent of the defendant. *Anon.* 2 Clift. R. 199.



trial comes on before his departure, or after his return, the depositions cannot be read. (q)

An order for the examination of a witness resident in England, but unable from illness to attend the trial, cannot be made by the Court of Queen's Bench in a criminal prosecution, either by the common law authority of the court, or under the 1 Will. 4, c. 22. (r)

An order for examination of witnesses cannot be granted in a criminal case.

Where an indictment or information is exhibited in the King's Bench for an offence committed in India, the depositions of the witnesses may be obtained under the provisions of the 13 Geo. 3, c. 63, s. 40 and s. 44. This statute enacts, that the court may award a writ of mandamus to the judges of the courts in India, as the case may require, for the examination of witnesses, who are to be examined publicly in the court, upon oath administered according to the form of their several religions; and these depositions duly taken and returned, in the form prescribed by the Act, are to be allowed, and deemed as good and competent evidence, as if the witnesses had been sworn at the trial, and examined *virâ voce*. But where, on the examination of a witness under such a mandamus, original documents are produced, it is not sufficient to return copies of these documents with the examination of the witness, but the original documents themselves ought to be returned. (s)

Depositions in India.

In the case of a prosecution for an offence committed abroad by any person employed in the public service, the depositions of witnesses resident abroad may be obtained in the way pointed out by the 42 Geo. 3, c. 85.

In cases of offences committed by public servants abroad.

By the 17 & 18 Vict. c. 104, s. 267, all offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions, by any master, seaman, or apprentice, who is or within three months previously has been employed in any British ship, are to be deemed offences of the same nature, and are to be tried in the same manner and by the same courts as if such offences had been committed within the jurisdiction of the Admiralty of England.

Merchant Shipping Act, 17 & 18 Vict. c. 104.

By sec. 270, 'whenever in the course of any legal proceedings instituted in any part of Her Majesty's dominions before any judge or magistrate, or before any person authorized by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, then upon due proof, if such proceeding is instituted in the United Kingdom, that such witness cannot be found in that kingdom, or if in any British possession, that he cannot be found in the same possession, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in Her Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence subject to the following restrictions; (that is to say),

Depositions to be received in evidence when witness cannot be produced.

- (1.) If such deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom:

(q) Tidd. 362. 2 Phill. Ev. 94.

1 Dowl. P. C. 520.

(r) Reg. v. Upton, St. Leonard's, 10 Q. B. 827, and see Rex v. Lady Briscoe,

(s) Reg. v. Douglas, 1 C. & K. 670. Lord Denman, C. J.

- (2.) If such a deposition was made in any British possession, it shall not be admissible in any proceeding instituted in the same British possession :
- (3.) If the proceeding is criminal it shall not be admissible unless it was made in the presence of the person accused :

every deposition so made as aforesaid shall be authenticated by the Signature of the judge, magistrate, or consular officer, before whom the same is made ; and such judge, magistrate, or consular officer shall, when the same is taken in a criminal matter, certify, if the fact is so, and that the accused was present at the taking thereof, but it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition : and in any criminal proceeding such certificate as aforesaid shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified : but nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or Ordinance of the legislature of any colony, so far as regards such colony, or to interfere with the power of any colonial legislature to make such depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible.'

Depositions taken by the British Consul at Constantinople. Questions as to swearing the witnesses, translating their statements, giving the prisoner an opportunity to cross-examine, and striking out hearsay from the depositions.

The prisoner was indicted for larceny alleged to have been committed in February 1852, on board an English merchant vessel, lying in the Bosphorus, of which the prisoner was mate and the prosecutor captain. The principal evidence against the prisoner consisted of the depositions of witnesses still abroad ; and the captain proved that he made a charge against the prisoner of stealing his property before the British Consul at Constantinople. Each witness was sworn and examined by the Consul. Each witness was asked if he could speak English, and if he could not he was sworn in another language ; some were sworn in Greek, which the captain did not understand. They were all sworn on the same book, which was an English bible. The captain did not know the religion of any of the witnesses sworn in a foreign language. The Consul himself took the examinations, and translated each question and answer as it was given, and wrote the depositions in English ; and when the whole of each deposition was taken down it was read to the prisoner, and he was asked what he had to say ; and all he said was that he was not guilty. The captain could not be answerable whether the prisoner was asked whether he would ask any witness any question. He could not ask questions of the witnesses, because he did not understand the language, and he did not tell the Consul anything he wished to be asked of the witnesses. The depositions had been transmitted to the Board of Trade by the Consul, and by that Board to the attorney for the prosecution, who produced them, and the captain proved his signature to his information and examination, which were amongst the depositions. The depositions bore the official seal of the English Consul for Constantinople, and were certified to have been taken in the presence of the prisoner. It was objected, 1, that there was no proof that the witnesses were duly sworn ; 2, that there ought to have been an

interpreter sworn, and that the Consul could not act as interpreter as he had done, or the depositions ought to have been returned in the language of the witnesses; 3, that the depositions, not being in the language of the witnesses, were not in fact their depositions; 4, that the prisoner was not proved to have had a fair opportunity of cross-examination. For the Crown it was contended that the Merchant Shipping Act, 7 & 8 Vict. c. 112, s. 59, made depositions taken before a Consul abroad and certified under his official seal to be the depositions, and that they were taken in the presence of the accused, admissible in courts of criminal jurisdiction, 'in like manner as depositions taken before any justice of the peace in England,' (t) and that by the Mercantile Marine Act, 13 & 14 Vict. c. 93, s. 115, depositions of any witnesses taken before any consular officer in any criminal proceeding in the presence of the accused, and certified under his official seal to have been so taken, shall be admissible; and 'any deposition purporting to be so certified shall be deemed to have been so taken and certified as aforesaid, unless the contrary is proved.' (u) That the deposition so certified is the deposition as it stands on the face of the documents. The 13 & 9 Vict. c. 113, s. 1, was also cited. It was replied that the 13 & 14 Vict. c. 93, s. 115, was answered, because it was proved that the depositions were not properly taken; and that the 7 & 8 Vict. c. 112, s. 59, only made the depositions receivable where they would have been receivable if taken in England, and that these depositions would not have been so receivable. Greaves, Q. C., consulted Wightman, J., and they agreed that the proper course would be to admit the depositions, but to reserve the points. The depositions were then put in; but on examination they were found to contain a great deal of hearsay evidence. It was then objected that they were inadmissible on this ground; as it was impossible to separate the good and bad evidence, and the statute had made the depositions evidence, and there was no power to strike out any part of them. Greaves, Q. C., was of opinion that he might run his pen through all the objectionable parts of the depositions, (v) and direct the officer to read the remainder. (w)

(t) This Act is repealed by the 17 & 18 Vict. c. 120.

(u) This Act is also repealed by the 17 & 18 Vict. c. 120.

(v) See *Small v. Nairne*, 13 Q. B. 840. *Hutchinson v. Bernard*, 2 M. & Rob. 1. *Steinkeller v. Newton*, 9 C. & P. 313.

(w) *Reg. v. Russell*, MSS. C. S. G. S. C. 6 Cox, C. C. 60. On attempting to strike out the objectionable parts, it appeared so clear that the depositions had been taken by a person very little conversant with law, that Greaves, Q. C., told the counsel

for the prosecution that it was very difficult to presume that such a person had properly administered the oath or given the prisoner a proper opportunity of cross-examination; and, thereupon, the prosecution was abandoned. Wightman, J., thought that as the witnesses had taken the oath without objection, it might perhaps be presumed that they were properly sworn; but on the other points he entertained grave doubts. Greaves, Q. C., was strongly inclined to think that all the objections were good.



## CHAPTER THE FIFTH.

OF WITNESSES.—WHAT FACTS WITNESSES MAY DISCLOSE, AND WHAT ARE PRIVILEGED COMMUNICATIONS.—HOW WITNESSES ARE TO BE EXAMINED.—HOW THE CREDIT OF WITNESSES MAY BE IMPEACHED.—HOW MANY WITNESSES ARE SUFFICIENT.—HOW THE ATTENDANCE OF WITNESSES IS TO BE COMPELLED AND REMUNERATED.—OF ACCOMPLICES.—AND WHAT WITNESSES ARE COMPETENT TO GIVE EVIDENCE.

## SEC. I.

*Of Privileged Communications, and other Matters which a Witness may not Disclose.*

[902]  
Privileged  
communica-  
tions.

A WITNESS is to be sworn to speak the truth, the *whole* truth, and nothing but the truth. But this form of oath, absolute as it seems, must be taken with an implied reservation, that the witness is not to disclose any facts within his knowledge, which, by the law of the land, founded on considerations of justice, and of public policy, he is forbidden to make known. Of such a nature are professional communications between a client and his attorney, solicitor, or counsel, and matters connected with the government of the country. (*a*)

Between client  
and attorney,  
or counsel.

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The law attaches so sacred an inviolability to communications between a client and his legal advisers, that it will neither oblige nor suffer persons so employed to reveal any facts confidentially disclosed to them at any period of time, neither after their employment has ceased by dismissal or otherwise, nor after the cause in which they were engaged is entirely concluded. (*b*) The privilege of not being examined on such subjects is the privilege of the client, and not of the attorney or counsel; (*c*) and it never ceases. 'It is not sufficient,' said Mr. J. Buller, (*d*) 'to say that the cause

(*a*) It seems, however, to have once been thought necessary to vary the form of the oath on an occasion of this sort. In the case of *Spark v. Middleton*, 12 Vin. Abr. Ev. B. a, 4, p. 38. 1 Keb. 505, Mr. Aylmer having been counsel for the defendant, desired to be excused to be sworn on the general oath as witness for the plaintiff to give the whole truth in evidence, which the court, after some dispute, granted, and that he should only reveal such things as he either knew before he was counsel, or that came to his knowledge since by other persons; and the particulars to which he was to be sworn were particularly proposed, *viz.*, what he knew concerning the will in question? whether he knew anything of

his own knowledge?

(*b*) Lord Say and Seale's case, 10 Mod. 41. *Wilson v. Rastall*, 4 Term Rep. 753, in the judgment of Buller, J. *Sloman v. Herne*, 2 Esp. N. P. C. 695. *Rex v. Withers*, 2 Campb. 578. *Parkhurst v. Lowten*, 2 Swanst. 194, 221. *Richards v. Jackson*, 18 Ves. 474.

(*c*) 10 Mod. 41. Bull. N. P. 284. But if the client waive his privilege, the witness may be examined. *Merle v. More*, R. & M. N. P. C. 390. But he is not considered as waiving it by calling his attorney as a witness. 1 Phill. Ev. 163, citing *Waddron v. Ward*, Styl. 449. *Vailant v. Dodemead*, 2 Atk. 524.

(*d*) 4 T. R. 759. 'The first duty of an attorney is to keep the secrets of his cli-

is at an end; the mouth of such a person is shut for ever.' And it makes no difference that the client is not in any shape party to the cause before the court. (e)

The privilege is strictly confined to communications made to counsel, solicitors, and attorneys. (f) No others, however confidential, or whatever be the relation or employment of the party entrusted, are privileged. Therefore all other professional persons, whether physicians, surgeons, or clergymen, are bound to disclose the matters confided to them. (g) Thus where the prisoner, being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted, that confession was permitted by Buller, J., to be given in evidence on the trial, and the prisoner was convicted and executed. (h) So a confession to a Popish priest has been held not to be privileged. (i) So a

Rule confined to legal advisers.

ents,' per Gaselee, J. *Taylor v. Blacklow*, 3 B. N. C. 235. He ought, therefore, 'to consider his lips sealed with a sacred silence' as to all confidential communications, per Tindal, C. J., *ibid*. And see Petrie's case and *Madam du Barré's* case, cited 4 T. R. 756. An attorney, therefore, who without his client's consent discloses a confidential communication, is 'guilty of a gross breach of a great moral duty,' per Vaughan, J., *Taylor v. Blacklow*, and is liable to an action for any injury that may arise from such disclosure. *Ibid*. Or he may be punished by the court to which he belongs, admitted *arguendo*. *Ibid*. Two learned barons, however, in *Hibberd v. Knight*, 2 Exc. R. 11, expressed an opinion that if an attorney chose *voluntarily* to disclose a confidential communication, the court would receive the evidence. These observations were merely *obiter dicta*, and seem to have arisen from an erroneous impression of the facts in *Marston v. Downes*, 6 C. & P. 381. 1 A. & E. 31. The former of these reports correctly states what occurred on the trial, and certainly the attorney did not volunteer any statement of the contents of any deed; and upon the observations in *Hibberd v. Knight* being cited in *Newton v. Chaplin*, 10 C. B. 356, Maule, J., said, 'I presume that the learned barons did not mean that the attorney may in all cases betray his own client.' The matter, however, seems to be set at rest by *Cleave v. Jones*, 7 Exch. 421, as it was there held that an attorney could not give in evidence on his own behalf a confidential communication in an action against his client. In *Volant v. Soyer*, 13 C. B. 231, Jervis, C. J., stated a doubt whether the 14 & 15 Vict. c. 99, had not taken away the ground of objecting to the production of a document on the ground of its having been received professionally; but Maule, J., said that 'The right, which a client has always enjoyed, of being protected from a breach of professional confidence, remains the same. I think the protection still continues unimpaired, so far as regards the prohibition

to the attorney to give evidence of the contents of, or to produce documents belonging to, his client.'

(e) *Rex v. Withers*, 2 Campb. 578.

(f) 4 T. R. 758. *Rex v. Duchess of Kingston*, 11 St. Tr. 246.

(g) *Ibid*.

(h) *Rex v. Sparkes*, cited in *Du Barré v. Livette*, Peake R. 78, in which latter case Lord Kenyon said he should have paused before he admitted such evidence. But the point, that confessions to clergymen are not privileged, has been fully established by the recent decision in *Rex v. Gilham*, *ante*, p. 400. In *Broad v. Pitt*, 3 C. & P. 518, Best, C. J., after recognising this decision, said, 'I, for one, will never compel a clergyman to disclose communications made to him by a prisoner, but if he chooses to disclose them I shall receive them in evidence.' In *Reg. v. Griffin*, 6 Cox. C. C. 219, the chaplain of a workhouse was called to prove certain conversations he had had with the prisoner as to injuries she had inflicted on her child, for whose murder she was being tried, when he visited her as her spiritual adviser; Alderson, B., 'I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is because, without an unfettered means of communication, the client would not have any proper legal means of assistance. The same principle applies to a person deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule, but I think such evidence ought not to be given.' No case was cited.

(i) *Butler v. Moore*, M'Nall, Ev. 253, as cited 1 Phill. Ev. 165. In *Reg. v. Hay*, 2 F. & F. 4, Hill, J., committed a Roman Catholic priest for refusing to state from whom he received a stolen watch, which he stated he had received in connexion with the confessional. But the priest was not asked to disclose anything that had been stated to him in the confessional, and therefore no question arose as to that. Where a witness had taken an

Arbitrator.

[904]

Interpreter.

Agent.

Clerk.

Person consulted as an attorney, not being one.

banker, (*j*) steward, servant, or private friend, is bound to disclose a communication, however confidential. (*k*) And where a clerk to the commissioners of the property-tax was required to prove the defendant to be a collector, and he objected, because he had taken an oath of office not to disclose what he should learn as clerk concerning the property-tax, except with the consent of the commissioners, or by force of an Act of Parliament, it was held that he was bound to give his testimony, and that the evidence which a witness was called upon to give in a court of justice was to be considered as an implied exception in the Act. (*l*) An arbitrator cannot be permitted to disclose, in an action for a malicious holding to bail, what transpired before him upon the examination of the parties themselves, or on an inspection of the plaintiff's books, upon the principle that the parties themselves could not have been examined in the former cause, nor the plaintiff compelled to produce his books; (*m*) but he may be called to prove what matters were claimed before him on a reference: (*n*) he cannot, however, be admitted or called on to give evidence of any concessions made by one party during the reference for making his peace and getting rid of the suit, although, as to regular admissions by the parties, there is no objection to his testimony. (*o*) A person who acts as an interpreter, (*p*) or agent, (*q*) between the attorney and his client, or the attorney's clerk, (*r*) cannot be called on to reveal a confidential communication; for they stand precisely in the same situation as the attorney himself, and are considered as his organs. So a barrister's clerk cannot be called to prove his master's retainer. (*s*)

It has been held that a person who is consulted confidentially on the supposition of his being an attorney, when in fact he is not one, is compellable to answer. (*t*) And propositions which the attorney of one party has been professionally entrusted to make to another party may be proved by another witness who was present when they were delivered. (*u*) And an attorney may be called upon by a plaintiff to state a conversation in which the defendant proposed a compromise to the plaintiff, although the witness attended

eath to a prisoner that he would not reveal what the prisoner should tell him, Patteson, J., said, 'These oaths are very wrong and wicked, but still they are not binding, and every person, except counsel and attorneys, is compellable to reveal what they may have heard; and counsel and attorneys are only excepted because it is absolutely necessary, for the sake of their clients, that communications to them should be protected;' and admitted the confession. *Rex v. Shaw*, 6 C. & P. 372.

(*j*) *Lloyd v. Freshfield*, 2 C. & P. 329.

(*k*) *Vaillant v. Dodiemead*, 2 Atk. 524.

*Lord Falmouth v. Moss*, 11 Price, 455.

(*l*) *Lee v. Birrell*, 3 Campb. 337.

(*m*) *Habershon v. Troby*, 3 Esp. 38, by Lord Kenyon.

(*n*) *Martin v. Thornton*, 4 Esp. 181, by Lord Alvanley.

(*o*) *Slack v. Buchanan*, Peake N. P. C. 6. *Westlake v. Collard*, Bull. N. P. 236.

*Martin v. Thornton*, 4 Esp. 181. It is said in Bull. N. P. 284, that a trustee shall not be a witness to betray the trust; and

a case is cited, *Holt v. Tyrrel*, where the defendant pleaded to debt on bond the statute of buying and selling offices, and upon the trial a witness was called to give an account upon what occasion the bond was given, and Lord C. J. Holt refused to admit him, because he was privately entrusted by both parties to make the bargain, and to keep it secret. But this is contrary to the later authorities, and may be considered to have been overruled by the *Duchess of Kingston's* case, and *Wilson v. Rastall*, *ubi supra*.

(*p*) *Du Barré v. Livette*, Peake N. P. C. 78. S. C. 4 T. R. 756.

(*q*) *Parkins v. Hawkshaw*, 2 Stark. 239.

(*r*) *Taylor v. Forster*, 2 C. & P. 195. See *Webb v. Smith*, 1 C. & P. 337.

(*s*) *Foote v. Hayne*, R. & M. N. P. C. 165.

(*t*) *Fountain v. Young*, 6 Esp. 113.

(*u*) *Gainsford v. Grammar*, 2 Campb. 10.



on that occasion as attorney for the defendant. (c) So where the plaintiff and defendant went together to the plaintiff's attorney's office, and had a conversation in the presence of the attorney's clerk, it was held that this conversation was not a privileged communication, but might be proved by the clerk, and that a letter written by the clerk in consequence of instructions given by the defendant in the course of that interview was admissible, as that was an act done. (w) So where an act is done in pursuance of a bargain between two parties and in the presence of the attorneys of each of them, the communication made by one party to his attorney relating to that act in the presence of the other party and his attorney is not privileged. The defendant, in the presence of his attorney, and one Clark and his attorney, Vallance, signed a note, and it was held that Vallance might prove that the note was given by the defendant to Clark in consideration of his withdrawing all opposition to the defendant's passing his last examination as a bankrupt. (x) So a mere bargain with the other side in the presence of the opposite attorney is not a confidential communication. (y) And communications made to a person, by profession an attorney, but not employed as an attorney in the particular business which is the subject of inquiry, are not privileged, though they may have been made confidentially. (z)

Communications in the presence of both parties.

Attorney not consulted as such.

Where two parties employ the same attorney, a communication by one to him in his common capacity is not privileged, but may be used by the other. (a) And where a party employs an attorney who is also employed by the other side, the privilege is confined to such communications as are clearly made to him in the character of his own attorney. (b)

Where two parties employ the same attorney.

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(v) *Griffith v. Davies*, 5 B. & Ad. 502. And per Parke, J., 'This is not a confidential disclosure, but an open communication from one adversary to another, witnessed by the attorney of one party. In *Gainsford v. Grammar*, the Lord Chief Justice might properly reject the attorney's evidence of what his client said to him, but not his statement of what he himself afterwards said to the opposite party.'

(w) *Shore v. Bedford*, 5 M. & G. 271.

(x) *Weeks v. Argent*, 16 M. & W. 817.

(y) Per Parke, B., *ibid*.

(z) *Wilson v. Rastall*, 4 T. R. 753, 760, and see *post*, p. 516. In a trial at Nisi Prius at Westminster, an attorney who had drawn an agreement between a sheriff and his under-sheriff, being produced to prove a corrupt agreement between them, was not compelled to discover the matter, and per Holt, C. J., it seems to be the same law of a scrivener; and he cited a case where upon a covenant to convey as counsel shall advise, *et consilium non dedit advisamentum* being pleaded, conveyances made by the advice of a scrivener being tendered and refused, was allowed to be good evidence upon this issue; for he is a counsel to a man with whom he will advise, if he be instructed

and educated in the way of practice, otherwise of a gentleman, parson, &c., *Anonymous Skinn.* 404. And in *Turquand v. Knight*, 2 M. & W. 98, it appeared that Knight had applied to an attorney to procure him a loan of money, and it was contended that where an attorney was employed to raise money, that was not such an employment as brought him within the rule; and that here he was acting as a scrivener only. Lord Abinger, C. B., said, 'As to the point of this document being brought to him in the character of a scrivener, Lord Nottingham laid it down that he would not compel a scrivener to disclose the communications made to him.' *Harvey v. Clayton*, 2 Swanst. 221 n.

(a) *Baugh v. Cradocke*, 1 M. & Rob. 182, *Patteson, J. Cleve v. Powel*, 1 M. & Rob. 228, Lord Denman, C. J., saying, 'either party has a right to the disclosure.'

(b) *Perry v. Smith*, 9 M. & W. 681, per Parke, B., in which case it was held that the same attorney having been employed upon the sale of an estate by the vendor and purchaser, a communication from the purchaser to the attorney, asking him for time to pay the purchase money, was not privileged. See *Griffith v. Davies*, per Parke, J., *supra*, note (v).

What sort of communications between attorney and client are privileged.

It now remains to be considered what sort of communications made to an attorney, solicitor, or counsel by his client are entitled to protection. A very eminent writer on the Law of Evidence (*c*) has laid it down, that the privilege of the client is not confined to cases only where he has employed the attorney in a suit or cause, but extends to all such communications as are made by him to the attorney in his professional character and with reference to professional business. And this opinion has been confirmed by a case (*d*) where it was held that an attorney, to whom an application had been made to draw an assignment of goods, which he declined to do, could not be allowed to disclose that circumstance, a question having arisen whether an assignment subsequently drawn by another attorney, was fraudulent. And in that case Richardson, J., said, that if an attorney were to be consulted on the title to an estate, he would not be at liberty to disclose any information thus communicated to him to the prejudice of his client. And Sir J. Leach, V. C. in *Walker v. Wildman*, (*e*) considered the protection to extend to every communication made by the client to his counsel or attorney or solicitor for professional purposes. (*f*) And although Lord Tenterden, C.J., on several occasions, both before and since the case of *Cromack v. Heathcote*, expressed at Nisi Prius a contrary opinion, (*g*) yet it is now clearly settled that the privilege of professional confidence is not limited to cases in which a suit is in contemplation, (*h*) but that the client's privilege extends much beyond communications in respect of a suit. (*i*) Thus where it was proposed to ask an attorney whether a person had not applied to him to draw a conveyance, Parke, J., refused to allow the question to be asked, saying, 'I am of opinion that the privilege applies to all cases where the client applies to the attorney in his professional capacity, and an application to draw a deed is, I think, of that description.' (*j*)

The general rule as to where communications are privileged.

The rule was thus laid down by Lord Brougham, C. J., in *Greenough v. Gaskell*. (*k*) 'If touching matters which come within the ordinary scope of professional employment they receive a communication in their professional capacity, either from a client or on his account, and for his benefit in the transaction of his business, or which amounts to the same thing, if they commit to paper, in

(c) Phill. Ev. 7th ed. 143.

(d) *Cromack v. Heathcote*, 2 B. & B. 4.

(e) 6 Madd. 47.

(f) And from the cases of *Brard v. Ackerman*, 5 Esp. 120, and *Robson v. Kemp*, 5 Esp. 52, it appears that Lord Ellenborough, C. J., was of the same opinion.

(g) *Wadsworth v. Hamshaw*, 2 Brod. & Bing. 5, note (a). *Manning's Dig.* 374. *Williams v. Mundie*, R. & M. N. P. C. 34.

(h) Phill. Ev. 168.

(i) The opinion of Lord Chancellor Brougham, Tindal, C. J., Lord Lyndhurst, C.B., and Parke, B., in *Greenough v. Gaskell*, Mylne & K. 98, as stated 4 B. & Ad. 876, per Parke, B.

(j) *Doe d. Sheppard v. Harris*, 5 C. & P. 592. The learned Baron also held in the same case that the attorney could not

be asked whether the party had asked his advice for a lawful or for an unlawful purpose, saying, 'there is a great deal of difficulty in the witness's disclosing whether the conference between him and his client was for a lawful or unlawful purpose, without one being told what it was. It might be that the party asked if a particular thing could legally be done.' The learned Baron also said, that *Williams v. Mundie* was overruled by *Greenough v. Gaskell*. In *Bowman v. Norton*, 5 C. & P. 177, Tindal, C. J., held that a conversation between a client, who afterwards became bankrupt, and his attorney's clerk, on the subject of his affairs, was a privileged communication, and could not be given in evidence in an action by his assignees for the purpose of showing his motives.

(k) *Supra*.



the course of their employment on his behalf, matters which they knew only through their professional relation to their client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness.'

In another case, (*l*) Alderson, B., said, 'The rule seems to be correlative with that which governs the summary jurisdiction of the courts over attorneys. In *Ex parte Aithen*, (*m*) that rule is laid down thus: "Where an attorney is employed in a matter wholly unconnected with his professional character, the court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him; but where the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, there the court will exercise this jurisdiction." So where the communication made relates to a circumstance so connected with the employment as an attorney, that the character formed the ground of the communication, it is privileged from disclosure.' Thus communications made in relation to the sale and purchase of estates are protected; an attorney, therefore, who has been employed in the purchase and sale of estates, cannot be asked as to a communication made to him by the party who employed him. (*n*) So an attorney who, being resorted to by a borrower to raise money for him, peruses on the part of the proposed lender the abstracts of the borrower, is not allowed to give evidence concerning them. (*o*) But where a treaty had been entered into by B. with E. for the exchange of lands, and an abstract was handed by the attorney of E. to the attorney of B., and he compared it with the title deeds, and the attorney of B. on being called upon to produce the abstract stated that his client claimed to be entitled to the property under the contract of exchange, and that he held the abstract as part of the evidence of the contract, and had not applied to his client for leave to produce the abstract, but was ready to do so if the judge thought he ought, and the judge answered that there appeared no sufficient reason why he should not, it was held that the abstract was properly produced. (*p*)

An attorney is not bound to produce, or to answer any questions concerning the nature or contents of, a deed or other instrument

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The rule is correlative with that which governs the summary jurisdiction of the courts over attorneys.

On sale of estates.

Attorney not bound to produce or

(*l*) *Turquand v. Knight*, 2 M. & W. 98.

(*m*) 4 B. & Ald. 47. See also *Ex parte Yeatman*, 4 Dowl. P. R. 304.

(*n*) *Mynn v. Jolliffe*, 1 M. & Rob. 326, Littledale, J.

(*o*) *Doe d. Peter v. Watkins*, 3 Bingh. N. C. 421, and per Tindal, C. J., 'It would be of dangerous consequence if, where the same professional man is resorted to by lender and borrower, he is permitted to disclose the communications made to him on either side.' And see *Taylor v. Blacklow*, 3 Bing. N. C. 235.

(*p*) *Doe d. Lord Egremont v. Langdon*, 12 Q. B. 711. This case must not be taken to decide that the court held that the production of the abstract might have been compelled, as Lord Denman, C. J.,

observed, 'It cannot be said that the witness was in fact compelled to produce the document; he did not insist on the objection;' and the ground of the decision was thus stated: 'The abstract was produced by the solicitor for a gentleman who had proposed to exchange some property with Lord E., but which exchange had not been carried into effect, and who had, therefore, no title which could be affected by the production of it. Nor had the solicitor any instructions from any one not to produce it. He did not volunteer the production, but said he was ready to do so, if the judge thought that he ought to produce it. The judge thought there was no sufficient reason why he should not; and we are of the same opinion.'



state the contents of any document ;

except for the purpose of identification.

The privilege extends to all knowledge, however obtained.

Attorney not allowed to produce documents, &c., deposited with him by his client.

Doe v. Seaton.

intrusted to him professionally by his client ; and the judge has no right to look at the instrument to see if the objection to produce it or to disclose its contents be well founded or not ; for the mere statement of the attorney that he received the document from his client professionally is enough to protect it. (*q*) But where an attorney refused to produce a deed on the ground that it was one of his clients' title deeds, and his clients had instructed him not to produce it, the privilege was allowed ; but the judge directed him to produce the deed and permit a witness to read the indorsement on it, but not the deed itself, for the purpose of identification ; it was held that the judge did right, for the privilege is only not to produce the instrument for the purpose of disclosing its contents. (*r*)

A communication made to a solicitor, if confidential, is privileged in whatever form made ; if it would be privileged when communicated in words spoken or written, it will be privileged equally when conveyed by means of sight instead of words. (*s*) For the privilege extends to all knowledge that the attorney obtains, which he would not have obtained but for his being consulted professionally by his client. (*t*) Where, therefore, the attorney of a defendant, at the suggestion of his counsel in consultation, obtained a deed from the defendant, and in the presence of his counsel, and for their information ascertained its contents, it was held that he was not bound to state its contents. (*u*) So letters between a defendant and her country or town solicitors, and letters between her country and town solicitors, are privileged. (*v*) So is a letter by a defendant to his attorney, directing him to take counsel's opinion on a question in dispute. (*w*)

An attorney will not be allowed to produce a deed which has been deposited with him confidentially in his professional character ; and if the deed has been obtained out of his hands, for the purpose of being produced in evidence by another witness, it cannot be received. Thus a copy of a deed which had been obtained from one who had formerly been entrusted with the original in his professional character as an attorney, is not good secondary evidence against his client. (*x*) But this case has been doubted. (*y*)

(*q*) *Volant v. Soyer*, 13 C. B. 231.

(*r*) *Phelps v. Prew*, 3 E. & B. 430. Coleridge, J., said that the process of identification might at times involve a disclosure of the contents of the instrument ; and when it did it was objectionable. But in this case it did not involve any disclosure of the contents, and was like the case of disclosing a blot of red ink on the back of a deed.

(*s*) 1 Phill. Ev. 169, citing *Robson v. Kemp*, 5 Esp. R. 54, where it was held that an attorney could not give evidence as to the fact of the destruction of an instrument which he had been admitted in confidence to see destroyed. In *Wheatley v. Williams*, 1 M. & W. 533, it was held that an attorney is not compellable to state, when examined as a witness, whether a document shown to him by his client in the course of a professional interview was then in the same state as when produced on the trial, *e.g.*, whether it was then stamped or not ; and per

Lord Abinger, C.B., 'Suppose an attorney, when searching for a deed belonging to his client, found another deed which might operate to the client's prejudice, can it be said that he would be bound to produce it ? If, therefore, a document be exhibited to the attorney in pursuance of a confidential consultation with his client, all that appears on the face of such document is a part of the confidential communication.'

(*t*) Per Alderson, B., in *Wheatley v. Williams*, *supra*.

(*u*) *Davies v. Waters*, 9 M. & W. 608.

(*v*) *Reid v. Langlois*, 1 Mac. & Gord. 627. *Goodall v. Little*, 1 Sim. N. S. 155. And see *Penruddock v. Hammond*, 11 Beav. 59. *Blenkinsop v. Blenkinsop*, 10 Beav. 277, as to cases for counsel, &c.

(*w*) *Vent v. Pacey*, 4 Russ. 193.

(*x*) *Fisher v. Heming*, MS. 1 Phill. Ev. 170, Bayley, J. See also *Copeland v. Watts*, 1 Stark. N. P. C. 93.

(*y*) 'I have always doubted the cor-

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Where a vendor had a draft of conveyance made by his own attorney, from which the deeds were afterwards prepared, and the attorney was paid for this business by the vendor and purchaser in moieties by agreement, but the latter employed an attorney on his own part to look over the draft, which remained afterwards with the vendor's attorney; the Court of King's Bench held that such draft was confidentially deposited with the latter by the purchaser as well as the vendor, and could not be produced on a trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney. (z) And even if an attorney has on one occasion produced a deed entrusted to him by a client under the erroneous compulsion of one tribunal, he will not be bound to produce it before another tribunal. An attorney who had received a deed from his client had been compelled to produce it by commissioners of bankrupt, and had afterwards received it back from them under an undertaking to produce it again if required; but Tindal, C. J., held that the production of the deed had originally been improperly obtained from the witness by the commissioners, and that he might refuse to produce it in an action brought by the assignees of the bankrupt, under whose commission he had been compelled to produce it. (a) So where an attorney, attending under a subpœna *duces tecum*, stated that he had a deed in his custody as attorney, but that his clients had instructed him not to produce the deed, which was one of their title deeds, and he, therefore, refused to produce it, it was held that he was not bound to produce it. (b) So where upon an indictment for perjury alleged to have been committed on a trial in the County Court with reference to the writing on a paper then produced, an attorney was called under a subpœna *duces tecum* to produce such paper; he had been attorney for the prisoner in the County Court, and had received this paper from the prisoner for the purpose of conducting the case in the County Court as his attorney, and he claimed a lien on the paper for his costs; Coltman, J., held that the attorney's possession was the possession of the prisoner, and that he ought not to produce it. (c)

Nixon v.  
Mayoh.

Paper re-  
ceived for the  
purpose of a  
cause.

So on a prosecution for the forgery of a promissory note, an attorney who had acquired possession of the note in his professional character from the prisoner was not compelled or allowed to produce it, although subpœnaed so to do, and although he was not employed professionally for the prisoner at the trial, but was originally consulted about the note, for the purpose of suing the party upon it whose name was charged to be forged. (d) But

Smith's case.  
Forged note.

rectness of that ruling. Where an attorney intrusted confidentially with a document, communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?' per Parke, B., in *Lloyd v. Mostyn*, 10 M. & W. 478, where it was held that a copy examined with a bond, produced for the purpose of admission under a judge's order, was admissible, although the attorney who held the bond was not bound to produce it on the trial.

(z) *Doe d. Strode v. Seaton*, 2 A. & E. 171.

(a) *Nixon v. Mayoh*, 1 M. & Rob. 76.

(b) *Phelps v. Prew*, 3 E. & B. 431.

(c) *Reg. v. Hankins*, 2 C. & K. 823.

(d) *Rex v. Smith, cor. Holroyd, J.*, MS. 1 Phill. Ev. 171. In *Weeks v. Argent*, 16 M. & W. 817, Parke, B., said, 'All that *Rex v. Smith* decides is that the possession of the attorney for the prisoner was the possession of the prisoner, so that if the prisoner did not suffer him to produce it, secondary evidence of it would have been admissible for the purposes of criminal justice.'



Avery's case.  
Forged will.

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If a person applies to an attorney to advance him money on mortgage, and deposits a forged document with him as part of the title to the property, this is not a privileged communication.

this case has since been doubted. On an indictment for forging a will, a solicitor stated that he was applied to by the prisoner to act as his solicitor in raising some money: and that he was the solicitor of the prisoner in raising the money as well as of Williams in the advance of it: that the prisoner made an application to him; it was objected that this was a privileged communication, as the party was the solicitor for the prisoner; and the preceding case was relied upon. Patteson, J., 'I think that the case cited is not law, (e) and that the solicitor may be examined to show what was the transaction between the parties, and what led to that transaction; but I will reserve the point for the consideration of the judges, if I should hereafter think it necessary to do so.' The witness then stated that the prisoner proposed to mortgage some land, which had been left him by his aunt, and that the prisoner told him the title deeds had been burnt, but that he gave him a paper which he said was his aunt's will. It was again objected that, as the will had been delivered to the witness by the prisoner while he was attorney for the prisoner, he ought not to produce it; Patteson, J., 'I think he is bound to do it.' The will was produced and read, and it was the will alleged to be forged. (f)

Upon an indictment for forging a will, it appeared that the wife of the prisoner, by his direction, took a will purporting to be the will of W.W. (not the will in question, but another forged will) to Mr. Cadle, a solicitor, and asked if he could advance her husband some money upon mortgage of property under the will of her father, W.W. She left the will with Mr. C., who afterwards returned it to her husband, and communicated to him what had passed with his wife. Mr. C., while the will was in his possession, had made an exact copy of the will, and the prisoner had had notice to produce it, and, not producing it, the copy was tendered in evidence. Mr. C. said, that at the time the will was produced to him he was not acting as attorney of the prisoner, and did not charge for the interview, but if he had been acting as his attorney he should have made a charge; if he had found the security sufficient, he should have advanced the money; he was in no other way acting as the prisoner's solicitor. It was objected that the interview with the prisoner's wife was confidential, and that the conversation, which then took place, and the copy of the will, were not admissible; but the evidence was admitted. And, upon a case reserved, the judges held that the communication was not privileged. (g)

(e) In *Reg. v. Tylney and Tuffs*, 1 Den. C. C. 319, Patteson, J., said that this observation was too strong, and that *Rex v. Smith* and *Reg. v. Avery* were distinguishable.

(f) *Reg. v. Avery*, 8 C. & P. 596. The indictment charged the intent to be to defraud Williams and the attorney in different counts. The prisoner was convicted, but no sentence passed on the indictment for forgery, the prisoner being sentenced on an indictment charging the transaction as a false pretence. Mr. Phillips, vol. 1, p. 171, observes, that 'the distinction between this case and *Rex v. Smith* is obvious. In *Reg. v. Avery*, the prisoner deposited the instrument in the

hands of his solicitor, not with reference to a suit, nor with reference to any transaction resting solely between themselves, but for the purpose of a money transaction between himself and a third person, and to be disclosed and communicated to that person. In the case of *Rex v. Smith*, on the contrary, the instrument was deposited with the solicitor for the purpose of a suit in which he consulted him professionally as a matter in confidence between him and his solicitor, and solely for his own interest. The two cases, therefore, are not inconsistent, and the one does not overrule the other.'

(g) *Reg. v. Farley*, 1 Den. C. C. 197. 2 C. & K. 313. Pollock, C. B., in the



The prisoners were convicted of uttering a forged will. One of them having possessed himself of some title deeds from the house of the deceased, placed the forged will in the midst of them, and sent them to his attorney for the ostensible purpose of asking his advice upon the title deeds; but as Pollock, C. B., clearly thought, in order that the attorney might find the will among them, and act upon it, which he did by producing it on various occasions in the presence of such prisoner. It was afterwards produced before the magistrates at the preliminary investigation, and returned to the attorney. He was called upon the trial, and required to produce the will, which he did without objection, and handed it to the officer of the court. It was objected that it was a privileged communication, and ought not to be read; but Pollock, C. B., overruled the objection, and, upon a case reserved, the judges thought that the will was not put into the attorney's hands in professional confidence, and that the rule as to privileged communications between attorney and client did not apply. (*h*)

If a forged will be delivered to an attorney, in order that he may act upon it, this is not privileged.

So where on an indictment for forging the will of W. Tuffs, an attorney, who had possession of the will, stated that the prisoner had consulted him, on a previous occasion, about some professional matters, on which he had advised her, though he had never made any charge for that advice, and that she afterwards brought a paper (the forged will) with her, and he judged from what she said that she came to consult him as to that document; that it was for the purpose of enforcing that document: he said further, 'she did not come to consult me as to what her rights were, but that I might enforce her rights under it.' It was objected on behalf of the prisoner that the attorney could not be allowed to produce the document; but Coltman, J., considered the effect of the attorney's evidence to be, that the document was committed to him, not to be kept as a confidential deposit, but in order that it might be exhibited in court for the purpose of enforcing her rights, and thought it, under the circumstances, advisable to receive the document in evidence with a view of obtaining the opinion of the judges on the point; which was reserved, but no opinion was given upon it, as the case went off on another point. (*i*)

If a forged will is given to an attorney to enforce the party's rights, *semble* that it is not privileged.

Where on an indictment for forgery it appeared that the prisoner had charged one Britain with forgery, and had employed an attorney to conduct that prosecution, who had been served with a subpoena *duces tecum* to produce certain documents in this prosecution, and who, being called as a witness, stated that the documents

Attorney compelled to produce forged documents.

course of the argument, asked, 'Do you mean that a man may always apply to an attorney to discount a forged bill with impunity?'

(*h*) Reg. v. Hayward, 2 C. & K. 234. S. C., as Reg. v. Jones, 1 Den. C. C. 166.

(*i*) Reg. v. Tylney and Tuffs, 1 Den. C. C. 319. See *ante*, vol. 2, p. 783. Parke, B., observed, 'the expression "for the purpose of enforcing the document" seems ambiguous. Suppose it was delivered to the attorney for the express purpose of showing that the tenant in possession might give up the possession to the forger of the

will? Supposing, on the other hand, a man gives his title deeds to an attorney to enable him to bring an action of ejectment, he ought not, perhaps, to show them adversely to his client.' In the report of this case, 3 Cox, C. C. 160, Wilde, C. J., said, 'If title deeds are intrusted to an attorney as an attorney, can it be doubted that he is not at liberty to produce them?' Lord Denman, C. J., 'But if a forged and false instrument is given to an attorney, ought he not to take it to a magistrate?' Wilde, C. J., 'I apprehend the magistrate could not receive the statement.'

had come into his possession as attorney for the prosecution in *Reg. v. Brittain*, in which case he was retained by the prisoner as attorney for the prosecution. It was urged for the Crown that an attorney cannot refuse to produce documents deposited with him by a person charged with an offence in respect of such documents, otherwise justice might be defeated. Were the privilege here sought to be established granted, conviction might be impossible, by reason of the non-production of the forged document; and Willes, J., held that the documents must be produced. (j)

The preceding case occurred after the passing of the 24 & 25 Vict. c. 98, s. 46, by which any justice may issue a warrant to search for any forged instrument whatsoever; and, though no reference is reported to have been made in that case to that clause, it may possibly have influenced the decision; for as a forged instrument may be seized under that clause, it is difficult to see how an attorney can have such a possession of it as will privilege him from producing it. (k)

A very important question arises, where an attorney has been employed for an illegal purpose, whether any communication in furtherance of such purpose can be considered as privileged; and the authorities appear to be very strong that no privilege exists in such cases. (l)

(j) *Reg. v. Brown*, 9 Cox, C. C. 281. May 1862. The prisoner was undefended, no case was cited, and the report does not state what the documents were.

(k) See the clause and the note to it, *ante*, vol. 2, p. 846.

(l) In the great case of *Annesley v. The Earl of Anglesea*, 17 How. St. Tr. 1139, p. 1226 *et seq.*, it appeared that Giffard had been frequently employed as attorney for Lord Anglesea, but that for some time another firm had been his attorneys, and that on the 1st of May Annesley had shot a man, on whom an inquest was held on the 4th of May, and a verdict of murder found against Annesley, for which he was afterwards tried and acquitted (see *Rex v. Annesley*, 18 How. St. Tr. 1094), and that on the 2nd of May Lord Anglesea had sent for Giffard, and directed him to collect evidence, and to carry on the prosecution, and to follow the directions of the other attorneys, who had advised him not to appear in the prosecution for fear of its hurting him in the cause which was coming on between him and Annesley; and that Lord Anglesea, either then or afterwards, but it does not clearly appear when, told Giffard that he did not care if it cost him 10,000*l.* if he could get Annesley hanged, for then he should be easy in his title and estates, and he understood that it was his resolution to destroy him if he could. It was supposed at the time that Annesley intended to sue for the title and estates of Lord Anglesea, and this was to prevent it. Giffard conducted the prosecution. The question was, whether the statement as to the 10,000*l.* was pri-

vileged; for Annesley it was contended that it was not. Serjt. Tisdall said, 'If he is employed as an attorney in any unlawful and wicked act, his duty to the public obliges him to disclose it. No private obligations can dispense with that universal one, which lies on every member of society to discover every design which may be formed, contrary to the laws of society, to destroy the public welfare. For this reason, I apprehend that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, the obligation to the public must dispense with the private obligation to the client: but in this case the witness was not attorney to Lord Anglesea in any case relative to his testimony.' The court held that the statement was not privileged, and seem to have adopted the view urged by counsel. C. B. Bowes said, 'As this was in part a wicked secret, it ought not to have been concealed; though, if earlier disclosed, it might have been more for the credit of the witness.' Mounteney, B., after repeating the statement, said, 'Let us consider the doctrine, that such a declaration made by any person to his attorney ought not by that attorney to be proved. A man (without any natural call to it) promotes a prosecution against another for a capital offence—he is determined at all events to get him hanged—he retains an attorney to carry on the prosecution, and makes such a declaration to him as I have mentioned (the meaning and intention of which, if the attorney has common understanding about him, it is impossible

As to the effect of the 24 & 25 Vict. c. 98, s. 46.

Attorney employed for an illegal purpose.

In the case of *Rex v. Dixon* (*m*) it was held by Lord Mansfield, and the rest of the court, that an attorney, who had been served with a *subpœna duces tecum* out of the Crown Office to produce certain vouchers which his client, a Mr. Peach, had exhibited and relied upon before a Master in Chancery, and which subpœna had been served on the attorney in order to found a prosecution for forgery against his client, was not bound to produce these required vouchers. (*n*) A barrister cannot be called to prove what was stated by him on a motion before the court. (*o*) And the attorney-general, if questioned as to the reasons for filing an *ex officio* information, may refuse to answer. (*p*)

Counsel.  
Attorney-  
General.

he should mistake)—he happens to be too honest a man to engage in such an affair—he declines the prosecution—but he must never discover this declaration because he was retained as attorney. The prosecutor applies in the same manner to a second, a third, and so on, who still refuse, but are still to keep this inviolably secret; at last he finds an attorney wicked enough to carry this iniquitous scheme into execution, and after all none of these persons are to be admitted to prove this in order either to bring the guilty party to condign punishment, or to prevent the evil consequences of his crime with regard to civil property. Is this law? Is this reason? I think it is absolutely against both.’ In *Russell v. Jackson*, 9 Hare, 387, an attorney had been instructed to prepare a will by a testator to leave his property for the purpose of establishing a school for the education of children in the doctrines of socialism, and the attorney intimated doubts whether the law would permit such a disposition, and the testator then said that his two devisees knew his intentions, and, having confidence in them, he would leave his property to them, being satisfied that they would carry out his intentions; and the question was whether these instructions were privileged; and it was held that they were not; and V. C. Turner said, ‘Can it then be said that the communication should be protected, because it may lead to the disclosure of an illegal purpose? I think that it cannot; and that evidence which would otherwise be admissible cannot be rejected on such a ground. On the contrary, I am very much disposed to think that the existence of the illegal purpose would prevent any privilege attaching to the communication. Where a solicitor is party to a fraud, no privilege attaches to the communications with him on the subject, because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law.’ In Equity any person standing in the confidential relation of a clerk or servant may be prohibited, subject to certain exceptions, from disclosing any part of the transactions of which he so acquires a knowledge; and

in *Gartside v. Outram*, 26 Law J. Chanc. 113, the plaintiffs filed a bill for an injunction to restrain their former clerk from disclosing any of their transactions; the clerk, by his answer, stated that the plaintiffs carried on their business in a fraudulent manner, specifying the particulars, and filed interrogatories for the examination of the plaintiffs, containing questions as to the alleged fraudulent transactions; and it was held that the plaintiffs were bound to answer these interrogatories. Wood, V. C.: ‘The true doctrine is that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist.’ Having referred to *Reg. v. Avery*, *ante*, p. 510, and said that, ‘if there is a discrepancy of authority upon the subject, I much prefer the decision of Patteson, J.,’ Wood, V. C., next cited *Annesley v. the Earl of Anglesea*, and spoke of it as a case ‘in which the point is put so ably and clearly by the counsel in argument, that I adopt that argument as the best expression of my opinion,’ and then read Serjt. Tisdall’s argument, *supra*, and the parts of the judgments of C. B. Bowes and B. Mounteney, *supra*.

(*m*) 3 Burr. 1687, cited by Lord Ellenborough in *Amey v. Long*, 9 East, 485.

(*n*) See also *Laing v. Barclay*, 3 Stark. 38, where it was held by Abbott, C. J., that a solicitor under a commission of bankrupt was not bound to produce the proceedings under the commission in a collateral action, where the production might tend to the detriment of his clients; see also *Harris v. Hill*, 3 Stark. N. P. C. 140. S. C. 1 Dowl. & Ry. N. P. C. 17. *Rex v. Upper Boddington*, 8 Dowl. & Ry. 726.

(*o*) *Curry v. Walter*, 1 Esp. 456, *cor.* Eyre, C. J., who said it was at the option of counsel whether he would give his testimony or not. A court of equity will compel the production of a case submitted to counsel, but not his opinion on it. *Preston v. Carr*, 1 Younge and Jervis, 175.

(*p*) *Rex v. Horne*, 11 St. Tr. 283.



How far the privilege extends, and as to what facts an attorney may be examined.

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The privilege does not attach to everything which the client says to his attorney; the test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the attorney is employed; if it is necessary it becomes privileged, (*q*) but if it is not it may be disclosed. Thus an attorney may be examined like any other witness to a fact which he knew before his retainer, that is, before he was addressed in his professional character, (*r*) or where he has made himself a party to the transaction, (*s*) or where he is questioned to a collateral fact which he might have known without being intrusted as the attorney in the cause, (*t*) Thus he may prove his client's handwriting, though the knowledge was obtained from witnessing his execution of the bail bond in the action, (*u*) And he may be called to prove his client's identity, (*r*) And if he is a subscribing witness to a deed he may be examined concerning the execution, (*w*) Or if the question be about a rasure in a deed or will, he may be examined whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; (*x*) but he ought not to be permitted to discover any confessions which his client may have made to him on such head, (*y*) So if the attorney were present when his client was sworn to an answer in chancery, upon an indictment for perjury, he would be a witness to prove the fact of taking the oath, for it is a fact in his own knowledge, and no matter of secrecy committed to him by his client, (*z*) So the attorney of one of the parties may be examined as to the contents of a written notice which had been received by him in the course of a cause, requiring him to produce papers; (*a*) for the privilege only extends to confidential communications from the client, and not to those from collateral quarters, although made to him in consequence of his character as an attorney, (*b*) So an attorney

(*q*) *Per curiam* Gillard *v.* Bates, 6 M. & W. 547. There an attorney was sued for work and labour in issuing an execution, and the defence was that he was employed by B., and not by the defendant, and it was held that the plaintiff's agent, an attorney, might be asked whether the plaintiff had not said, on introducing B. to him, that he, the plaintiff, had been employed by B. to issue the execution in question, and that this was not a privileged communication.

(*r*) *Cuts v. Pickering*, 1 Vent. 197. Lord Say and Seale's case, 10 Mod. 41. 1 Phill. Ev. 166.

(*s*) *Duffin v. Smith, Peake*, N. P. C. 108. *Robson v. Kemp*, 5 Esp. 52.

(*t*) Bull. N. P. 284. 1 Phill. Ev. 175.

(*u*) *Hurd v. Moring*, 1 C. & P. 372, Abbott, C. J.

(*v*) *Studdy v. Saunders*, 2 Dow. & Ry. 347; but see *Parkins v. Hawkslaw*, 2 Stark. N. P. C. 239.

(*w*) *Doe v. Andrews*, Cowp. 846. *Robson v. Kemp*, 4 Esp. 235. S. C. 5 Esp. 52. *Weeks v. Argent*, 16 M. & W. 817. For if an attorney puts his name to an instrument as a witness, he makes himself thereby a public man, and is no longer clothed with the character of an

attorney: his signature binds him to disclose what passed at the execution of the instrument, but not what took place in the concoction and preparation of the deed: by Lord Ellenborough, 5 Esp. 54.

(*x*) But see *Wheatley v. Williams*, 1 M. & W. 533, ante, p. 508, note, where it was said that this passage must apply to a case where an attorney has his knowledge independently of any communication from his client.

(*y*) Bull. N. P. 284.

(*z*) Bull. N. P. 284, 285. But he is not bound to speak to the particulars of a bill of exchange intrusted to him by his client; for the existence of such a bill is not a mere fact, but consists of circumstances, which he came to be acquainted with from the delivery of the bill to him by his client. *Brard v. Ackerman*, by Lord Ellenborough, 5 Esp. 120.

(*a*) *Spencely v. Schulenburg*, 7 East, 357.

(*b*) So (*semble*) a letter written by an attorney to his client, and produced with the client's signature endorsed upon it, is evidence against the client. *Assignees of Meyer v. Sefton*, 2 Stark. N. P. C. 274. So an admission of a debt made by an at-

conducting a cause in court may be called as a witness by the opposite side, and asked who employs him, in order to show the real party, and so let in his declarations. (c) So an attorney may be called and asked whether he has not a particular document in his possession, in order to let in secondary evidence, if the document is not produced. (d) So an attorney who prepares deeds which are granted on a usurious consideration, may be called as a witness to prove the usury: for that does not come to his knowledge in the character of an attorney, he being as it were a party to the original transaction. (e) And where an action on a promissory note had been compromised by the defendant's paying part of the money and giving a warrant of attorney to confess judgment for the residue, and in the interval between the time when the warrant of attorney was given, and the time the money became due according to the defeasance thereof, the plaintiff told his attorney in the suit, that he was glad it was settled, for that he had not given consideration for the note, and he knew it was a lottery transaction; it was held, that the attorney was admissible to prove this conversation in an action to recover back the money. (f) The communication, said Lord Kenyon, was not made by the client in confidence as instructions for conducting his cause; on the contrary, the purpose in view had been already obtained, and what was said was in exultation to his attorney for having before deceived him as well as his adversary, and for having obtained his suit.

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Where a prisoner being in custody on a charge of forgery wrote a letter to a person, desiring him to ask Mr. G. or any other solicitor, whether the punishment of forging a bill is the same where the name of the parties are entirely fictitious, as where the names are those of real persons; it was held that this letter was not a privileged communication, as the relation of client and attorney did not exist between the prisoner and G. (g)

Brewer's case.

Foster had charged Brown before a magistrate with embezzlement, and had produced his day-book and cash-book, which were examined both by Brown's counsel and the magistrate, and no entry of the sum alleged to have been embezzled was found in them. Brown was remanded on bail, and at that time he had a key of the counting-house in which the books were kept. When brought again before the magistrate the day-book was again produced, when there was found in it, in the handwriting of Brown, an entry of the sum in question; and the charge was dismissed. Brown then brought an action against Foster for a malicious prosecution, and it was held that on the trial of that action, the counsel of Brown might be called to prove that the entry was not in the book on the first hearing before the magis-

If during a trial a document is produced by one party, the counsel or attorney of the opposite party may afterwards prove the state in which the document then was.

torney to the adverse party, by direction of his client, is not privileged. *Turner v. Railton*, 2 Esp. 474.

(c) *Levy v. Pope*, Moo. & Mal. 410, Parke, J.

(d) *Coates v. Birch*, 2 Q. B. 252. *Dwyer v. Collins*, 7 Exch. R. 639; though it appears that he obtained it from his client in the course of a communication with reference to the cause. *Bevan v. Waters*,

Moo. & Mal. 235, Best, C. J. So an attorney's clerk may be asked whether he has not received a particular paper from his client. *Eicke v. Nokes*, Moo. & Mal. 303, Lord Tenterden, C. J.

(e) *Duffin v. Smith*, Peake, N. P. C. 108, by Lord Kenyon.

(f) *Cobden v. Kendrick*, 4 T. R. 432.

(g) *Rex v. Brewer*, 6 C. & P. 363, Park, J. A. J.

trate : for the counsel of Brown did not acquire his knowledge of the contents of the book from his client ; and he was only called upon to say what he himself saw upon the document, not what was communicated to him by his client. (*h*)

If a document has been received confidentially, a person interested in it cannot compel its production.

The confidence does not cease by the attorney becoming interested.

An attorney cannot use a confidential communication on his own behalf.

Communications to obtain information as to facts.

Where in an action against the managing director of a projected railway company, by a shareholder, to recover his deposits on the ground of fraudulent misrepresentations and failure of consideration, an attorney, who had been served with a subpoena *duces tecum* to produce the minute-book of the company, declined to produce it, on the ground that he had received it, after the company had ceased to exist, from a member of the provisional committee, for the purpose of defending him in an action brought against him as such : it was held that he was not bound to produce it, although it was contended that the plaintiff was equally interested in the book with the person from whom the attorney received it. (*i*) It follows from this decision that, where an attorney holds a document for a client, he cannot be compelled to produce it by a person who has an equal interest in it with his client. So also confidential communications made by a party to his attorney or counsel do not cease to be privileged by the fact, that the attorney or counsel afterwards becomes interested as devisee of the property, to the title of which such communications related. (*j*)

Where in an action on a promissory note it appeared that the plaintiff, being employed by the defendant as her attorney, had written to ask her for information in order to assist him in preparing a case for the opinion of counsel ; it was held that he could not give in evidence an account of monies paid and received which had been sent to him in consequence of his letter, for the purpose of taking the case out of the Statute of Limitations. (*k*)

The privilege is also confined to communications to the attorney in his character of attorney ; and, therefore, a communication made to him, or question asked him by his client, not for the purpose of getting his *legal* advice, but to obtain information as to a matter of fact, is not privileged. As where a client asked his attorney whether he could safely attend a meeting of his creditors, called on the attorney's suggestions, and the attorney advised him to remain at his office for the present, and he accordingly remained there two hours to avoid being arrested : it was held that the attorney might prove all these facts, in order to show an act of bankruptcy, in an action by his client's assignees. (*l*) So in the case of *Annesley v. Lord Anglesea*, (*m*) it was held, that a conversation which passed between Lord A. and

(*h*) *Brown v. Foster*, 1 H. & N. 736.

(*i*) *Newton v. Chaplin*, 10 C. B. 356. Wilde, C. J., after consulting Colman, Maule, Cresswell, and Williams, Js. The question was argued before the court, but no express decision given on it. However, Maule, J., observed, 'A man has a document in his possession, the disclosure of which may utterly ruin him. For his necessary defence in another action, he confides it to his attorney. Is it to be said that the attorney is bound to produce it, because some other person whom

he, the attorney, does not represent, and has no connection with, has an interest in it?' 'The privilege of the person who delivered the book to the attorney, as to the book, was the same in the hands of the attorney as if he had kept the book in his own hands.'

(*j*) *Chant v. Brown*, 7 Hare, 79.

(*k*) *Cleave v. Jones*, 7 Exch. R. 421.

(*l*) *Bramwell v. Lucas*, 2 B. & C. 745.

(*m*) 9 St. Tr. 391, before the Barons of the Exchequer in Ireland, 1743.



his attorney twenty years ago, respecting the prosecution of the plaintiff for murder, was not privileged, since it was not matter of professional confidence.

If an attorney or counsel be called by his own client to give evidence, he is not privileged from cross-examination on the same matter as to which he was examined in chief, although it were a confidential communication made professionally; but the cross-examination must not extend beyond that matter. (n)

Cross-examination of an attorney.

There is another class of cases in which, though there is no professional confidence, yet parties are not compellable to give parol evidence of the contents of documents. Thus when a party refuses to produce a title deed, and is justified in so doing, he cannot be compelled to give parol evidence of its contents. Where therefore a person declined to produce a deed on the ground that he held it as trustee for the defendant, it was held that he was not compellable to state its contents. (o)

Title deeds.

Where a party refuses to produce a document, and is justified in so doing, he cannot be compelled to disclose its contents; for it would be perfectly illusory for the law to say that a party was justified in not producing a deed, but that he was compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happened to know the contents of the document, and would be only a roundabout way of getting from every man an opportunity of knowing the defects there might be in the deeds and titles of his estates. (p)

Where a party is justified in refusing to produce a document, he cannot be compelled to prove its contents.

With respect to the mode of determining the question whether the communication be privileged or not, 'in general it is the attorney who declines to give the evidence, on the ground of professional confidence. But it is competent for the client to take the objection, and call witnesses to prove the incompetency, and the judge is to determine the law arising from the facts.' (q) Where, therefore, it was proposed to put in a written account on the part of the plaintiff, it was held that the defendant was entitled to interpose, and put in evidence a letter of the plaintiff, and examine a witness to prove that the account was confidentially communicated by the defendant to the plaintiff as her attorney. (r)

How the question may be raised and decided.

There are, besides these professional communications, a number of cases of a particular description, in which, for reasons of public policy, information is not permitted to be disclosed. Courts of justice will not permit witnesses to be asked the names of those from whom they receive information as to frauds on the revenue. (s) And the rule of public policy which protects a witness from being asked such questions as would disclose the informer,

Informers.

(n) *Vaillant v. Dodemead*, 2 Atk. 524.

(o) *Davies v. Waters*, 9 M. & W.

608.

(p) *Davies v. Waters*, 9 M. & W. 608. Per *Alderson, B.* *Hibberd v. Knight*, 2 Exch. R. 11. *Marston v. Downes*, 6 C. & P. 381. 1 A. & E. 31.

(q) Per *Martin, B.*, *Cleave v. Jones*, 7 Exch. 421.

(r) *Cleave v. Jones*, *supra*, *Erle, J.*, at the trial, and sanctioned by the court above; and per *Rolfe, B.*, at the first

trial of the same cause. Hereford Sum. Ass. 1849. MSS. C. S. G.

(s) By *Dallas, C. J.*, in *Home v. Bentinck*, 2 Brod. & Bing. 162. *Hardy's case*, 24 How. St. Tr. 753. But where a person officiously interferes to inform any of the constituted authorities of alleged abuses, the communication is not privileged; and, if untrue, may be considered malicious and actionable. *Robinson v. May*, 2 Smith, 3.

if he be a third person, equally applies to questions which would disclose whether the witness is himself the informer. Therefore a witness for the Crown in a revenue prosecution cannot be asked in cross-examination, 'Did you give the information?' (*t*) In all the trials for high treason of late years, the same course has been adopted; and if parties were willing to disclose the sources of their information, they would not be suffered to do it by the judges. (*u*) 'If the name of an informer,' said Buller, J., in *Hardy's case*, 'were to be disclosed, no man would make a discovery, and public justice would be defeated.' And this privilege not only protects the actual informer himself, but those questions, which tend to the discovery of the channels by which the disclosure was made to the officers of justice, are not permitted to be asked. Thus a person who has been employed to collect secret information for the executive government, (*v*) or for the service of the police, is not allowed to reveal the name of his employer, or the nature of the connection between them; (*w*) or the names of any persons to whom he has communicated his information for the purpose of its being transmitted, (*x*) whether those persons were magistrates, or concerned in the administration of government, or were merely the channel through which information was conveyed to government. (*y*)

Agent of government or police.  
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The rule does not apply to ordinary prosecutions.

In the *A. G. v. Briant*, (*z*) Pollock, C. B., during the argument said, 'In ordinary prosecutions the name of the sovereign is used; but it may be used by the prosecutor; and probably the rule does not apply at all to such cases.' And where on an indictment for administering corrosive sublimate with intent to murder, it appeared that some communication had been made to the police, on which they searched a privy used only by the prisoner, and found in the soil a phial containing corrosive sublimate, and on the trial the policeman was asked from whom he had received the information, and he stated that all the police had received printed instructions, one of which forbade them to name persons from whom any information was received; and he therefore refused to say who were his informants unless ordered to do so by his superintendent. Cockburn, C. J., ordered him to answer the question, and he answered that he had it from two girls, who were not called for the prosecution. (*a*)

Official communications.

Upon the same ground the attorney-general of Upper Canada was not allowed to be asked as to the nature of a communication made by him to the governor of the province. (*b*) So the orders given by the governor of a foreign colony to a military officer under his command ought not to be produced. (*c*) So Abbott,

(*t*) *A. G. v. Briant*, 15 M. & W. 169.

(*u*) 2 Brod. & Bing. 162.

(*v*) A shorthand writer sent to Ireland by the government. *Reg. v. O'Connell*, 1 Cox, C. C. 403.

(*w*) 24 How. St. Tr. 753. 1 Phill. Ev. 178.

(*x*) 24 How. St. Tr. 811.

(*y*) By Abbott, J., in *Rex v. Watson*, 2 Stark. 136. *Stone's case*, as cited by Lord Ellenborough, C. J., *ibid*.

(*z*) *Supra*.

(*a*) *Reg. v. Richardson*, 3 F. & F. 693.

Cockburn, C. J., pointed out that it was most material to the ends of justice that the persons should be named, as they could have stated how it was that they came to know that the bottle was where it was found, and perhaps could have given some clue as to the person who put it there.

(*b*) *Wyatt v. Gore*, Holt, N. P. C. 299, ruled by Gibbs, C. J. 1 Phill. Ev. 181.

(*c*) *Cooke v. Maxwell*, 2 Stark. N.P.C. 185.

C. J., refused to admit in evidence the report of a military court of inquiry, in an action of libel by an officer, respecting whose conduct the court had been appointed to inquire ; and his decision was confirmed on error in the Exchequer Chamber. (d) And Lord Ellenborough, C. J., would not permit the contents of a letter, written by an agent of government to Lord Liverpool, then secretary of state, or his lordship's answer, to be produced as evidence. (e) In *Watson's case*, an officer of the Tower of London was not allowed to prove that a plan of the Tower, produced by the defendant, was accurate. (f)

Questions contrary to state policy.

But a letter written by a private individual to a public officer (the chief secretary of the postmaster-general) complaining of the misconduct of a person under him, does not fall within the preceding cases. They were all cases of communication made by and between ministers and officers of government, and in the course of the discharge of a public duty by the person making the communication. Here the letter was written by a private individual, having no public duty in writing it. (g)

Letter by a private person.

The question whether the production of a document would be injurious to the public service must be determined, not by the judge, but by the head of the department having the custody of the paper ; and if he attends and states that in his opinion the production of the document would be injurious to the public service, the judge ought not to compel the production of it. If indeed the head of the department does not attend personally to say that the production will be injurious, but sends the document to be produced or not as the judge may think proper, or sends a subordinate with the document with instructions to object, but nothing more, the case may be different. (h)

Who is to determine whether a document should be produced.

In the *case of the Seven Bishops*, the clerk of the privy council was compelled to state what passed in the Council Chamber, and even what was said by the King himself, although the counsel for the Crown objected to it. (i) And the same evidence was allowed in *Lord Strafford's case*. (j) But in *Lager's case*, (k) it seems to have been considered that the minutes taken before the privy council were not to be divulged ; and the two other cases above cited were decided under the strong feelings which the circumstances of the times had produced ; and the latter in particular has been considered as a very unwarrantable departure from law and justice. (l)

Transactions of privy council.

A clerk attending upon a grand jury shall not be compelled to reveal that which was given them in evidence ; (m) and the

Grand jury.

(d) *Home v. Lord E. C. Bentinck*, 2 Brod. & Bing. 130.

(e) *Anderson v. Hamilton* (n.), 2 Brod. & Bing. 156.

(f) 2 Stark. 148.

(g) *Blake v. Pilfold*, 1 M. & Rob. 198, Taunton, J.

(h) *Beatson v. Skene*, 5 H. & N. 838. *Martin, B., dissentiente* : he thought that whenever the judge is satisfied that the document may be made public without prejudice to the public service, the judge ought to compel its production, notwithstanding the reluctance of the head

of the department to produce it. In *Dickson v. the Earl of Wilton*, 1 F. & F. 419, where a clerk from the War Office was called to produce a letter written by a commanding officer of a regiment to his immediate superior, but submitted on behalf of the secretary of war whether it ought to be produced, Lord Campbell, C. J., held that it ought.

(i) 4 St. Tr. 346.

(j) 1 St. Tr. 723.

(k) 6 St. Tr. 288.

(l) 1 Phill. Ev. 182.

(m) 12 Vin. Abr. Evidence B., a, 5.



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jurors themselves are bound by oath not to disclose what passes before them; but it has been held that a grand jurymen may be called to prove who was the prosecutor of an indictment; for it is a question of fact, the disclosure of which does not infringe on his oath. (*n*) But where the grand jury returned a bill of indictment containing ten counts for forging and uttering the acceptance of a bill of exchange, with an indorsement, 'a true bill on both counts.' Patteson, J., would not allow one of the grand jury to be called as a witness, after the prisoner's trial had commenced, and after the grand jury had been discharged, to explain their finding. (*o*) And the Court of King's Bench have refused to receive an affidavit from a grand jurymen as to the number of grand jurors who concurred in finding a bill. (*p*)

Evidence before the grand jury.

But where a gentleman of the grand jury heard a witness swear in court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury; and he immediately communicated the circumstance to the judge, who, upon consulting the judge in the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed; and the witness was committed for perjury, to be tried upon the testimony of the gentlemen of the grand jury. It was held that the object of this concealment was only to prevent the testimony produced before them from being contradicted by subornation of perjury on the part of the persons against whom bills were found. This was a privilege which might be waived by the Crown. (*q*) And so where the prisoner was indicted for perjury in evidence given before the grand jury on a bill of indictment, a police constable, who was in the grand-jury room at the time the evidence was given, was called to prove the evidence of the prisoner, and it was urged that one of the grand jury would not be allowed to give the evidence, and that if this witness were allowed to do so, it would be doing that indirectly which could not be done directly; Tindal, C. J., held that the evidence might be given, as it was for the purposes of public justice. (*r*)

(*n*) *Sykes v. Dunbar*, Selw. N. P. 1059, per Kenyon, C. J.

(*o*) *Reg. v. Cooke*, 8 C. & P. 582.

(*p*) *Rex v. Marsh*, 6 A. & E. 236.

(*q*) *Christian's Note*, 4 Bl. Com. 126.

There appears to be very little weight in the reason assigned for the concealment even before the Prisoners' Counsel Bill passed, because the prisoner had in far the greater number of cases heard the evidence of the witnesses before the magistrate, and there is still less weight now, since the prisoner is entitled to copies of the depositions. And the oath itself seems not to apply to the facts proved before the grand jury; as far as regards this subject, it is 'the King's counsel, your fellows' and your own, you shall keep secret.' 4 Chitt. Cr. L. 183. C. S. G.

(*r*) *Reg. v. Hughes*, 1 C. & K. 519. In 2 Rolle Abr. 77 (F.) 1, we find 'if a man empannelled and sworn on the Grand Inquest discover to strangers the evidence given to him and the rest of the jurors

for the King, this is an offence punishable by fine and imprisonment on an indictment. Mich. 15, Ja. B. R. in *Smithe & Hill's case* admit. And the clerks of the Crown Office said that this is usual.' In 27 Ass. pl. 63, a grand jurymen was indicted as a felon for discovering what took place before the grand jury; but it was said that some justices held that this was treason; he was arraigned, however, for felony only, and acquitted: and a quære is added as to what the judgment would have been if he had been convicted. In the *Poulterers' case*, 9 Rep. 55 b, the judges heard the evidence given to the grand jury openly in court. In the *Earl of Shaftesbury's case*, 3 Llrg. St. Tr. 417, on a bill of indictment for high treason the evidence was given in public before the grand jury, who doubted as to the legality of the proceeding; but *Pemberton, C. J.*, and *North, C. J.*, both declared that it had always been the practice to examine the witnesses publicly

In *Watson's case*, (s) a witness was questioned by the counsel for the prisoner as to his having produced and read a certain writing before the grand jury, and Lord Ellenborough, C. J., said, 'He had considerable doubt upon the subject; he remembered a case in which a witness was questioned as to what passed before the grand jury, and though it was a matter of considerable importance, he was permitted to answer.' But it has since been held that a witness for the prosecution in a case of felony may be asked on cross-examination whether he has not stated certain facts before the grand jury, and that the witness is bound to answer the question. (t)

A witness may be asked what he said before the grand jury.

A witness was not allowed by Lord Ellenborough to be asked as to the expressions or arguments which a member of the House of Commons had made use of in the House; for, said his lordship, it would be a breach of duty in the witness (who was a member himself), and a breach of his oath, to reveal the councils of the nation; (u) but as to the fact of the plaintiff's having taken part in the debate, he was bound to answer. (v) So a member may prove who acted as speaker on a particular occasion. (w)

House of Commons.

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In 1818 the following resolutions were passed by the House of Commons: 'Resolved, *nemine contradicente*, that all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House in respect of anything that may be said by them in their evidence. Resolved, *nemine contradicente*, that no clerk or officer of this House, or shorthand writer employed to take minutes of evidence before this House, or any committee thereof, do give evidence elsewhere in respect of any proceeding or examination had at the bar or before any committee of this House, without the special leave of the House.' (x)

Since these resolutions it has been held that a member of the House who acts as a teller on a division is not an officer of the House; and if a member be asked how another member voted on a particular occasion, he will not be compelled to answer if he decline doing so, and have not the leave of the House to give evidence. (y)

before the grand jury whenever it had been requested by those who prosecuted for the King. This practice seems strongly to show that any person not a grand juror is competent to prove what he has heard a witness state before the grand jury; for it cannot be doubted that any of the public present in court when the grand jury heard the evidence openly might prove what he heard. *Shaftesbury's case* is said to have been the last instance of such a procedure. 4 Bl. Com. 302, Edit. Chr.

(s) 32 How. St. Tr. 107.

(t) Reg. v. Gibson, C. & Mars. 672, Parke, B. It has recently been held that when the grand jury have found a bill, the judges before whom the case comes on to be tried ought not to inquire whether the witnesses were properly sworn before they went before the grand jury, and it seems that an improper mode of

swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge merely. Reg. v. Russell, C. & Mars. 247. Gurney, B., and Wightman, J.; and Wightman, J., added, that Lord Denman, C. J., and himself had decided the same point the same way on the Northern Circuit.

(u) Plunkett v. Cobbett, 5 Esp. 137. 29 How. St. Tr. 71, 72.

(v) 5 Esp. 137.

(w) Chubb v. Salomons, 3 C. & K. 75. Pollock, C. B.

(x) See 2 C. & K. 483. During the recess it has been the constant practice of the Speaker to grant such leave on the application of the parties to a suit. May's Law of Parl. 314.

(y) Chubb v. Salomons, 3 C. & K. 75. Pollock, C. B., after consulting the other Barons.

## SEC. II.

*How Witnesses ought to be examined, and what Questions they may be Asked, and compelled to Answer.*

BEFORE a witness is examined, he must be sworn in open court. The proper method of administering the oath, and the objections which may be made previous to the administration of it, will be hereafter considered. (a) And the proper time and mode of objecting to the competency of a witness, whether on the *voir dire*, or at a later stage of the trial, will be discussed in the last section of this chapter. (b)

Examination  
in chief.  
Leading  
questions.

After a witness has been regularly sworn, the party who has called him proceeds to examine him in chief; respecting which examination the most important rule is, that leading questions must not be put to the witness; that is, questions which, being material to any of the points of the issue, plainly suggest to him the answer he is expected to make. But this objection is not allowed to be applied if the question is merely introductory, and one which, if answered by *Yes* or *No*, would not be conclusive on any of the points of the issue; for it is necessary to a certain extent to lead the mind of the witness to the subject of the inquiry. (c)

What are not  
leading ques-  
tions.

Thus in an action of assumpsit against two, in order to prove that the defendants were partners, the first witness was asked whether one of them had interfered in the business of the other. And upon this question being objected to as leading, Lord Ellenborough ruled that it might properly be asked. (d) An affirmative answer to this question would not have been conclusive, for the defendant might have interfered, without making himself a partner. So where the witness called to prove the partnership of the plaintiffs could not recollect the names of the component members of the firm, so as to repeat them without suggestion, but said he might possibly recognise them, if suggested to him; Lord Ellenborough (alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names), ruled, that there was no objection to asking the witness whether certain specified persons were members of the firm. (e) Upon the trial of *De Berenger* and others, before Lord Ellenborough, at Guildhall, for a conspiracy, it became necessary for a witness (a post-boy, who had been employed to drive one of the actors in the fraud) to identify *De Berenger* with that person; and Lord Ellenborough held, that for this purpose the counsel for the prosecution might point out *De Berenger* to the witness, and ask him whether he was the person. (f) So in *Rex v. Watson*, (g) tried at bar, upon its becoming necessary to identify three of the prisoners, it was objected, that the attention of the witness was too directly pointed to them; but the court held, that the counsel for the prosecution

Pointing out  
prisoners.

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(a) *Post*, p. 614.

(b) *Post*, p. 635.

(c) *Nicholls v. Dowding*, 1 Stark. N.P.C.

81.

(d) 1 Stark. N. P. C. 81.

(e) *Acerro v. Petroni*, 1 Stark. N. P. C. 100.

(f) 1 Stark. Ev. p. 167.

(g) Stark. N. P. C. 128.



might ask in the most direct terms, whether any of the prisoners was the person meant and described by the witness. So where the plaintiff's son, being called as a witness for his father, was cross-examined as to the contents of a letter received by him from the plaintiff, which he swore had been lost, and mentioned some particular expressions as part of its contents; and witnesses were called on the part of the defendant to speak to the contents of the same letter; Lord Ellenborough ruled that the defendant's counsel might ask one of them, who had first exhausted his memory by stating all he recollected of the letter, whether it contained the particular expressions sworn to by the plaintiff's son; for otherwise, said his lordship, it would be impossible ever to come to a direct contradiction. (*h*)

When, upon cross-examination, a witness has denied having used particular expressions, or having made a particular statement to A. B., who is afterwards called on the part of the adverse party, for the purpose of contradicting the first witness, by proving that he actually did speak the words, or make the statement to him, it is very usual in practice for the counsel of the adverse party, in examining A. B. in chief as his own witness, to ask him, in the first instance, whether the former witness, in conversing with him, said so and so, or made such and such a statement. And accordingly, where a witness of the plaintiff's, in cross-examination, had been asked as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and he had denied having used them; Abbott, C. J., held, that the defendant's counsel, having called a person to prove that the former witness had used such expressions, was entitled to read to his own witness the particular words from his brief. (*i*) However, a very able writer (*j*) has with great force endeavoured to show, that leading questions under such circumstances are irregular.

Leading in chief to contradict former witness of adverse party.

But this rule does not apply to conversations which are evidence themselves. A witness who was present at the time of the apprehension of the plaintiff by the defendant, was asked whether he had not used certain expressions in a conversation which then took place between the plaintiff and defendant, which he denied; and Erskine, J., held that a person who was called to prove that the witness had said what he had denied could not be examined by the counsel reading from his brief the very words which the witness had so denied having used, but that the examination must proceed in the usual way by asking what had passed. (*k*) Where one witness has given an account of what a prisoner has said on a particular occasion, and another is called for the prisoner to give a different account, the proper course is to call upon him to give his version of the matter; and when he has done so, then to ask him whether this or that expression has been used; for this is not like the case of a proposed contradiction, where a witness has denied that certain specific words were used. (*l*)

Where not allowable.

If a witness should appear to be in the interest of the opposite

Leading an

(*h*) *Courteen v. Touse*, 1 Campb. 43.  
(*i*) *Edmonds v. Walter*, 3 Stark. N. P. C. 7.  
(*j*) 2 Phill. Ev. 404, 405. The practice, however, is perfectly well settled as stated in the text. C. S. G., and see 1

*Stark. Ev.* 169, 170.  
(*k*) *Hallett v. Cousens*, 2 M. & Rob. 238.  
(*l*) *Reg. v. Fussell*, 3 Cox, C. C. 291. *Wilde, C. J., Maule, J., and Parke, B.*

adverse witness.

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party, or unwilling to give evidence, the court may deem it right to relax the rule against leading questions, and allow the examination in chief to assume something of the form of a cross-examination. It is entirely in the discretion of the judge to determine how far he will allow the examination in chief to be by leading questions. (*m*) And where an issue had been directed by the Court of Chancery, with power to examine the parties, Best, C. J., held that the defendant stood in a situation which of necessity made him adverse to the plaintiff, by whom he was called, and that the counsel for the plaintiff might, as a matter of right, cross-examine him. (*n*) But in general, the fact of a witness being an unwilling or adverse witness is to be ascertained by the nature of his evidence, his manner of answering, and demeanour, before the unrestricted power of leading can be given; it is not enough, for instance, in a prosecution, that the witness is intimate with the prisoner, or that he has been informed against by the prosecutor, to justify the counsel in beginning at once with the cross-examination. (*o*)

Cross-examination.

After the examination in chief is closed, the other party is at liberty to proceed to cross-examination, without regard generally to the rule restricting examinations in chief in respect to leading questions.

Leading questions in cross-examination.

If the witness betrays a zeal against the cross-examining party, or shows an unwillingness to speak fairly and impartially, he cannot, it should seem, be led too much. (*p*) But where the witness on the other hand discovers an anxiety to serve the cross-examining party, although the courts do not usually exclude the counsel, on cross-examination, from putting leading questions, it is obvious that evidence so obtained is very unsatisfactory, and is open to much observation. (*q*) And, although the witness may be led on cross-examination to bring him directly to the point as to the answer, yet if he has betrayed an inclination to lean, and be favourable to the cross-examining party, it is not allowable to go the length of putting into the witness's mouth the very words which he is to echo back. (*r*) But the practice has generally been to put leading questions in cross-examination to a witness, whether willing or ad-

(*m*) 2 Phill. Ev. 403. In *Bastin v. Carew*, R. & M. N. P. R. 127, Abbott, C. J., allowed the cross-examination of an adverse witness, and said, 'I mean to decide this, and no further—that in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice.' Reg. v. *Chapman*, 8 C. & P. 558, Lord Abinger, C. B. Reg. v. *Murphy*, 8 C. & P. 297, Coleridge, J.

(*n*) *Clarke v. Saffery*, R. & M. N. P. R. 126.

(*o*) 2 Phill. Ev. 404, citing Reg. v. *Ball*, 8 C. & P. 745, where a witness called on the part of the prosecution contradicted the prosecutor as to the fact of the prisoner having been at her house on the night when the offence was committed, and it appeared that she was intimately acquainted with the prisoner, and that the prosecutor had informed against her

for keeping her beer-house open at improper hours; and on its being submitted that these facts raised such an inference of hostility towards the prosecutor, and of bias in favour of the prisoner, as to entitle the counsel for the prosecution to cross-examine her; Erskine, J., said, 'I think that the situation in which this witness stands towards either party does not give the party calling the witness a right to cross-examine her, unless her evidence was of itself of such a nature as to make it appear that she was an unwilling witness.'

(*p*) 2 Phill. Ev. 406.

(*q*) Mr. Starkie, in his *Treatise on Evidence*, vol. 1, p. 197, mentions that he has heard Lord Tenterden express himself to this effect more than once.

(*r*) By Buller, J., in *Hardy's case*, 24 How. St. Tr. 755, referring to a rule laid down on the day before by Eyre, C. J., to the same effect.

verse : and where a counsel was putting leading questions in the usual way to a witness who appeared favourable to the side of the counsel who was cross-examining him, and this was objected to; Alderson, B., said, 'I apprehend that you may put a leading question to an unwilling witness on the examination in chief at the discretion of the judge; but you may always put a leading question in cross-examination, whether a witness be unwilling or not.' (*s*)

A witness cannot be asked, upon cross-examination, questions which are not in any way relevant to the matters in issue; (*t*) neither is a question allowed to be asked, which, if answered affirmatively, would be wholly irrelevant to the issue, for the purpose of discrediting the witness if he answers in the negative, by calling other witnesses to disprove what he says; (*u*) but this subject will perhaps be more conveniently discussed in a subsequent section, (*v*) concerning the modes of impeaching the credit of a witness; (*w*) in which place will also be considered the obligation of a witness to answer questions tending to subject him to a criminal prosecution, or degrading to his character. It is, however, proper to mention in this place how far a witness is compellable to answer a question, whereby he may subject himself to a civil action, or charge himself with a debt. Considerable doubts had been entertained upon this subject, before the 46 Geo. 3, c. 37; for the settlement of which it was thereby declared and enacted, that a witness cannot by law refuse to answer any question relevant to the matter in issue (the answering of which has no *tendency* to expose him to a penalty or forfeiture of any nature whatsoever) by reason only, and on the sole ground that the answering such questions may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his Majesty, or any other persons. (*x*) This statute, however, did not affect the right which the parties to a suit had of declining to give evidence for the opposite party: and, therefore, upon an appeal, a rated inhabitant of the appellant parish (being considered a party to the appeal) could not be compelled, even since the statute, to give evidence when called upon by the respondents. (*y*) And the witness is still privileged from answering any question, the answer to which might subject him to a forfeiture of his estate; for the statute implies, that a witness may legally refuse to answer a question which has a tendency to expose him to a forfeiture of any nature whatsoever. (*z*)

Counsel upon cross-examination cannot assume that the witness      Assumptions

(*s*) *Parkin v. Moon*, 7 C. & P. 408.

(*t*) A cross-examination as to a fact otherwise irrelevant, is not warranted by the circumstance that the adverse counsel opened it, without any attempt at proof. *Lucas v. Novosilieki*, 1 Esp. N. P. C. 296.

(*u*) *Post*, p. 559.

(*v*) Sec. 3.

(*w*) *Post*, p. 539.

(*x*) There is a distinction between the obligation of a witness, since this statute, to answer questions, though they may subject him to civil suits; and his obligation to produce writings, &c., under a

*subpœna duces tecum*. For if a *subpœna duces tecum* is served, the party must bring his deeds into court in obedience to the *subpœna*, although, if he states that they are his title deeds, no judge will ever compel him to produce them. *Pickering v. Noyes*, 1 B. & C. 263.

(*y*) *Rex v. Woburn*, 10 East, 395. But this decision was before the 54 Geo. 3, c. 170, and the 3 & 4 Vict. c. 26, which provide that no rated inhabitant of a parish shall be deemed an incompetent witness for or against such parish.

(*z*) 2 Phill. Ev. 420.

What may be asked on cross-examination.

[916]

Questions must not be irrelevant.

Obligation of witness to answer, where the answer might subject to a penalty or prosecution, or degradation.

To a civil suit.



not allowable in cross-examination.

Cross-examination as to written instruments ;

[917] for the purpose of contradiction.

Cross-examination of witness called by one of several defendants alone.

Where one prisoner calls witnesses who incriminate another prisoner, the latter is entitled to cross-examine such witnesses, and to address the jury again on their evidence.

has made an assertion in his examination in chief, which was not in fact made, (*a*) or put a question which assumes a fact not in proof. (*b*)

It is not allowable upon cross-examination to ask a witness as to the contents of written instruments, (*c*) although they are shown to be in the possession of the opposite party, and notice has been given to the opposite party to produce them. (*d*) Under what circumstances a cross-examination as to the contents of a written document, for the purpose of impeaching the credit of a witness, is allowable, will be considered hereafter in the third section of this chapter. (*e*)

Upon the trial of Kroehl, Gibson, and Koech, (*f*) for a conspiracy, where the three defendants defended separately, Koech alone called witnesses, and examined to a conversation between himself and Kroehl. The counsel for the prosecution was proceeding to cross-examine as to another conversation between Koech and Kroehl, when the counsel for the prisoner Kroehl objected, on the ground, that the effect might be to bring out a new case against Kroehl, although he had called no witnesses, and after the case for the Crown was finished ; but Abbott, J., said, that as Koech had called witnesses, he could not prevent the cross-examination as to any conversations that might affect Koech. It might be a matter for future consideration whether the counsel for Kroehl, after such evidence, would have a right to address the jury upon it.

Woods and May were indicted for manslaughter, and separately defended ; the counsel for Woods addressed the jury, but called no witness, and then the counsel for May addressed the jury and called witnesses, who threw the blame on Woods ; and it was held that the counsel for Woods should be allowed not only to cross-examine May's witnesses, but again to address the jury. The proper course was for Woods' counsel to cross-examine first, and the counsel for the prosecution next, and the counsel for May to re-examine. At the close of the evidence, Woods' counsel would address the jury, confining himself strictly to the evidence adduced for May, and then the counsel for the prosecution would reply generally. (*g*) So where Burdett and Luck were tried for stealing wood, and in the course of the defence of Luck, Cox was called as a witness on his behalf, with a view of showing that Luck was an innocent agent in taking the wood, and in so doing Cox gave evidence tending to criminate Burdett ; Burdett's counsel claimed the right of cross-examining Cox, and then addressing the jury upon his evidence ; but the sessions refused permission to cross-examine and address the jury, but offered to put through the chairman such questions as Burdett's counsel suggested ; it was held, on a case reserved, that, in this particular case, the counsel for Burdett had a right to cross-examine Cox, and to cross-examine

(*a*) *Hill v. Coombe, cor. Abbott, J.*, Manning's Digest, tit. *Witness*, pl. 236.

(*b*) *Doe v. Wood, cor. Abbott, J.*, *ibid.* pl. 237. The objection was frequently taken and allowed during the proceedings in the House of Lords in the Queen's case. See the printed evidence.

(*c*) *Sainthill v. Bound*, 4 Esp. 74.

*Howell v. Lock*, 2 Campb. 14.

(*d*) *Graham v. Dyster*, 2 Stark. N. P. C.

23. *Sideways v. Dyson*, *ibid.* 49.

(*e*) *Post*, p. 549.

(*f*) 2 Stark. N. P. C. 343.

(*g*) *Reg. v. Woods*, 6 Cox, C. C. 224. The Recorder, after consulting Cresswell, J., and Williams, J.

him without doing so through the court, and had also a right to reply on his evidence. But the court must not be understood as saying that he would have had that right if the evidence of Cox had not tended to criminate him. All the court decided was that in this particular case the course taken was wrong. (*h*)

If a witness be called merely for the purpose of producing a written instrument, he need not be sworn, and, unless sworn, he is not subject to cross-examination. In an action for maliciously, and without probable cause, making a charge of felony before a justice of the peace against the plaintiff, and causing him to be apprehended, the plaintiff's counsel having called upon the justice to produce the information taken by him, which was accordingly produced, was proceeding to prove the information by the justice's clerk; when it was insisted by the defendant's counsel, that he should be allowed to cross-examine the justice, who had produced the examination: but Holroyd, J., held that this could not be done, and that the plaintiff's counsel might proceed to prove the examination in the regular manner. (*i*) And so on an indictment for perjury, where a sheriff's officer had been subpœnaed to produce a warrant of the sheriff; Littledale, J., ordered him to do so without being sworn. (*j*) But where upon an indictment for perjury the attorney for the prosecution was called and sworn, and produced a copy of a declaration in an action brought by the defendant against the prosecutor, though he was not asked any question on the part of the prosecution; Abbott, C. J., held that the defendant was entitled to cross-examine him. (*k*) And if a witness be called, though it be through necessity, for the purpose of the mere formal proof of a document, this makes him a witness for all purposes, and he may be cross-examined as to the whole of the case. (*l*) So it was once held, that if a witness has been called by one party, and sworn, the other may cross-examine him, though no question has been asked him in chief. (*m*) But it has been since held that if a witness be called under a mistake, and the mistake be discovered before any question is put to him by the counsel who calls him, he is not liable to cross-examination, although he has been sworn. (*n*) And so where a witness being sworn was asked

Who may be cross-examined.

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(*h*) Reg. v. Burdett, Dears. C. C. 431. See Beale v. Moulis, 1 C. & K. 1. On the same ground it would seem that one prisoner might call witnesses to contradict the witnesses called for another prisoner, if their evidence criminated him.

(*i*) Simpson v. Smith, 2 Phill. Ev. 397. See also Davis v. Dale, M. & M. 514. Evans v. Moseley, 2 Dowl. P. R. 364. Perry v. Gibson, 1 A. & E. 48. Summers v. Moseley, 4 Tyrw. 158.

(*j*) Rex v. Murlis, M. & Mal. 515.

(*k*) Rex v. Brooke, 2 Stark. N. P. C. 472.

(*l*) Morgan v. Brydges, 2 Stark. N. P. C. 314.

(*m*) Phillipps v. Eamer, 1 Esp. 356. But where in an action by the assignees of a bankrupt, the petitioning creditor was called for the purpose of producing the bill of exchange on which the action was founded, and sworn; Lord Ellen-

borough would not allow the defendant to cross-examine him, since he could not have been permitted to have given evidence for the plaintiff. Reed v. James, 1 Stark. N. P. C. 132.

(*n*) Wood v. Mackinson, 2 M. & Rob. 273, where the witness was called and sworn, and the counsel said he had been misinstructed as to what the witness was able to prove; and Coleridge, J., said, 'The more satisfactory principle to lay down is this, that if there really be a mistake, whether on the part of the counsel or the officer, and that mistake be discovered before the examination in chief has begun, the adverse party ought not to have the right to take advantage of this mistake by cross-examining the witness.' Rush v. Smyth, 4 Tyrw. 675. 1 C. M. & R. 94. Clifford v. Hunter, 3 C. & P. 16.

only one immaterial question, and his evidence stopped by the judge, it was held that the opposite party had no right to cross-examine him. (*o*)

Calling witnesses whose names are on the back of the indictment.

It is fully settled that the counsel for the prosecution are not bound to call every witness whose name is on the back of the indictment, (*p*) but may call what witnesses they think proper. (*q*) The prosecutor, however, ought to cause the witnesses to be present in court, because the prisoner may have neglected to bring them himself in consequence of their names being on the back of the bill. (*r*) It was formerly the practice, where the counsel for the prosecution did not call a witness whose name was on the back of the bill, for the judge to call the witness, in order that he might be cross-examined by the prisoner in the same way as if he had been called by the counsel for the prosecution; (*s*)

(*o*) *Creedy v. Carr*, 7 C. & P. 64, *Gurney*, B.

(*p*) *Reg. v. Woodhead*, 2 C. & K. 520, Dec. 1847, where Alderson, B., said, the judges had laid down this as a rule. *Reg. v. Edwards*, 3 Cox, C. C. 82. *Erle*, J. A.D. 1848. *Reg. v. Cassidy*, 1 F. & F. 79. March 1858. *Parke*, B., after consulting *Cresswell*, J.

(*q*) *Reg. v. Cassidy*, *supra*. *Reg. v. Edwards*, *supra*.

(*r*) *Reg. v. Woodhead*, *supra*. *Reg. v. Cassidy*, *supra*.

(*s*) *Rex v. Simmonds*, 1 C. & P. 84, *Hullock*, B. *Rex v. Whitbread*, *ibid.* note (*a*). *Reg. v. Bull*, 9 C. & P. 22. In *Rex v. Bezley*, 4 C. & P. 220, *Littledale* said that the counsel for the prosecution ought to call all the witnesses on the back of the bill; and in many cases on the Oxford Circuit learned judges have directed the counsel for the prosecution to call every witness on the back of the bill, and it has been treated as if the counsel for the prisoner had a right to have them all called by the counsel for the Crown, in order to enable him to cross-examine them. Indeed, the cases have gone further than this; as it has been held on several occasions that witnesses, not on the back of the bill, but who were acquainted with the facts of the case, ought to be called on the part of the prosecution. In *Reg. v. Holden*, 8 C. & P. 606, on an indictment for murder, *Patteson*, J., directed the daughter of the deceased, whose name was not on the back of the indictment, to be called, saying, 'every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter.' And in the same case, it appearing that there had been a *post mortem* examination of the body of the deceased by a surgeon who was examined, and another surgeon who was in court, and that there was some difference of opinion as to the cause of the death; *Patteson*, J., said, 'As the surgeon is in court, I shall

insist upon his being examined. He is a material witness, who is not called on the part of the prosecution; and as he is in court, I shall call him for the furtherance of justice.' And he was called and examined by the learned judge. In *Reg. v. Chapman*, 8 C. & P. 558, *Lord Abinger*, C. B., directed the name of the brother of the prisoner, who was present at the time when the murder was alleged to have been committed, to remain on the back of the bill, and said, the counsel for the prosecution would best discharge his duty by calling him as a witness on the trial. See also *Reg. v. Orchard*, *ibid.* note (*b*). In *Rex v. Stroner*, 1 C. & K. 650, March 1845, the prosecutrix, on a trial for rape, stated that she immediately complained to her mistress, and that her clothes were afterwards washed by a woman, and neither of these persons were bound over to give evidence, and their names were not on the back of the indictment; but both were attending as witnesses for the prisoner; and *Pollock*, C. B., held that they must be both called for the prosecution, but that the counsel for the prosecution must be allowed every latitude in examining them. In *Rex v. Bodle*, 6 C. & P. 186, *Gaselee*, J., and *Vaughan*, B., held that it was in the discretion of the judge whether a witness whose name is on the back of the indictment should be called for the prisoner's counsel to examine him before the prisoner was called on for his defence; and the father of the prisoner having been examined before the coroner, and bound over to give evidence at the assizes against the prisoner for murder, the learned judges held that the father ought to be called; and he was called, and asked as to statements he had made respecting the murder, with a view of discrediting and contradicting him, and thereby raising a suspicion that the witness might have committed the murder himself; and it was held that as the father had not been examined by the counsel for the prosecution, and had been only called at the instance of the counsel for the prisoner, the latter could not be allowed to call



but it is now settled that where a witness who is not called by the counsel for the prosecution is called by the prisoner, he must be considered his witness, as much as those subpoenaed and called by him. (*t*) As the witness is the prisoner's witness, it follows that the counsel for the Crown may impeach his evidence in the same manner as if he had been subpoenaed and called by the prisoner. (*u*)

Where several witnesses, who had been bound over by the magistrates to give evidence against a prisoner, did not go before the grand jury, nor were their names on the back of the bill; Alderson, B., is reported to have said, 'This practice must not be allowed. Every witness whose deposition is taken by the magistrate, and who is under recognizances to appear, should go before the grand jury, and his name should be indorsed on the bill. Otherwise great injustice may be done to prisoners. A prisoner relies upon certain witnesses being produced by the prosecution, and whose depositions he is entitled to. He has a right to their testimony, if it tells in his favour.' (*v*) But this dictum was uttered at a time when it was considered that the prisoner was entitled to have all the witnesses on the back of the bill called, in order that he might cross-examine them. (*w*) But as that is no longer the practice, it should seem that it will be quite sufficient if the prosecutor has the witnesses in court, though their names are not put on the back of the bill, and they have not been before the grand jury.

As to taking witnesses, who have been examined before the magistrate, before the grand jury.

It is reported to have been ruled by Lord Kenyon, (*x*) that where a witness has been examined by one party, and cross-examined by the other, and the latter has afterwards occasion to call the same witness back as part of his own case, the privilege of cross-examination continues, and leading questions may be put to him. But it has been very properly remarked, (*y*) that the mode of examination under such circumstances is in truth regulated, according to the disposition and temper manifested by the witness, by the discretion of the presiding judge. (*z*)

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Witness of one party afterwards called by the other.

Where on an indictment for burglary, there was no counsel for the Crown, Taunton, J., after the examination of witnesses to facts on the part of the prisoners, recalled a witness for the prosecution, and then, addressing the prisoner's counsel, inquired if he had any question to ask upon it, saying, that, although he as judge had recalled the witness for the purposes of justice, he

Witness recalled by the judge.

witnesses to contradict him as to the different accounts he had given respecting the murder. In *Reg. v. Vincent*, 9 C. & P. 91, Alderson, B., held that the calling such a witness in felony was discretionary, but it was a discretion always exercised, and he thought it might well be exercised in a case of misdemeanor.

(*t*) *Reg. v. Cassidy*, *supra*. *Reg. v. Woodhead*, *supra*. The following cases, therefore, cannot be considered authorities any longer. *Reg. v. Barley*, 2 Cox, 191, where Pollock, C. B., after consulting Coleridge, J., insisted on the counsel for the Crown calling witnesses on the back of the bill. The dictum of Alderson, B., that it was the duty of the prosecutor to put an adverse witness in the box, in *Reg. v. Carpenter*, 1 Cox, C. C. 72. *Rex v. Beezley*, 4 C. & P. 220,

where Littledale, J., held that the counsel for the Crown was confined to questions which arose out of the cross-examination of a witness whom he had directed to be called. *Rex v. Harris*, 7 C. & P. 581, as far as it may tend to show that where the witness is called by the judge, the counsel for the Crown has no right to examine him.

(*u*) *Reg. v. Woodhead*, *supra*, per Alderson, B.

(*v*) *Reg. v. Carpenter*, 1 Cox, C. C. 72. A. D. 1844.

(*w*) Alderson, B., said so in this case.

(*x*) *Dickinson v. Shee*, 4 Esp. 67.

(*y*) 1 Stark. Ev. 188.

(*z*) See also the observations of Abbott, C. J., in *Basten v. Carew*, Ry. & Mood. N. P. C. 127.

thought it right that the prisoner's counsel should have the opportunity of cross-examining the witness again. (a)

Re-examination.

The object of re-examining a witness being merely to explain the facts stated by the witness on cross-examination, he cannot be re-examined as to any facts unconnected with it; but if any material question has been omitted in the examination in chief, the practice is to suggest it to the court, who will put it to the witness, or decline to do so, at its discretion. (b)

Evidence in reply must be confined to the contradiction of the evidence for the defence.

The same principle is observed, with reference to the conduct of the entire case, as to the restriction on the evidence in reply to the defendant's case. After the close of the case for the defendant, the general rule is, that the evidence in reply must bear directly or indirectly upon the subject-matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it. (c) This is the general rule, made for the purpose of preventing confusion, embarrassment, and waste of time; but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted, as he may think best for the discovery of truth and the administration of justice. (d)

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Stimpson's case.

Where on an indictment for larceny, the case for the Crown rested merely on the fact of the stolen property being found in the house of the prisoner soon after it was lost, and a witness for the defence proved that the prisoner bought the property from a third person, who was called by the counsel for the Crown to prove not only that the prisoner did not buy the property of him, but that he saw the prisoner steal it; it was held that his evidence was only admissible as far as it went to destroy the case set up on the part of the prisoner, that is, to show that the prisoner did not buy the property of him. (e) So where the defence of the prisoners was an *alibi*, viz., that they were at a public-house a considerable distance from where the offence was committed, and it was proposed on the part of the Crown to prove in reply that the prisoners were seen near the spot at which the robbery was committed, and that, therefore, they could not have been in the public-house; Taunton, J., rejected the evidence, saying, 'Proving that the parties were near the place at which the offence was committed is evidence in chief, and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply; and the only evidence which can be given as evidence in reply, is that which goes to cut down the case on the part of the defence, without being any confirmation of the case on the part of the prosecution.' (f) But where on a similar indictment a similar defence was set up, Alderson, B., permitted a person, who had been robbed on the road near the place where the prosecutor was robbed, to prove not only that he saw the prisoner there, but the whole circumstances under which he met the prisoner. (g)

Briggs' case.

(a) *Rex v. Watson*, 6 C. & P. 653.

(b) 2 Phill. Ev. 408. See *post*, p. 562, as to re-examining a witness who has been cross-examined respecting his former statements and declarations.

(c) 2 Phill. Ev. 408.

(d) *Ibid.*

(e) *Rex v. Stimpson*, 2 C. & P. 415,

Garrow, B. Mr. Phillips observes, 'This was carrying the rule very far, as the fact of seeing the prisoner steal the goods would be strong evidence that he did not buy them.' 2 Phill. Ev. 410.

(f) *Rex v. Hilditch*, 5 C. & P. 299.

(g) *Rex v. Briggs*, 2 M. & Rob. 199. *Rex v. Hilditch* does not appear to have

And so where in an action for an injury occasioned by the defendant through negligently driving a carriage, the plaintiff's witnesses described the carriage as having been driven by the defendant when the accident occurred at Layton, and other witnesses spoke to the defendant having been seen in the neighbourhood of Layton about the time in question; and the defendant called witnesses to prove that, at the time in question, he was at Richmond, and the plaintiff then tendered other witnesses to show that the defendant was not at Richmond, but at Layton; Lord Denman, C. J., held that it would, perhaps, have been more correct had the plaintiff, in the first instance, called the witnesses then tendered, but he did not think that he could, even at this period of the cause, exclude the evidence from the jury, which certainly went to contradict the defendant's *alibi*. (*h*) And where on an indictment for horse stealing the defence was an *alibi*, which went to show that the prisoner, on the 7th and 8th of March, was at places many miles from the place where the horses were stolen, and on the 9th returned home; Tindal, C. J., permitted a witness to be called to prove that the prisoner, when taken into custody on the 10th of March, said that he had been at home ever since the Wednesday before. (*i*)

Briggs v  
Aynsworth.

Findon's case.

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Where on a trial for robbery the prosecutor proved that he had lost a large quantity of blood from his head, and that his assailant had put his arm round his neck, and the prisoner's coat appeared to have been recently stained with blood on the collar and sleeve; and the prisoner called a witness, who swore that on the day before the robbery he had observed that the prisoner's coat was bloody, and that the prisoner had told him the blood had flowed from a hare which he had carried over his shoulder; it was held that the statement of the prisoner before the magistrate, in which he had given a different account of the marks of blood, was admissible in reply to the evidence given by the prisoner. (*j*)

A statement  
of the pri-  
soner in reply  
to the pri-  
soner's wit-  
ness.

Where the plaintiff brought an action against the defendant for imprisoning her on a false charge of stealing chaff, which was found in her drawer, and two witnesses called by the plaintiff stated that they had sold her chaff similar to that found in her drawer, and the defendant's witnesses pointed out marks showing that the chaff found in the plaintiff's drawer corresponded with that belonging to the defendant, and mentioned in particular that linseed was mixed with the chaff, which was said to be unusual; it was held that the plaintiff might prove in reply that linseed mixed with chaff had been previously sent to the plaintiff. (*k*)

Evidence in  
reply, where  
linseed was  
mixed with  
chaff.

Where the counsel for the Crown has, *per incuriam*, omitted to put in a piece of evidence before commencing his reply, and the course of justice might be interfered with if the evidence were not given, the court may permit the evidence to be given. (*l*)

Reply com-  
menced before  
putting in  
evidence.

The question whether any particular evidence ought to be

It is in the

been cited in this case. It may have been thought in this case that the evidence of the second robbery was not essential on the part of the prosecution until the *alibi* was set up, and that that rendered the proof of the second robbery essential. See the cases collected, *ante*, p. 231, *et seq.* C. S. G.

(*h*) Briggs v. Aynsworth, 2 M. & Rob. 168. See a learned note to this case by

the reporters. And see Reg. v. Frost, 9 C. & P. 159.

(*i*) Rex v. Findon, 6 C. & P. 132.

(*j*) Reg. v. White, 2 Cox, C. C. 192. Pollock, C. B., after consulting Coleridge, J.

(*k*) Wright v. Willcox, 9 C. B. 650.

(*l*) Reg. v. White, 2 Cox, C. C. 192. See this case, *ante*, p. 464.



discretion of the court to admit evidence in reply.

Examination of witnesses generally, with reference to written documents.

Written instruments used to refresh the memory.

admitted in reply, rests in the discretion of the court, which will be exercised with a view to attain the ends of justice according to the circumstances of the case. (*m*)

It has already been remarked that a witness cannot be cross-examined as to a written document in the possession of the party who calls him; (*n*) and the rule is general, that a witness cannot either be examined in chief or cross-examined as to the contents of a written document, not produced; yet, in civil cases, he has sometimes been allowed to be examined as to the general result from a great number of documents, too voluminous to be read in court. (*o*)

A witness may refresh his memory by means of a written instrument, which cannot itself be legally produced in evidence. Mr. Phillpotts (*p*) divides the cases in which a witness may be allowed to refresh his memory into three classes. First, where the writing serves only to revive or assist the memory of the witness, and to bring to his mind a recollection of the facts. Secondly, where the witness recollects having seen the writing before, and, though he has no independent recollection of the facts mentioned in it, yet remembers that at the time he saw it he knew the contents to be correct. Thirdly, where it brings to the mind of the witness neither any recollection of the facts mentioned in it, nor any recollection of the writing itself, but, nevertheless, enables him to swear to a particular fact, from the conviction on his mind on seeing a writing which he knows to be genuine. In the first class of cases, where the memory of the witness has been revived by the previous inspection of the writing, it is not necessary, as a condition of the admission of his oral testimony, that the writing should be produced in court; but the absence of it might afford matter of observation. (*q*) In the two last classes of cases the writing must be produced. (*r*)

Where, in order to prove the taking of a tenement, a witness produced a book containing an entry made by him of the terms of the taking, and stated that he had no memory of them but from the book, without which he should not of his own knowledge be able to speak to the facts, but on reading the entry he had no doubt that the facts really happened; the court held that the witness might look at the entry to refresh his memory, and give parol evidence of the letting. (*s*) So where a receipt for money has been given on unstamped paper, it may be used by the witness, who saw it given, to refresh his memory. (*t*) And where a witness, who had received money and given a receipt for it, which could not be read in evidence for want of a proper stamp, had become blind, the receipt was allowed by Abbott, C. J., to be read over to him in court (he being informed that the paper was in his handwriting) in order to refresh his memory. (*u*) So to prove an act of bankruptcy committed some years back, a deposition made at the time by an aged witness was allowed by Lord Kenyon to

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(*m*) *Doe dem. Nicol v. Bower*, 16 Q.B. 805. *Wright v. Willeox*, 9 C. B. 650.

(*n*) *Ante*, p. 526.

(*o*) *Meyer v. Setton*, 2 Stark. N. P. C. 276. *Roberts v. Doxon*, Peake, N. P. C. 83.

(*p*) 2 Phill. Ev. 411.

(*q*) *Ibid*.

(*r*) 2 Phill. Ev. 412. *Doe v. Perkins*, 3 T. R. 794.

(*s*) *Rex v. St. Martin's*, Leicester, 2 A. & E. 210.

(*t*) *Rambert v. Cohen*, 4 Esp. 213.

(*u*) *Catt v. Howard*, 3 Stark. N. P. C. 3. See also *Jacob v. Lindsay*, 1 East, 460.

be read to him for the same purpose. (*v*) And where a witness was uncertain whether an execution was put in on the 4th or 5th of May, Tindal, C. J., on the authority of the preceding case, allowed his deposition, which had been made before the Commissioners of Bankrupt on the 12th of the same month, to be used by the witness, to refresh his memory as to the date of the execution. (*w*)

So where a deed bore date the 20th of June, and a witness could not recollect whether it was executed on the day of the date or not; Pollock, C. B., held that his examination taken on the 3rd of July, whilst the facts stated in it were fresh in his memory, and which was not in his handwriting, but was signed by him, might be used to refresh his memory. (*x*) But a witness cannot refresh his memory by such depositions, if they are not taken contemporaneously, or nearly so, with the matters to which they relate. (*y*)

With regard to depositions in criminal cases, it has been held that they are not available for the purpose of refreshing the memory of a witness, (*z*) unless they are used for that purpose with the sanction of the court. (*a*)

Depositions in criminal cases.

The general rule is, that a witness, to assist his memory, may use a written entry, if it were made by himself shortly after the occurrence of the facts to which it relates; but if he cannot speak to the fact from recollection, any further than as finding it entered in a book or paper, such book or paper ought to be produced, and if not evidence, the testimony of the witness amounts to nothing. (*b*) Although in general the entries ought to have been made by the witness himself, yet if another wrote them, and the witness regularly examined them from time to time, soon after they were written, and while the facts stated in them were fresh in his recollection, he may refresh his memory by referring to them, as if he had written them with his own hand. (*c*) So where a witness on looking at a written paper has his memory so refreshed that he can speak to the facts from a recollection of them, his testimony is clearly admissible, although the paper may not have been written by him. (*d*) Where therefore a witness had attended Chartist

Rule as to memorandum to refresh the memory.

(*v*) *Vaughan v. Martin*, 1 Esp. N. P. C. 440.

(*w*) *Smith v. Morgan*, 2 M. & Rob. 257. But Tindal, C. J., refused to allow the witness to look at more than the date of the transaction, as to which he was uncertain; as it would be leading a witness too much to attempt to bind him down to all that he had thus said.

(*x*) *Wood v. Cooper*, 1 C. & K. 645.

(*y*) *Whitfield v. Aland*, 2 C. & K. 1015, *Wilde, C. J.* No date is given in this case.

(*z*) *Reg. v. Stokes*, 4 Cox, C. C. 451, *Williams, J.*, saying, 'The deposition is not contemporaneous with the facts deposited to, and does not fall within the description of memoranda and entries available for the purpose of refreshing a witness's memory.' In this case it was the counsel for the prisoner who pro-

posed so to use the depositions. In *Reg. v. Palmer*, 5 Cox, C. C. 236, *Pollock, C. B.*, said, 'A deposition is not the witness's own memorandum, made by him contemporaneously with the occurrence of the facts stated there, but a narrative taken down by somebody else from a statement subsequently made by him, and, therefore, although very good evidence for the purpose of contradicting him, it differs from the principle of the cases that relate to refreshing the memory.'

(*a*) *Reg. v. Williams*, 6 Cox, C. C. 343, and other cases, *ante*, p. 492.

(*b*) *Doe v. Perkins*, 3 T. R. 749. *Beech v. Jones*, 5 C. B. 696. *S. P.* on the authority of *Doe v. Perkins*. See *Henry v. Lee*, 2 Chit. Rep. 124.

(*c*) *Burrough v. Martin*, 2 Campb. 112. The entries were in a log-book.

(*d*) 2 Phill. Ev. 413, citing the *Duchess of Kingston's case*, 20 How. Sta. Tr. 619,

meetings for the purpose of obtaining information and communicating it to the government, and within two hours after each meeting he detailed such information to an inspector, who took it down from his dictation, and some of the accounts were read over to him and some he read over himself, and he often saw what the inspector wrote, but did not see all, and he signed all the papers; and the inspector proved that he took down what the witness said as nearly as possible, and read the whole over to the witness; it was held that the witness might refresh his memory by these papers. If he could say that when his mind was so full of the circumstances, he ascertained that the paper correctly detailed them, it was immaterial whether he ascertained it by looking at the paper himself or by hearing it read over correctly by another person. (*e*) So where a captain produced the ship's log, which was written by the mate, who was absent, but he had himself read the log about a week after it was written, when the matters contained in it were fresh in his mind, and he then thought it correct, it was held that he might refresh his memory by it. (*f*) So where an editor of a paper proved that an article on the weather had been furnished by a gentleman, who was in the habit of writing such articles for that paper, and that the manuscript could not be found, and the writer stated that he had no recollection of having furnished the particular article, but that the statements contained in the articles he had furnished were invariably true; it was held that the article might be used for the purpose of refreshing his memory. (*g*) But where the witness neither recollects the fact, nor the truth of the account in writing, and the writing was not made by him, his testimony, so far as it is founded on the written paper, would be objectionable as hearsay; the witness can be no more permitted to give evidence of his inference from what a third person has written, than from what a third person has said. (*h*)

By a copy of  
a paper.

It has been held that a witness will not be allowed to refresh his memory with a copy of a paper, though the copy was made by himself, and though the writing might have been used for the purpose. Thus it has been held that a witness cannot refresh his memory by a copy of an original memorandum, made by him six months after he wrote the original, although the original was so covered with figures as to be illegible. (*i*) But it is said that in analogy to the ordinary rules of documentary evidence, a copy may be used to refresh the memory, on proof that the original is lost. (*j*) And two cases are reported where it is said to

and other cases. In *Lawes v. Reed*, 2 Lew. 152, Abderon, B. held that a witness might refresh his memory from the notes of counsel taken on his brief at a former trial; and he mentioned *Balme v. Hutton*, where a witness had been allowed to refresh his memory from a note taken by Parke, B. He, however, observed that the witness must afterwards speak from a refreshed memory, and not merely from the notes. *Reg. v. Phillpotts*, 5 Cox, C. C. 329, S. P., where Erle, J., said, that if a witness looks at a note within two days, it has been held sufficient to entitle him to refer to it to refresh his memory. *Reg. v. Bird*, 5

Cox, C. C. 11, where a counsel gave evidence from his notes of a previous trial.

(*e*) *Reg. v. Mullins*, 3 Cox, C. C. 526. Maule, J., and Wightman, J.

(*f*) *Anderson v. Whalley*, 3 C. & K. 54. Talfourd, J. See *Reg. v. Stokes*, 4 Cox, C. C. 451.

(*g*) *Topham v. McGregor*, 1 C. & K. 320. Rolfe, B.

(*h*) 2 Phill. Ev. 413.

(*i*) *Jones v. Stroud*, 2 C. & P. 196. Best, C. J.

(*j*) 1 Stark. Ev. 179, and see 2 Phill. Ev. 416.



have been held that a witness might refresh his memory by a copy. (*k*) And where a memorandum was made by a witness at the time on a rough piece of paper, and he copied it out more neatly, it was held that he might refresh his memory by the copy. (*l*) And where a clerk to a tradesman entered the transactions in trade as they occurred into a waste-book from his own knowledge, and the tradesman copied the entries day by day into a ledger, in the presence of the clerk, who checked them as they were copied; it was held that the clerk might use the entries in the ledger to refresh his memory, although the waste-book was not produced, nor its absence accounted for; as the entries in the ledger were in the nature of entries made by the clerk himself. (*m*) A witness cannot refresh his memory by extracts made by another person from minutes or memoranda made by the witness himself. (*n*)

It is not essential that the memorandum should have been contemporary with the fact; it seems to be sufficient if it has been made by the witness, or by another with his privity, at a time when the facts were fresh in the recollection of the witness, and that the reading such memorandum restores the recollection of the fact which had faded in the memory, or enables him to swear to the truth of the fact. (*o*) When a witness refreshes his memory from memorandums, it is always usual, and very reasonable, that the adverse counsel should have an opportunity of looking at them, when he is cross-examining the witness. (*p*)

A writing cannot be used to refresh the memory, if it appears to have been made for the purpose of the cause. Thus where a witness refreshed her memory by papers in her own handwriting, some of which were in the form of a deposition, which was drawn by the plaintiff's solicitor, whom she had requested to digest her

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At what time the memorandum must be made.

The adverse party may look at the memorandum.

Writing made for the purpose of the cause is unavailable.

(*k*) *Tanner v. Taylor*, cited in *Doe v. Perkins*, 3 T. R. 749, where a witness produced a copy of a day-book which he had left at home; and *Legge, B.*, held that if he could swear positively to the delivery from recollection, and the paper was only to refresh his memory, he might make oath of it; but if he could not from recollection swear any further than as finding the matters entered in the book, then the original should have been produced. And *Anonymous*, 1 Lew. 101, where *Bayley, J.*, is reported to have held that a witness cannot give a copy of a shop-book in evidence to prove facts contained in the shop-book, but if he was originally acquainted with the facts he might refer to such copy to refresh his memory.

(*l*) *Reg. v. Duffield*, 5 Cox, C. C. 404. It is plain that where a copy is made whilst the matters are fresh in the memory of the witness, it may just as well be used to refresh the memory as if it were the original. Suppose the witness made two memoranda whilst the matters were fresh in his memory, either might be so used.

(*m*) *Burton v. Plummer*, 2 A. & E. 341. In this case, *Patteson, J.*, said, 'The copy of an entry, not made by the

witness contemporaneously, does not seem to me to be admissible for the purpose of refreshing a witness's memory. The rule is, that the best evidence must be produced, and that rule appears to me to be applicable, whether the paper be produced as evidence in itself, or used merely to refresh the memory.'

(*n*) 2 Phill. Ev. 414, citing a case mentioned by *Lord Kenyon, C. J.*, in *Doe v. Perkins*, 3 T. R. 752.

(*o*) 1 Stark. Ev. 177. 2 Phill. Ev. 414.

(*p*) By *Eyre, C. J.*, in *Hardy's case*, 24 How. St. Tr. 824. 2 Phill. Ev. 411. *Sinclair v. Stevenson*, 1 Carr. & P. 582. But if a paper is put into a witness's hands merely to prove a handwriting, the other side have no right to see it. *Ibid.* per *Best, C. J.* If a counsel, in cross-examination, put a paper into the witness's hand to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence. And he may also ask the witness when it was written, without being bound to read it. *Rex v. Ramsden*, 2 C. & P. 604, by *Lord Tenterden*. *Howard v. Canfield*, 5 D. P. R. 417.

notes and reduce them to some order; and, after he had done so, she transcribed and altered them wherever it was necessary, to make them consistent with her meaning; it was held that she ought not to have been allowed to refresh her memory by these notes. (*q*)

Examination  
as to opinion.

Questions of  
skill and  
judgment.

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The general rule is, that a witness must not be examined as to his opinion, for his testimony must be confined to evidence of facts; but in questions of skill and judgment, men of science or experience are allowed to give evidence of their opinion. Thus in a civil case, in an inquiry as to an embankment choking up a harbour, an engineer has been admitted to prove, from his own experiments, what were the effects of natural causes upon that particular harbour, and on other harbours similarly situated on the same coast, and that the removal of the bank would not, in his opinion, restore the harbour. (*r*) So shipbuilders have been admitted to state their opinion on the sea-worthiness of a ship, from examining a survey, which had been taken by others, and at which they were not present. (*s*) Where the question is, whether a seal has been forged, seal-engravers may be called to show the difference between a genuine impression and that supposed to be false. (*t*) So on an indictment for forging a will, which, together with writings in support of it, it was suggested had been written over pencil marks, which had been rubbed out; an engraver who had examined the paper with a mirror and traced the pencil marks, was held competent to give evidence of what he had discovered upon such examination. (*u*) So in several cases where the genuineness of certain handwriting has been in question, persons skilled in the examination of handwriting, and in the detection of forgeries, as inspectors of franks, and clerks of the post office, have been allowed to state their opinion whether a particular writing is in a genuine or imitated character. (*v*) But the authority of these cases has been shaken by the case of *Gurney v. Langlands*, (*w*) in which an issue having been directed to satisfy the Court of King's Bench as to the forgery of a signature to a warrant of attorney; Wood, B., refused to admit the evidence of an inspector of franks at the post office, who, having never seen the party write, was called to prove, from his

(*q*) Anonymous, cited in *Doe v. Perkins*, 3 T. R. 752. The case was in chancery, and the Lord Chancellor suppressed the depositions. In *Skeineller v. Newton*, 9 C. & P. 313, a similar objection was made, but the point decided was that the paper was not written near enough to the transaction.

(*r*) *Folkes v. Chad*, MS. 1 Phill. Ev. 291, 7th ed., cited by Buller, J., in *Goodtitle v. Braham*, 2 T. R. 498. So the opinion of a person conversant with the business of insurance may be asked as to whether the communication of particular facts would have varied the terms of insurance, though not what his conduct would have been in the particular case. *Berthon v. Loughman*, 2 Stark. N. P. C. 258. *Holroyd, J.*, but see *contra* *Durrell v. Bederley*, Holt, N. P. C. 286, by Gibbs, C. J.

(*s*) *Thornton v. Royal Exchange Assurance Company*, Peake, N. P. C. 25. *Chaurand v. Angerstein*, *ibid.* 43. *Beckwith v. Sydebotham*, 1 Campb. 117. See *Alcock v. Royal Exchange Assurance Company*, 13 Q. B. 292, where evidence that a captain was addicted to drunkenness was held admissible in order to show that he was incapable of exercising a sound judgment in selling a ship.

(*t*) By Lord Mansfield in *Folkes v. Chad*, *ubi supra*.

(*u*) *Reg. v. Williams*, 8 C. & P. 454. Parke, B., after consulting Tindal, C. J.

(*v*) *Goodtitle v. Braham*, 4 T. R. 497. *Rex v. Cator*, 4 Esp. N. P. C. 117, 145. *Stranger v. Searle*, 1 Esp. 14.

(*w*) 5 B. & A. 330. *Ante*, vol. 2, p. 819, and see *Doe d. Mudd v. Suckermore*, *ante*, p. 363.

knowledge of handwriting in general, that the signature in question was not a genuine signature, but an imitation. On a motion for a new trial, the court refused to disturb the verdict, some of the judges expressing doubts whether the evidence was admissible, and all of them considering it, if admissible, not entitled to any weight. (x)

In criminal cases, the opinions of medical men of science are very frequently employed as evidence. A physician who has not seen the patient, may, after hearing the evidence of others, be called to prove, on his oath, the general effect of the disease described by them, and its probable consequences in the particular case. (y) The testimony of medical men is constantly admitted with respect to the cause of disease, or of death, in order to connect them with particular acts, and as to the general sane or insane state of the mind of the patient, as collected from a number of circumstances. Such opinions are admissible in evidence, although the professional witnesses found them entirely on the facts, circumstances, and symptoms established by others, and without being personally acquainted with the facts. (z) Thus where on a trial for murder the medical witnesses called on the part of the prosecution ascribed the death to strangulation, other medical men called on behalf of the prisoner were allowed to give their opinion that, from the evidence they had heard upon the trial, the death did not arise from strangulation, although they had not seen the body of the deceased, and had no means of forming a judgment of the cause of his death except from the evidence given in court. (a) So in prosecutions for murder, medical men have been allowed to state their opinion, whether the wounds, described by witnesses, were likely to be the cause of death. (b) So in a case of murder, (c) where the defence was insanity, the twelve judges were unanimous in thinking that a witness of medical skill might be asked, whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it. But several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide, viz., whether, from the other testimony given in the case, the act as to which the prisoner was charged was, in his opinion, an act of insanity. (d) And it has been since held that a physician

Medical men.

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(x) See also the case of *Cary v. Pitt*, Peake Ev. App. 84, in which Lord Kenyon refused to receive the evidence of an inspector of franks at the post office, as to whether he thought the defendant's acceptance a genuine handwriting or otherwise; and his lordship said that, though such evidence was received in *Revett v. Braham*, he had in his charge to the jury laid no stress upon it. Mr. Baron Wood, in his report in the case of *Gurney v. Langlands*, observed, 'Opinions of skilful engineers, mariners, &c., may be given in evidence on matters depending upon skill, viz., as to what effect an embankment in a particular situation

may have upon a harbour, or whether a ship has been navigated skilfully; because in such cases the witness has a knowledge of the alleged cause, and his skill enables him to judge and form a belief to that effect.'

(y) Peake Ev. 190.

(z) 1 Stark. Ev. 175.

(a) *Rex v. Shaw*, MSS. C. S. G. cor. Patteson, J. S. C. 6 C. & P. 372.

(b) 1 Phill. Ev. 290, 7th ed.

(c) *Rex v. Wright*, R. & R. 456.

(d) It seems that in *Reg. v. M'Naghten*, 10 Cl. & F. 200, such questions were allowed to be asked. 29 Law Mag. 396. See vol. 1, p. 19.



who had heard the whole evidence on a trial for murder might be asked whether the facts and appearances proved showed symptoms of insanity. (*e*)

Opinion as to  
law of another  
country.

A person of experience in the profession of the law of another country may state his opinion, what, according to the law of that country, would be the legal effect of the facts previously spoken to by the witnesses, taking the facts to be accurate. (*f*)

Separate ex-  
amination of  
witnesses.

It is usual for the court, at the instance of either party, in criminal as well as civil cases, to make an order that the witnesses, intended to be examined on either side, shall remain out of court during the examination of the other witnesses; (*g*) and it was formerly held that if any person were present contrary to that order, he could not, on any account, be permitted to be examined, (*h*) although he were the attorney in the cause. (*i*) But an attorney was not within the rule, and might remain, and still be admissible as a witness, his assistance being in most cases absolutely necessary to the proper conduct of a cause. (*j*) And it used to be considered that it was in the discretion of the judge whether he would allow the witness to be examined if he had been in court in defiance of an order to withdraw. (*k*) But it is now clearly settled that the court cannot lawfully refuse to permit the examination of the witness, though he may be fined for disobeying the order to leave the court; (*l*) and his wilful disobedience of the order may afford matter of remark on the value of his testimony.

The prosecu-  
tor.

A prosecutor merely as such has a right in a criminal case to remain in court, but if he is to be examined as a witness, the court will order him to leave the court as well as the other witnesses. (*m*)

A witness  
under exa-  
mination.

It sometimes happens that it is desirable that an argument as to the evidence of a witness should not be heard by him, and in such a case it is almost a right for the party desiring it to have

(*e*) *Rex v. Searle*, 1 M. & Rob. 75.

(*f*) *Rex v. Wakefield*, *cor. Hullock*, B., Murray's ed. p. 238, in which case a gentleman at the Scotch bar was examined as to whether the marriage, as proved by the witnesses, would be a valid marriage according to the Scotch law. See *ante*, p. 344.

(*g*) The order is made, on the application of a prisoner as an indulgence, not as a matter of right. 1 Chit. Cr. L. 618. 1 Burn. Just. tit. *Evidence*, p. 999.

(*h*) *Attorney-General v. Bulpit*, 9 Price, 4.

(*i*) *Rex v. Webb*, *cor. Best, J.*, MS. Mann. Dig. p. 324.

(*j*) *Pomroy v. Baddiley*, R. & M. N. P. C. 430. *Littledale, J. Everett v. Lowtham*, 5 C. & P. 91. *Boscquet, J.* And it is now the ordinary course to permit, not only attorneys, but professional or scientific persons, to remain in court, the rule being considered as not applying to witnesses of those descriptions. C. S. G.

(*k*) *Parker v. M'William*, 6 Bingh. R.

683. *Beamon v. Ellice*, 4 C. & P. 585, *Tamton, J.* *Rex v. Colley*, M. & M. 329, where *Littledale, J.*, after consulting *Gaselee, J.*, said it depended on the circumstances of the case whether such a witness ought to be examined. In *Rex v. Wylde*, 6 C. & P. 380, *Park, J. A. J.*, rejected a witness, saying, 'I will always in a criminal case reject a witness remaining in court after all the witnesses on both sides have been ordered to leave it.'

(*l*) *Cobbett v. Hudson*, 1 E. & B. 11. *Candler v. Horne*, 2 M. & Rob. 423, where *Erskine, J.*, said that it was now settled and acted upon by all the judges that the judge has no right to exclude the witness.

(*m*) *Reg. v. Newman*, 3 C. & K. 252, *Lord Campbell, C. J.* In *Charnock v. Dewings*, 3 C. & K. 378, *Talfourd, J.*, held that he had no authority in a civil suit to order the parties to the suit to leave the court as long as they behaved themselves with propriety. See *Selle v. Isaacson*, 1 F. & F. 194.

the witness out of court while a discussion is going on as to his evidence. (*n*)

Upon the trial of a misdemeanor, the defendant is not entitled to the assistance of counsel to cross-examine witnesses, when he reserves to himself the right of addressing the jury; but counsel may argue for him any points of law that arise, and may suggest the questions to be put to the jury. (*o*)

Though the counsel for the prosecution has closed his case, and the counsel for the prisoner has taken an objection as to a defect in the evidence, the judge is at liberty to make any further inquiry of the witnesses he thinks fit, in order to answer the objection. In *Rex v. Remnant*, (*p*) on a case reserved for the opinion of the judges, none of them seemed to have any doubt but that it was competent and proper for the judge to do so.

Counsel may not cross-examine if defendant addresses the jury.

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The judge may examine witnesses after case closed and objection taken.

### SEC. III.

#### *How the Credit of Witnesses may be impeached.*

THERE are four methods by which a person may impeach the credit of a witness who is called against him, besides the disproof of the facts stated by the witness. 1. By cross-examination. 2. By proof of statements made by him previous to his examination, inconsistent with his present evidence. 3. By proof of his acts and declarations touching the matters in issue. 4. By general evidence of his character.

Method of impeaching credit of witnesses.

I. As to impeaching the credit of a witness by cross-examination. If a witness be asked a question, for the purpose of showing him unworthy of credit, the answer to which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge (as, for instance, if he be asked whether he has been guilty of theft, fraud, or any offence subjecting him to a penalty or criminal proceeding), he is not obliged to answer. (*a*) So far has this principle been carried, that in an action for a libel, which was published by the defendant in a voluntary affidavit, sworn extrajudicially before a magistrate, it was held that the magistrate's clerk was not bound to answer whether he

1. By cross-examination of the witness as to his own conduct, &c.

Questions tending to criminate.

(*n*) *Reg. v. Murphy*, 8 C. & P. 297, Coleridge, J.

(*o*) *Rex v. White*, 3 Campb. 98, Lord Ellenborough. *Rex v. Parkins*, R. & M. N. P. C. 166, Abbott, C. J.

(*p*) R. & R. 136.

(*a*) See the cases collected, 2 Phill. Ev. 417, 1 Stark. Ev. 190. See also *ante*, p. 525, as to the obligation to answer where the answer might subject to a civil suit. The protection is not confined to questions where the answer would lead to an immediate conclusion of guilt, but extends to all questions that tend to criminate the witness, 'and the reason is that the party would go from one question to another; and though no question might

be asked, the answer to which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him.' Per Lord Tenterden, C. J. *Rex v. Slaney*, 5 C. & P. 213. Thus where a witness in an action by the indorsee against the drawer of a bill, where the defence was usury, was asked whether the bill had ever been in his possession before, and the witness said he thought his answer would have a tendency to convict him of the offence of usury, for which he had been indicted, it was held that he was not bound to answer the question. *Cates v. Hardacre*, 3 Taunt. 424.

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wrote the affidavit, and delivered it to the magistrate; because, as it was said, the bare copying out of a libel is criminal. (b) So a witness is not bound to answer whether he wrote an advertisement referring to libellous letters which a prosecutor had received; and though he is bound to answer whether he knows in whose handwriting it is, he is not bound to name the person, as it may be himself. (c) An accomplice who is admitted to give evidence against his associate in guilt, though bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution, is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; for he is not protected as to such offences. (d) So a witness in custody upon a charge of felony cannot be asked, 'Have you not said that you committed the offence for which you are now in custody?' (e) So where a witness stated that he was in a room which he had let to a club on a night on which it was alleged that money had been lost by gaming; it was held that he was not bound to answer the question, 'Was there a roulette table in the room?' as his answer might tend to involve him in the danger of being indicted as the keeper of a common gaming house. (f) But although a witness is not compellable to answer questions of this description, it should seem that such questions may legally be asked. (g)

Such questions may be asked.

It is for the court to judge whether the answer is likely to criminate.

It has been laid down, and seems now to be considered to be settled, that to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. (h)

(b) *Maloney v. Bartley*, 3 Campb. 210. *Rex v. Slaney*, 5 C. & P. 213.

(c) *Rex v. Slaney*, 5 C. & P. 213, Lord Tenterden, C. J.

(d) *West's case*, MS. 2 Phill. Ev. 419.

(e) *Rex v. Pegler*, 5 C. & P. 521, Park, J. A. J., and Littledale, J.

(f) *Fisher v. Ronalds*, 12 C. B. 762.

(g) See the observations of the judges in *Rex v. Watson*, 2 Stark. 149. *Rex v. Holding and Wade*, O. B. 1821, *cor. Bayley, J.*, MS. Archb. Crim. Pl. 238. S. C. 1 Archb. Pract. 193. *Harris v. Tippet*, 2 Campb. 637, Lawrence, J. *Contrà*, *Rex v. Lewis*, 4 Esp. N. P. C. 225. *M'Bride v. M'Bride*, *ibid.* 242; but see 2 Phill. Ev. 426. Indeed, if the imputation contained in a question is so connected with the inquiry and the point in issue, that the fact may be proved by other evidence, and the adverse party intends to call witnesses for that purpose, the witness proposed to be discredited must be asked whether he has been guilty of the offence imputed, *post*, p. 548. And Lord Tenterden has ruled that the counsel in a cause have no right to object, in favour of a witness, that the answer to a particular question renders him liable to punishment or forfeiture; such objection belongs to the witness only. *Thomas v.*

*Newton*, M. & M. 48, note (a) to *East v. Chapman*.

(h) *Reg. v. Boyes*, 1 B. & S. 311. *Osborn v. London Dock Co.* 10 Exch. R. 698, where Parke, B., said that this was the opinion of the majority of the judges in *Reg. v. Garbett*, 1 Den. C. C. 236. But that report expressly states that the majority of the judges 'did not decide, as the case did not call for it, whether the mere declaration of the witness on oath that he believed that the answer would tend to criminate him, would or would not be sufficient to protect him from answering.' See also *ex parte Fernandez*, 10 C. B. 3, and *Bartlett v. Lewis*, 12 C. B. (N. S.) 249. In *Fisher v. Ronalds*, 12 C. B. 762, Jervis, C. J., and Maule, J., expressed strong opinions that it was for the witness and not for the judge to determine whether the answer might tend to criminate. Maule, J., said, 'It is the witness who is to exercise his discretion, not the judge. The witness might be asked, "Were you in London such a day?" and though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission might complete a chain of evidence against him



But if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question; as there is no doubt that a question, which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. (i)

If danger appear great latitude is to be allowed to the witness.

It has also been laid down that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things,—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. A merely remote and naked possibility, out of the ordinary course of law, such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. (j)

The danger must be real and not imaginary.

As to questions which are asked, upon cross-examination, for the purpose of throwing discredit on a witness, and which tend merely to disgrace and degrade him, without subjecting him to a penalty or criminal charge, the authorities are conflicting on the point whether he is compellable to answer them. In *Cooke's case*, (k) on an indictment for high treason, the prisoner, in order to challenge a jurymen, asked him if he had not said he was guilty and would be hanged. Lord C. J. Treby overruled the question, and said, 'You may ask upon the *voire dire* whether he has any interest in the cause; nor shall we deny you liberty to ask, whether he be fitly qualified according to law by having a freehold of sufficient value; but that you may ask a juror or witness every question that will not make him criminous, that is too large. Men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny, but they have not been obliged to answer; for, although their answer in the affirmative will not make them criminal, nor

Questions tending to disgrace.

Authorities that they need not be answered.

*Cooke's case.*

which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him.' In *Adams v. Lloyd*, 3 H. & N. 351, Pollock, C. B., cited the dictum of Maule, J., and said, 'I have always thought that the law on that subject was correctly stated by Maule, J.,' and added, 'It is impossible to satisfy the judge without exposing the whole matter; and a man may be placed under such circumstances with respect to the commission of a crime, that if he disclosed them he might be fixed upon by his hearers as a guilty person; so that the rule is not always the shield of the guilty; it is sometimes the protection of the innocent, although very likely it was originally introduced from humane motives, being probably derived from the maxim *nemo tenetur seipsum accusare*.' In *Chester v. Wortley*, 17 C. B. 410, Jervis, C. C., said that 'In *Fisher v. Ronalds*, my brother Maule and I thought that it was for the witness and not for

the judge to determine whether or not the answer to a particular question may tend to criminate him. Some judges, however, have entertained a different opinion;' but intimated no change in his own opinion. This case and *Adams v. Lloyd* were subsequent to *Osborn v. The London Dock Company* (which was cited in both of them), and *Reg. v. Garbett*. In *Bartlett v. Lewis*, *supra*, Byles, J., said, 'I do not concur with some of the observations which have been made as to the nature and the reasons for the privilege which a witness has to protect himself from answering as to a matter having a tendency to criminate him. The rule was intended for the protection of the innocent and not for that of the guilty.'

(i) *Reg. v. Boyes*, *supra*, *Osborn v. London Dock Co.*, *supra*, per curiam.

(j) Per curiam, *Reg. v. Boyes*, *supra*, where, after a pardon of bribery, it was held that the risk of an impeachment was not sufficient to protect the witness from answering.

(k) 4 St. Tr. 748.

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subject them to punishment, yet they are matters of infamy, and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty: his crime is purged. But merely for the reproach of it, it shall not be put upon him to answer a question, whereon he will be forced to forswear or disgrace himself. So persons have been excused from answering, whether they have been committed to Bridewell as pilferers or vagrants, &c.; yet to be suspected is only a misfortune and shame—no crime. The like has been observed in other cases of odious and infamous matters, which are not crimes indictable.

Laver's case.

So in *Laver's case*, (l) the court would not allow the witness to be examined on the *voir dire*, as to whether he had been promised a pardon or reward for swearing against the prisoner; and Lord C. J. Pratt said, 'If the objection goes to his credit, must he not be sworn, and his credit left to the jury? No person is to discredit himself, but is always taken to be innocent till it appear otherwise.' In *Sir John Friend's case*, (m) who was tried for high treason, it was held that a witness could not be asked whether he was a Roman Catholic, because he might subject himself to penalties by his answer; and Treby, C. J., said, 'No man is bound to answer any questions that will subject him to penalties or to infamy.' The expressions of the two eminent judges mentioned above are certainly very strong and direct on the point, that a witness is not compellable to answer degrading questions put for the purpose of discrediting him: at the same time it must be remarked, that such a decision was not necessary in any one of the above cases. In the first (*Cooke's case*) the question was asked, not to discredit a witness, but to exclude a jurymen. In the second (*Laver's case*), the object of the examination was not to show the witness unworthy of credit, but incompetent to give evidence: and in the last case (*Sir John Friend's*), there was a sufficient objection to the question, on the ground that the answer might subject the witness to penalties. There are two modern decisions at Nisi Prius, in accordance with the doctrine laid down by the chief justices in the above cases. In *Rex v. Lewis*, (n) which was an indictment for an assault, the prosecutor, in the course of cross-examination, was asked if he had not been in the House of Correction in Sussex, and Lord Ellenborough, C. J., interposed, and said, that that question should not be asked; that it was formerly settled by the judges, among whom were Treby, C. J., and Powell, J., both of whom were great lawyers, that a witness was not bound to answer any question, the object of which was to degrade, or render him infamous.

Lewis's case.

M'Bride v.  
M'Bride.

*M'Bride v. M'Bride* (o) was an action of assumpsit, in which a woman being called as a witness for the plaintiff, the counsel for the defendant was proceeding to examine her as to her living in a state of concubinage with the plaintiff, but Lord Alvanley interposed, and said, he thought questions as to general conduct might be asked, but not such as went immediately to degrade the witness. His lordship added, 'I do not go so far as others may. I will not say a witness shall not be asked to what may tend to disparage him; that would prevent an investigation into the character of a witness, which it may often be of importance

(l) 6 St. Tr. 259. 2 Phil. Ev. 424.  
(m) 4 St. Tr. 606. 1 Stark. Ev. 206.

(n) 4 Esp. N. P. C. 225.  
(o) 4 Esp. N. P. C. 242.

to ascertain. I think those questions only should not be asked which have a direct and immediate effect to disgrace or disparage the witness.<sup>2</sup>

In the trial of *O'Coigley* and *O'Connor* (*p*) for high treason, where a witness was asked, on cross-examination, how many informations he had laid for the purpose of throwing an imputation on him as a common informer, whereupon he appealed to the protection of the court: it was held that the question should not be repeated or followed up by another.

*O'Coigley and  
O'Connor's  
case.*

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Where on a trial for burglary a witness for the prosecution was asked in cross-examination whether he had not been charged with a crime, and imprisoned two years; Cresswell, J., held that the question might be put, but the witness was not bound to answer it, as the matter was of an infamous nature. (*q*)

*Parker's case.*

In addition to these cases must be mentioned that of *Rex v. Hodgson*, (*r*) which was an indictment for a rape upon Harriet Halliday. After she had given her evidence, she was cross-examined by the prisoner's counsel, who put these questions to her: 'Whether she had not before had connection with other persons?' and 'Whether she had not before had connection with a particular person (named)?' It was objected that she was not obliged to answer these questions; and Mr. Baron Wood allowed the objection, on the ground that she was not bound to answer them, as they tended to criminate and degrade her. And, on a case reserved, the twelve judges determined that the objection was properly allowed. (*s*) But this case seems no longer a binding authority. (*t*)

*Hodgson's  
case.*

On the other hand, there are the following authorities in favour of the position, that the witness is compellable to answer questions which merely disgrace or disparage. In *Rex v. Edwards*, (*u*) on an application to bail the prisoner, who was charged with grand larceny, one of the bail was asked whether he had not stood in the pillory for perjury? This question was objected to, as tending to criminate him; but the court overruled the objection, saying, there was no impropriety in the question, as the answer could not subject him to any punishment; and, the bail admitting the fact, he was rejected. In the case of *Frost v. Holloway*, (*v*) the counsel, in cross-examining a witness, asked him whether he had not been tried for theft at Reading. The witness refused to answer, and appealed to Lord Ellenborough, C. J., whether he was bound to answer such a question. Lord Ellenborough, C. J., said, 'If you do not answer the question, I will commit you;' adding, 'you shall not be compelled to say whether you were

*Authorities  
that they must  
be answered.*

*Rex v. Ed-  
wards.*

*Frost v. Hol-  
loway.*

(*p*) 26 How. St. Tr. 1353.

(*q*) *Reg. v. Parker*, 1 Cox, C. C. 76. Cresswell, J., referred to C. J. Treby's opinion, *ante*, p. 541; and if the case had been of sufficient importance it seems the question would have been reserved.

(*r*) *R. & R. C. C. R. 211*. But see *Rex v. Barker*, 3 C. & P. 589.

(*s*) See also *Dodd v. Norris*, 3 Campb. 519. S. P. mentioned by Lord Ellenborough as having been decided by all the judges. It may be observed that, besides degrading the witness, her answer

might have subjected her to punishment in the spiritual court. In *Rex v. Pitcher*, which was an indictment against a female prisoner for stealing from the person, Hullock, B., would not allow the prosecutor to be asked, on cross-examination, whether anything improper passed between him and the prisoner at the house where he lost the property. 1 C. & P. 85.

(*t*) See the cases, *ante*, p. 293.

(*u*) 4 T. R. 440.

(*v*) MS. 2 Phill. Ev. 428.



Cundell v.  
Pratt.

guilty or not.' This occurred at the sittings after Hil. Term, 1818; and it would appear, that his lordship had changed his opinion as to the obligation on the witness to answer, since his decision in *Rex v. Lewis*, as above mentioned. In *Cundell v. Pratt*, (*w*) Best, C. J., said, 'Until I am told by the House of Lords that I am wrong, the rule I shall always act on is, to protect witnesses from questions, the answers to which may expose them to punishment; if they are protected beyond this, from questions that tend to degrade them, many an innocent man would unjustly suffer.' (*x*)

Effect of a  
pardon.

Where a pardon for an offence has been granted, the rule appears to be that the pardon removes the privilege of a witness of not answering questions, provided they are relevant to the issue; (*y*) but where the adverse party is attacking the witness, he is justified in refusing to answer what would disgrace him, although he has obtained a pardon. (*z*)

Effect of a  
certificate  
under the  
Bribery Act.

Where a witness had received a certificate under the 15 & 16 Vict. c. 57, s. 10, which protects witnesses, who have made a true disclosure touching corrupt practices at the election of members of parliament, it was held that the witness was bound to answer, whether he had received any sums of money from a person charged with bribery, as that certificate protected him from all penal actions, penal disabilities, and criminal prosecutions of every kind. (*a*)

Where the  
time for pro-  
secution is  
passed.

[930]

And where in an action on a bill of exchange the defence was, that the bill was drawn and accepted for the balance of an account of stockjobbing transactions, and one of the parties to the transaction objected to answer the question, on the ground that his answer might subject him to penalties under the Stockjobbing Acts; but the transaction had taken place more than three years before the trial, and the witness did not know that any proceeding had been commenced against him; Lord Tenterden, C. J., held that the witness was bound to answer the questions put to him. (*b*)

A witness  
may be asked  
whether he  
has not been  
previously  
convicted, &c.

But now by the 28 & 29 Vict. c. 18, s. 6, 'a witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal parts) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court, where the offender

(*w*) Mood. & Malk. 108.

(*z*) See also 1 Arch. Pract. 193. Arch. Cr. Pl. 238, where a MS. case of *Rex v. Holding and Wade* is cited, in which Bayley, J., held that all questions must be answered except those the answer to which may subject the witness to punishment.

(*y*) Reg. v. Boyes, 1 B. & S. 311.

(*z*) Per Crompton, J., *ibid.* stating that that is the distinction between Reg. v. Boyes and Reg. v. Reading, 7 How. St. Tr. 259, 296, where the question was put in the cross-examination of a witness

for the Crown; and the Earl of Shaftesbury's case, 8 How. St. Tr. 817, where the question was put by a grand juror to test the character of a witness. See M. & M. 193, note (*b*).

(*a*) Reg. v. Charlesworth, 2 F. & F. 326. The witness refused to answer, and was committed and applied in vain to the Court of Exchequer and Court of Common Pleas to be discharged, and both courts approved of his commitment. *Ex parte Fernandez*, 10 C. B. (N. S.) 3. *In re Fernandes*, 6 H. & N. 717.

(*b*) Roberts v. Allatt, M. & M. 192.

was convicted, or by the deputy or clerk of such officer (for which certificate a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.'

Assuming that a witness be not compellable to answer degrading questions, it seems allowed (as in the case of criminating questions) (c) that the questions may legally be asked. (d) If the witness declines answering questions tending either to criminate or degrade him, it seems hardly possible to avoid coming to a conclusion almost as unfavourable to his credit as if he had admitted the misconduct imputed to him in the question; but in *Rex v. Watson*, (e) Holroyd, J., said that he had understood the rule to be that if you propose a question to a witness and he declines to answer it, his not answering it can have no effect on the jury. And in *Rose v. Blakemore*, (f) where a witness for the plaintiff refused to answer a question, whether he had published a particular handbill, on the ground that he had been threatened with a prosecution for the publication; and the counsel for the defendant, in his address to the jury, put it to them that the witness really must have been concerned in the publication, for that a denial of it, if he could deny it, would not injure him; Abbott, C. J., interposed and said, that no such inference ought to be drawn, and that there was an end of the protection of a witness, if a demurrer to the question were to be taken as an admission of the fact inquired into. And in *Lloyd v. Passingham*, Lord Eldon expressed a similar opinion. (g)

If the question be of a tendency to criminate or degrade, and the witness answers it, the cross-examining party must be satisfied with the answer, and will not be allowed to falsify it by evidence; (h) that is, if the question be merely collateral to the point in issue; for if it be relevant to it, and the witness deny the thing imputed, evidence may be called to contradict. Thus where a witness for a prosecution in larceny had been asked, in cross-examination, whether he had not been charged with robbing his master, and whether he had not afterwards said he would be

If the witness declines to answer, it can have no effect on the jury.

Witness's answer conclusive.

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(c) See *ante*, p. 540.

(d) See 1 Stark. Ev. 212.

(e) 2 Stark. N. P. C. 157.

(f) R. & M. N. P. C. 382.

(g) 16 Ves. 64. See the note of the Reporters in *Rose v. Blakemore*, in which doubts are ably expressed, with deference to such high authorities, whether these *dicta* be not inconsistent with the general principles on which the rules concerning the right of witnesses to refuse an answer to questions have been established.

(h) *Rex v. Watson*, 2 Stark. R. 149, 151, 158. *Rex v. Clarke*, 2 Stark. R. 244, per Holroyd, J. *Harris v. Tippet*, 2 Campb. 637, *cor.* Lawrence, J. For the court will not try a collateral question whether the witness has been guilty of the misconduct imputed to him. However, in this case of *Harris v. Tippet*,

which has been relied upon by very high authorities in support of the general rule (see *Rex v. Watson*, 2 Stark. 155, 158), it may be perhaps doubted whether the decision of the learned judge in this particular instance was correct, although the principle laid down by him undoubtedly is so. The witness being called for the defendant, was asked whether he had not attempted to dissuade a witness examined for the plaintiff from attending the trial; the question, therefore, it may be argued, was not altogether collateral, but so connected with the cause that other witnesses might be called to contradict him. See the Queen's case, 2 B. & B. 311, *post*, p. 561, and see the cases where a prosecutrix in rape, and a daughter in an action for seduction, have been contradicted by other witnesses, *ante*, p. 298.

revenged of him, and would soon fix him in gaol, and had denied both; Lawrence, J., ruled, that as to the former, his answer must be taken as conclusive; but that as the words were material to the guilt or innocence of the prisoner, evidence might be adduced that they were spoken by the witness. (*i*)

A witness cannot be asked whether he is a spy.

Where on an indictment for murder, which was prosecuted by the attorney-general for the government, a police officer, on cross-examination, stated that he had attended a meeting by the direction of the commissioners of police, and that his instructions were to attend the meeting and report, and that he attended the meeting and reported; he was asked whether he attended as a spy, and the question was objected to. Lord Campbell, C. J., 'I am of opinion that it is irregular, not on the ground that the witness is called on to criminate himself, and may refuse to answer, but on the ground that he is called upon to draw an inference from the facts. It will be open to the counsel for the prisoner to denominate the witness a spy hereafter if he think fit; but I am of opinion that he cannot ask the witness "Did you go as a spy?"' (*j*)

Privilege of the witness only.

The privilege of refusing to answer is the privilege of the witness, and not of the party; for that reason, Lord Tenterden, C. J., refused to allow counsel to support, by argument, the privilege as belonging to the party whom he represented. (*k*) It was formerly held that if a witness answered any questions on cross-examination on a matter rendering himself liable to forfeiture or punishment, he could not afterwards claim his privilege, but must answer throughout. (*l*) And so if a witness voluntarily answered questions tending to degrade him on his examination in chief, he was bound to answer on cross-examination, however penal the consequence may be. (*m*) But it has since been held that it makes no difference in the right of a witness to protection that he has chosen to answer in part; and the witness is entitled to protection at whatever stage of the examination he chooses to claim it. (*n*)

A witness is entitled to protection at any time, and although he may have answered in part.

Rule that best evidence possible must be given not applicable to cross-examination to discredit: *semble*.

The rule which requires the best evidence to be produced, of which the nature of the thing is capable, is, it should seem, in some degree relaxed in regard to cross-examination for the purpose of discrediting a witness; for the rule is to be understood as applicable only to the proof of the issue or some fact material to the issue. (*o*) Thus it is usual in practice to ask in cross-examination an accomplice or other witness who appears against a person on a criminal prosecution, whether he has not been tried for some offence; although the fact of his having been tried for such an offence is partly matter of record, and, therefore, according to the general rule, not to be proved without the record, which is the highest species of proof. (*p*)

(*i*) Yewin's case, 2 Campb. 638; see also the Queen's case, 2 B. & B. 313, and *post*, p. 561.

(*j*) Reg. v. Bernard, 1 F. & F. 240.

(*k*) 2 Phill. Ev. 418, citing Thomas v. Newton, M. & M. 48 n.

(*l*) East v. Chapman, M. & M. 46. Lord Tenterden, C. J. Dixon v. Vale, 1 C. & P. 278. Best, C. J.

(*m*) Per Dampier, J., Winchester Sum. Ass. 1815, Mann Ind. Witness, 222.

(*n*) Reg. v. Garbett, 1 Den. C. C. 236.

(*o*) 1 Phill. Ev. 301, 7th ed.

(*p*) 1 Phill. Ev. 301, 7th ed. 2 Phill. Ev. 428, last ed. But if the object was, not merely to discredit, but to exclude the witness altogether on the ground of



The preceding passage has, however, been questioned. Where a witness called for a plaintiff was asked on cross-examination by the defendant's counsel, who produced a letter purporting to be written by the witness, 'Did you not write that letter in answer to a letter charging you with forgery?' it was held that the question could not be put. The rule is that the best evidence in the possession or power of the party must be produced. Generally the original document is the best evidence; but circumstances may arise in which secondary evidence of its contents may be given. In this case these circumstances did not exist. For anything that appeared, the defendant's counsel might have the letter in his hand when he put the question. It was sought to give evidence of a letter without in any way accounting for its absence, or showing any attempt made to obtain it. The best evidence of the document was not tendered. (q)

In the preceding case, on counsel urging that a witness might be asked in cross-examination whether he has not been convicted, Cresswell, J., said, 'If objected to, it is always disallowed.' (r) But where the defendant was asked in cross-examination whether there had not been proceedings against him in the county court at the suit of one Agutta in respect of a similar claim, which he had resisted, and upon which he had given evidence, and the jury notwithstanding found their verdict for the then plaintiff, and it was objected that the question could not be put without producing the record of the proceedings in the county court; and the objection was overruled, and the defendant answered that there had been such proceedings, in which he had given evidence, and that he had lost the verdict; the court held that no new trial ought to be granted by reason of this question having been allowed, and said, 'We dissent from the *obiter dictum* of Cresswell, J., in *Macdonnell v. Evans*, as to what stands upon the same ground, viz. the necessity of producing the record of the

A witness cannot be asked, 'Did you not write that letter in answer to one charging you with forgery?'

Could a witness be asked whether he had been convicted?

See the 28 & 29 Vict. c. 18, s. 6, *ante*, p. 544.

his conviction for a crime, the conviction must have been proved by the production of the record.

(q) *Macdonnell v. Evans*, 11 C. B. 930. The court, however, studiously guarded against laying down any general rule, Jervis, C. J., saying, 'It is unnecessary, as it seems to me, for the court to lay down any general rule upon this subject.' During the argument Maule, J., said, 'If you want the jury to know that there was a letter containing a charge of forgery, the proper way to do so is by producing the letter itself;' and again, 'Suppose the witness had said, "I did write this letter in answer to another which is in court," good sense obviously requires that the letter should be produced, if it is wished to get at its contents;' and in giving judgment, 'Suppose we assume that the paper was shown to the witness, and he was asked, "Did you not say Yes in answer to something contained therein?" can it be contended that the contents of the paper could not be shown? It seems to me that if the document was present, the proper way of dealing with it would be to pro-

duce it, and then to ask the witness, "Did you not write so and so in answer to it?"' The court treated the question in this case exactly the same as if it had arisen on an examination in chief. In *Boosey v. Davidson*, 13 Q. B. 257, which was an action for the infringement of a copyright of certain airs in an opera, a witness was asked whether he had not seen printed copies of these airs in a particular shop; and it was held that the question could not be put, as the answer would be a statement of the contents of a written instrument, without accounting for its non-production.

(r) It may be remarked that the fact of a trial or conviction may always be proved indirectly. The witness may be asked whether he was not in gaol at a particular time, and whether that was not after he had been in court? Whether he has not been charged with such an offence? &c. And the editor has known judges on many occasions object to such a cross-examination, and say, 'Why do you not put the question directly?'

conviction in order to found the question, on cross-examination, "Have you been convicted?" Upon a question collateral to the issue, as a rule, the questioner is bound by the answer; so that extraneous evidence is vain. Either the witness answers, "I have been convicted," and the question is useless, or he denies it, and then (apart from the Common Law Procedure Act 1845, s. 25, which does not touch this case) the proof of the conviction is forbidden. It cannot be given in evidence before the witness has answered, for it is not evidence in the cause. It could not be given in evidence after, because the answer is conclusive; and so of the proceedings in the county court in the present case. The case of *Macdonnell v. Evans*, the *Queen's case*, (s) and numerous other cases, in which it has been held that documents must be produced, are cases in which either the document would have been evidence upon the issue, or to contradict the witness if he answered in a particular way, or in which the precise terms and language of the documents were necessary to be referred to in order to answer the question. This is not a question as to the contents of a written document.' (t)

2. By proof of contradictory statement.

A foundation must be laid on cross-examination.

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2ndly. The credit of a witness may be impeached by giving evidence of his having said or written touching the cause what is at variance and inconsistent with his testimony on the trial. (u) But in order to lay a foundation for such discrediting evidence, it is necessary first to ask the witness, whom it is proposed to discredit by proof of contradictory *verbal* statements, upon cross-examination, whether he has made the statement or declaration, or held the conversation which it is intended to prove. (v) Thus if a witness, on being examined in chief as to some transaction supposed to have occurred between certain persons, should admit that he had heard of such a thing, but does not know its cause, it would be irregular to prove his having made a declaration respecting the cause, in order to show his knowledge of the cause, without first asking him in the cross-examination whether he had not made such a declaration; or if he had answered that he did not remember the transaction, it would be equally irregular, without such previous cross-examination, to prove declarations made by him respecting the transaction for the purpose of showing that he must have remembered it: (w) for it would, in many cases, have an unfair effect upon the witness and upon his credit, and would deprive him of that reasonable protection which it is the duty of the court to afford to every person who appears as a witness, to allow proof of his former conversation without first interrogating him as to that conversation, and reminding him of it, in order to call up all the powers of his memory as to the

(s) 2 B. & B. 288, 292.

(t) *Henman v. Lester*, 12 C. B. (N. S.) 776. Byles, J., *dissentiente*.

(u) *De Saille v. Morgan*, 2 Esp. N. P. C. 691. *Christian v. Combe*, 2 Esp. 489. See *ante*, p. 491, as to the depositions of a witness before a magistrate being used for this purpose. In order to impeach the credit of a witness for a defendant upon an information for assaulting revenue officers, by proving that on an information before two magistrates against

the same defendant for having smuggled goods in his possession he gave a different account of the matter, proof of the conviction containing the testimony of the witness is insufficient; it is necessary to prove it by the testimony of those who heard what was said. *Rex v. Howe*, 1 Campb. 461. S. C. 6 Esp. 125.

(v) *The Queen's case*, 2 B. & B. 299. *Carpenter v. Wall*, 11 A. & E. 803.

(w) *The Queen's case*, 2 B. & B. 299.



transaction. (x) And it is not enough to ask the general question, whether the witness has ever said so and so, because it may frequently happen that, upon the general question, he may not remember having said so; but the witness must be asked as to the time, place, and person involved in the supposed contradiction; because, when his attention is challenged to particular circumstances, he may recollect and explain what he has formerly said. Where, therefore, a witness had denied that he had ever said that he was in partnership with the defendant, but had not been questioned as to the particular person, or conversation; Tindal, C. J., refused to allow a witness to be asked whether on a particular occasion the witness had told him that he was in partnership with the defendant. (y)

With respect to the mode of proceeding where a contradictory statement formerly made by the witness in writing is proposed to be produced to discredit him, some important rules were laid down in the House of Lords in the *Queen's case*. (z) A witness named Louisa Dumont, who had been called on the behalf of the prosecution, was asked upon cross-examination whether she had not made particular statements, which the counsel read to her out of a supposed letter to her sister; it was objected that the letter itself should be put in before any use could be made of its contents; and thereupon the following question was proposed to the judges: Whether in the courts below a party, on cross-examination, would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness whether the witness wrote

Mode of laying a foundation for proof of contradictory statements.

Proof of contradictory statements in writing.  
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The witness formerly must not have been cross-examined as to the contents, but the paper must have been

(x) 2 B. & B. 300. Abbott, C. J., in delivering the opinion of the judges, added that, in any grave or serious case, if the counsel had, on his cross-examination, omitted to lay the necessary foundation, the court would, of its own authority, call back the witness in order to give him an opportunity of doing so. Another reason why he ought to be cross-examined is, that he may have an opportunity of explaining his conduct, 2 B. & B. 314.

(y) *Angus v. Smith*, M. & M. 473. The witness was allowed to be recalled, and asked the particular question; and the same rule was laid down by Parke, B., in *Crowley v. Page*, 7 C. & P. 789, *post*, p. 562, note (a), and in *Rex v. Pearce*, Gloucester Spr. Ass. 1829, MSS. C. S. G. Learned judges have in many instances allowed witnesses to be recalled in order to lay a foundation for the admission of such contradictory evidence. In *Reg. v. Harris*, Salop Spr. Ass. 1842, upon an indictment for murder, the prisoner had no counsel, and in his defence to the jury he alleged certain statements to have been made by the principal witness for the prosecution, and imputed that his son, who could prove the statements, had been prevented from attending to give evidence for him; and Patteson, J.,

stopped the trial, and ordered the son to be sent for, at the same time directing that no communication should be made to him of the matters as to which he was going to be examined. The prisoner having no attorney, and the son not having been examined by any one as to what statements he had heard the witness make, a difficulty arose as to the mode which was best to be adopted in the examination of the son, and the cross-examination of the witness, and the following mode was adopted as the best under the peculiar circumstances of the case:—The son was first examined by the editor, at the request of the learned judge, as to what he had heard the witness say, the witness being kept out of court during such examination, and then the witness was called in and cross-examined by the editor as to the statements which the son had sworn that he had made. The jury acquitted the prisoner, although the evidence for the prosecution was very strong. This case has been mentioned, as it may serve as a guide for the practice in cases where the prisoner wishes to call witnesses to prove contradictory statements made by witnesses for the prosecution, without having laid the ground for so doing in a proper manner. C. S. G.

(z) 2 B. & B. 286.



shown him, and he must have been asked if it was his writing.

If he admitted it, it might be read as part of the evidence on the other side.

If he did not admit it, he could not be cross-examined to its contents.

A witness may be cross-examined as to written statements made by him.

Observations on the new clause.

that letter,\* and his admitting that he wrote such letter? The judges answered this in the negative; and Abbott, C. J., stated their reasons to be, that the contents of every written paper are to be proved by the paper itself, and by that alone, if the paper be in existence: the proper course, therefore, was to ask the witness whether or no that letter was of the handwriting of the witness. If the witness admits this, the cross-examining counsel may, at his proper season, read that letter as evidence. (a) A second question was at the same time put to the judges, part of which was, whether the court would allow a witness, in case he should not admit that he did or did not write the same, to be examined to the contents of such letter. (b) To which the learned judges gave an answer in the negative, for the same reason which led them to give the answer to the first question, viz., that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other.

But now by the 28 & 29 Vict. c. 18, s. 5, 'a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge at any time during the trial to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.' This clause, by sec. 1, applies to 'all courts of judicature as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence;' and consequently any court of sessions trying any offence, or any justice or justices hearing any charge of any offence, may require the production of any writing, &c., though the word 'judge' alone occurs in the clause.

This 5th section is the same in substance as the 17 & 18 Vict. c. 125, s. 24, and it is not known that any questions have arisen upon its construction; but as it is obvious that some questions are likely to arise upon the new clause, it may be well to advert to them. The clause seems to assume that the writing is in the possession of the party who is cross-examining, and where that is the case, no difficulty as to its production can arise. But the writing may not be in his possession, and, in the most common case in criminal trials, the depositions are in the custody of the court. Here however, also, no difficulty can arise, as the court will, no doubt, always permit or cause them to be used for the

(a) *Id. ibid.* But if he suggests to the court that he wishes to have the letter read immediately in order to found certain questions upon its contents, that cannot be well or effectually done without reading the letter itself; in that case, for the more convenient administration of justice, the letter is permitted to be read, but considering it as part of the evidence of the counsel proposing it, and subject to all the consequences of its being so

considered. *Ibid.* 289, 290.

(b) The other part of the question was whether, when a letter is produced in the court below, the court would allow a witness to be asked, upon showing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part; and the judges were of opinion that it should be answered in the affirmative.

purpose of the clause. But the writing may be in the custody of other parties, and several questions may arise where that is the case. It may be in the custody of the prisoner, and notice to produce it may have been given, or it may be in the custody of a third party who has been subpœnaed; in either of these cases it is apprehended that the cross-examining party is entitled to prove the notice, and to call for the writing, or to call on the party subpœnaed to produce the writing: and it is now clearly settled that such a course ought at once to be adopted, and not postponed till the cross-examining party enters on his case. (c)

If the document be obtained in either of these modes, no difficulty will occur; but it may be that it may not be produced, though it is shown to be in the custody of the prisoner or witness. The question will then arise whether the judge has power to compel its production; the words ‘it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection,’ are perfectly general, and, if they stood alone, would seem to give the judge such power; but they occur in the proviso to the preceding part of the clause, which seems plainly to contemplate that the document is in the hands of the cross-examining party: and they seem to have been introduced for the purpose of enabling the judge to prevent an improper impression being produced by a partial communication of the contents of the writing; and, therefore, it admits of serious doubt whether it would be held that the judge was empowered in such a case by this clause to compel the production of the writing. Then, suppose the writing not to be attainable in these cases, or that it is in the possession of some person who has not been subpœnaed to produce it, and is not present; in such a case, as the power to cross-examine as to any writing is given in perfectly general terms, there seems no doubt that the right to cross-examine would exist; but as, before any contradictory proof can be given, the attention of the witness is to be called to the parts of the writing, it seems to be clear that in such a case no contradictory proof will be admissible.

Lastly, if a paper written by the witness is proved to have been lost or destroyed (in which case the only mode of contradicting him would be by producing afterwards some secondary evidence of the contents of the paper), the counsel may cross-examine the witness as to the contents of such paper, (d) and this might be done before the new Act. Thus where on the trial of an indictment which had been found at the Monmouth Special Commission, it was proved that at that Commission the depositions of the witnesses had been frequently produced, and that they had been mislaid, and that diligent search had been made for them several times, and they could not be found; Patteson, J., held that a witness might be cross-examined as to what he had said before the magistrates by a copy of the depositions, which was proved to be a correct copy. (e)

Where the paper is lost.

A witness, who has been examined before commissioners in a bankruptcy, may be asked whether he had mentioned a fact, which he had just mentioned, before the commissioners, without

Statement before Commissioners of Bankruptcy.

(c) Boyle v. Wiseman, 11 Exch. R. 360, and other cases, post, p. 636. (d) 2 Phill. Ev. 439. (e) Reg. v. Shellard, 9 C. & P. 277.

Right of the  
opposite  
counsel to  
inspect docu-  
ments.

[934]

The judge is  
to decide as  
to the writer  
of a paper.

Cross-exami-  
nation as to  
statements  
made before  
committing  
magistrates.

putting his examination into his hand, as the object is to show that he did not mention the fact, and he may admit that if he chooses; if he does not ask for the examination to refresh his memory, he may answer without it if he chooses. (*f*)

It was once said that, if the counsel who cross-examines puts a paper into the witness's hand, and puts questions on it, and anything comes of the questions founded upon it, the opposite counsel has a right to see the paper, and re-examine upon it; but if the cross-examination founded on the paper entirely fails, the opposite counsel has no right to look at it. (*g*) But it has since been laid down that whenever counsel puts a document into the hand of a witness, and asks him whether it is in his handwriting, and then proceeds to found any question on such document, the counsel on the opposite side has a right to see it; and the only case in which the opposite counsel has not this right is where counsel, after handing the document to the witness (and asking him whether it is his handwriting), goes no further. (*h*) And if the counsel in cross-examining a witness put a letter in his hands, and, after asking if he wrote it, desire him to read it, and then put questions upon it, such counsel is not bound to have the letter read until after he has addressed the jury. (*i*)

If a letter or other writing be tendered in evidence for the purpose of contradicting a witness, and a question is raised whether it was written by the party, it is for the judge to determine that question. (*j*)

As there has been no decision on the 17 & 18 Vict. c. 125, s. 24, which can in any way throw any light on the new clause, and as it is impossible to foresee in what manner, and to what extent, the judges may hold that that clause affects the cross-examination of witnesses as to statements contained in their depositions, it has been thought the more expedient course to insert all the previous decisions on the subject, especially as some of them may serve as a guide for the use which the judges may make of the depositions for the purposes of the trial.

We have seen (*k*) that by the rules of the judges, which were promulgated soon after the passing of the Prisoners' Counsel Act, a witness for the Crown cannot, upon his cross-examination, be asked whether he did or did not in his deposition make such or such a statement, or whether he did or did not make such a statement before the magistrate, until after his deposition has been read. These rules have been acted upon with great strictness in practice, and it seems fully settled that a counsel for a prisoner can neither ask a witness as to anything contained in his deposition, or anything not contained in the deposition, without first putting in the deposition to show what the witness did state. (*l*)

(*f*) *Ridley v. Gyde*, 1 M. & Rob. 197, Tindal, C. J.

(*g*) *Reg. v. Duncombe*, 8 C. & P. 369, Lord Denman, C. J.

(*h*) Per Erle, J., in *Cope v. the Thames Haven Dock Company*, 2 C. & K. 757. The words between brackets are inserted from the marginal note, and render the passage consistent with the regular prac-

tice.

(*i*) *Holland v. Reeves*, 7 C. & P. 36. Alderson, B.

(*j*) *Cooper v. Dawson*, 1 F. & F. 550. Wightman, J. *Boyle v. Wiseman*, 11 Exch. R. 360.

(*k*) *Ante*, p. 353.

(*l*) *Reg. v. Taylor*, 8 C. & P. 726. Erskine, J. *Reg. v. Holden*, 8 C. & P.



Some cases occurred in which the counsel for the prisoner, on cross-examining a witness for the prosecution, offered to put into his hand his deposition, and then proposed to ask him whether, having looked at the paper, he still persevered in the statement already made in his evidence in court; Parke, B., and Coltman, J., had some doubt as to the propriety of this course; but, it having been permitted by some judges, they thought it right to allow it. They, however, asked the opinion of the judges whether they were right, and the judges were of opinion that the course pursued was inexpedient, and that it ought not to be allowed in future. (m)

So where Ford, Higginson, and Maddock were tried for a burglary, and a policeman, in consequence of a statement by Maddock, went with him to Ford, and asked Ford 'where the hams were that he had bought of Higginson?' Ford at that time denied having any hams, but on the way towards his house he said to the policeman, 'I have the little ham at home, but I know nothing at all about the big ham.' The policeman added that neither he nor Maddock had said anything about little or big hams in Ford's hearing before he made this statement. On cross-examination the policeman was several times asked 'whether Maddock did not say in Ford's hearing, when he first met with Ford, "That is the man that bought the big and little ham?"' which he as often denied. The prisoner's counsel then proposed to put his deposition into his hand, to desire him to read it, and then to ask him 'whether he adhered to the statement that nothing had been said about the big or little ham in Ford's hearing before Ford made the statement about them?' But the prisoner's counsel did not propose to put the deposition in evidence. The deposition did in fact contain a statement that, when the policeman met Ford, Maddock said 'That is the man that bought the big and the little ham.' Greaves, Q. C., consulted Patteson, J., and finding that he had an impression that the course proposed had been permitted by some of the learned judges, but that his opinion was opposed to it, and entertaining himself a very decided opinion against such a course and having on a previous day at the same assizes refused to permit it to be adopted, he thought it better to refuse to permit it in the present instance; but in order that the point might be finally settled, he reserved the question, whether the prisoner's counsel was entitled, as a matter of right, to put the deposition into the witness's hand, to desire him to read it, and then to ask him whether he adhered to the statement he had made. On the case coming on before the judges, Lord Campbell, C. J., said, 'The judges are all of opinion that the course which the prisoner's counsel wished to take ought not to be allowed; that the question was *res judicata*;' and his lordship read the preceding case, and added, 'After that decision, the question is certainly not open for argument; and I entirely concur in the decision. I have always considered it an improper and inexpedient practice, though hitherto I have not had the courage to prevent it; but *the matter is now settled for the future*; and the proper course to be

A deposition cannot be put into the hand of the witness, and the witness asked whether he adheres to his previous statement.

A deposition cannot be placed in the hands of a witness, the witness be directed to read it, and then be asked whether he adheres to his statement, if it is not intended to put the deposition in evidence.

606. Patteson, J. *Rex v. Edwards*, 8 C. & P. 26, Littledale, J., and Coleridge, J.; and see the cases, *ibid.* 31, note (a).

(m) Anonymous, cited in *Reg. v. Ford*,

2 Den. C. C. 245, from the MSS. of Parke, B. April 1843. This case and *Reg. v. Ford* seem not to be affected by the new clause.

pursued is that pointed out in the *Queen's case*. (*n*) The deposition should either be read to the witness at the time of the cross-examination, and before the questions as to its contents are put, or should be given in evidence by the prisoner's counsel as part of his own case. (*o*)

And so strictly has this practice been adhered to, that it has been held that a prisoner's counsel cannot be permitted to ask a witness whether he had ever made a particular statement before, but that the question ought to be qualified by adding, 'except when you were before the magistrate,' or 'the coroner,' as the case may be. (*p*)

A contradiction must not be obtained by a sidewind.

Nor will the court allow a question to be put in order to get a contradiction, by a sidewind, between the evidence of a witness and his deposition, without putting in the deposition. On a trial for murder a witness was asked by the prisoner's counsel whether, when he was examined before the magistrate, he recollected a particular fact, and it was said that the same question had been allowed to be put on the previous trial of the same case by Coltman, J. Patteson, J., said he had a great respect for the opinion of Mr. J. Coltman, but the question was evidently an evasion, and an attempt, by a sidewind, to get a contradiction between the testimony of the witness in the box and his statement before the magistrate, without putting in the deposition. This was clearly irregular, and could not be allowed. (*q*)

Where a statement is not in the deposition.

Where, however, a witness admitted that he had been cross-examined by the prisoner's attorney when he was before the magistrate, the counsel for the prisoner was permitted to question him as to the answers he gave, it appearing to the judge that no cross-examination of the witness was returned by the magistrate. (*r*) If the counsel for the prosecution refers to the deposition, and states that it contains no note of any cross-examination, this entitles the prisoner's counsel to cross-examine the deponent as to any statement made by him in cross-examination before the magistrate. (*s*) So where on a trial for murder a witness stated a conversation with the prisoner, which did not appear in the depositions, and, on cross-examination, the witness was asked whether she had ever made that statement before, and it was objected that this question included what was said before the magistrate; Alderson, B., after consulting Cresswell, J., said 'We are of opinion that the question may be put. No doubt, if the

Where a deposition contains no cross-examination.

(*n*) 2 B. & B. 289.

(*o*) Reg. v. Ford, 2 Den. C. C. 245, 5 Cox, C. C. 184. Spring Ass. 1851. Reg. v. Palmer, 5 Cox, C. C. 236. Pollock, C. B. S. P. April, 1851. Reg. v. Brewer, 9 Cox, C. C. 409, S. P. Blackburn, J. Jan. 1863.

(*p*) Reg. v. Holden, *supra*. Reg. v. Shiellard, 9 C. & P. 277, Patteson, J. Reg. v. Price, 7 Cox, C. C. 405, Wightman, J., is *contra*, but the previous cases were not cited.

(*q*) Reg. v. Newton, 4 Cox, C. C. 262, March 1850.

(*r*) Rex v. Edwards, 8 C. & P. 26.

(*s*) Reg. v. Curtis, 2 C. & K. 763. A witness had been examined before the

magistrates touching the charge for which the prisoner was indicted, and on cross-examination in court it was proposed to ask him whether, whilst he was under cross-examination by the prisoner's attorney before the magistrates, he did not make a certain statement. The counsel for the prosecution objected to this question, on the ground that *the depositions, on being referred to, were found to contain no note of any such cross-examination*. Erle, J., was of opinion that the question must be allowed. There did appear to have been decisions the other way (see *ante*, p. 489), but he had always been of opinion that, in principle, these decisions were wrong.

object is to contradict a witness, or elicit what was said before the magistrate, the depositions must be put in; but when they are in they will not prove whether or not such a statement was made. At the utmost, they could only show that they did not contain it.' (t)

In one case, it seems to have been considered a fitting course for the judge to look at the depositions while the witnesses were under examination, and question them as to any discrepancy between them and their evidence; (u) but in other cases learned judges have refused, where counsel were employed by the prisoner, to look at the depositions at all. (v)

Although the counsel for a prisoner must put in the deposition before cross-examining the witness as to what he said before the magistrate, the court may, in its discretion, if it think fit, put any question to the witness without putting the deposition in evidence, or may allow the prisoner's counsel, as the mouthpiece of the court, to put the question, without putting in the deposition. (w) Where, therefore, a witness being asked in cross-examination 'whether, when the prisoner struck the blow with the knife, the deceased did not seem as if he was going to strike the prisoner?' and the witness answered 'No;' Wightman, J., drew the counsel's attention to the witness's deposition, and handed it down to him, saying, 'You may put it into his hands to look at; you don't thereby make it evidence. He may look at it to refresh his memory.' The deposition was then put into the witness's hands, and after he had looked at it Wightman, J., said, 'Well, having read that, what do you say?' The witness said, 'Yes, he did.' (x)

Where the deposition was put in the hands of a witness, and on being asked to read it he said he could not read writing, it was held that there was no objection to the deposition being read over to him, and the officer of the court read it over to him accordingly. (y) But where a similar course was proposed to be adopted,

Whether the judge will look at the depositions.

The court may itself put questions, or allow the prisoner's counsel so to do, without putting in the depositions.

Reading a deposition to a witness.

(t) Reg. v. Moir, 4 Cox, C. C. 279. May 1850.

(u) Rex v. Edwards, *supra*. This is a course which has not unfrequently been adopted in cases where the prisoner has had no counsel, and in such cases it appears highly expedient, as prisoners rarely have copies of the depositions unless they are defended by counsel, and, even if they had, probably would not be able properly to avail themselves of any contradictions that might arise; and it is to be remembered that the depositions are returned to the judge for the express purpose of enabling him to judge as to the accuracy of the witnesses. C. S. G.

(v) Rex v. Thomas, 7 C. & P. 817. Parke, B., as stated 8 C. & P. 27, and that statement is correct. Reg. v. Holden, *supra*. In both these cases the counsel for the prisoner requested the judge to look at the depositions, and the object was to avoid putting in the depositions, and if the judge had in those cases looked at the depositions, and questioned the witnesses upon them, it would have been indirectly getting rid of the effect of the rules themselves. It is a very different

question whether the judge may not in his discretion question a witness as to discrepancies which strike his mind, and either have not struck the counsel for the prisoner, or, if so, have been considered by him not of such importance as to induce him to put in the depositions, and so give the counsel for the Crown the reply. C. S. G.

(w) Reg. v. Peel, 2 F. & F. 21, Willes, J.

(x) Reg. v. Quin, 3 F. & F. 818. It is clear that the whole here was done on the motion of the court, and the marginal note thus misrepresents it. 'Wightman, J., allowed the deposition made by a witness to be put into his hands to refresh his memory, and he was then asked what he said about a fact which he had answered before in the negative, and answered the question affirmatively.'

(y) Rex v. Edwards, 8 C. & P. 26. Littledale, J., and Coleridge, J. It has been assumed that it was decided that this could be done without putting in the deposition; but there is no such statement in the report, and, on the contrary, though only witnesses to character were



and the preceding case was relied upon as an authority, and it was said that Coltman, J., had acted on its authority. (z) Erle, J., held that the course would be irregular and contrary to all rule. It would be in effect putting the officer in the position of a witness, without being on oath, to contradict the testimony of the sworn witness in the box. (a)

Depositions  
before a  
coroner.

On an indictment for murder a witness was asked, in cross-examination, whether she had stated a particular fact when she was examined before the coroner; and it was objected that the deposition must first be put in. On the other hand it was urged that the rules framed by the judges only applied to depositions taken before justices; but it was held that there was no distinction whatever between depositions before a coroner and depositions before a magistrate. (b) But where on a trial for murder a witness was asked in cross-examination whether he had not made before the coroner a certain statement, and it was contended that the rules as to depositions did not apply to the depositions taken before coroners; Byles, J., said, 'Unless some authority is shown me to the contrary, I shall allow the question to be put. The rules laid down by the judges apply to examinations before a magistrate; examinations before a coroner are not mentioned, and this seems to me strongly in favour of the argument. If it had been intended that the same rules should apply to depositions taken before a coroner, they would have been mentioned. As I said before, unless an authority be shown against such a question being put, I shall, *in favorem vitæ*, allow it to be put.' (c)

Depositions  
lost.

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In a case where it was proved that the depositions had been regularly taken against the prisoner before the magistrates, and returned to the proper officer, and that officer proved that he had made diligent search after them, and could not find them; Patteson, J., held that the prisoner's counsel might cross-examine from copies of them, which were proved by the magistrate's clerk to be correct. (d)

The same rule  
applies to the  
counsel for  
the prosecu-  
tion cross-

The same rule applies as to the cross-examination of a witness on his deposition by the counsel for the Crown as by the counsel for the prisoner. On a trial for murder a witness was called for the prisoner, whose deposition had been taken by the coroner, and

called, the counsel for the prosecution replied. Probably, therefore, the deposition was put in, and so much only is reported as related to the reading of the deposition.

(z) Reg. v. Tooker, 4 Cox, 93 (b). But Coltman, J., there said, 'I do not accede to Rex v. Edwards; but there being that case, I think the prisoner should have the benefit of it.'

(a) Reg. v. Matthews, 4 Cox, C. C. 93, August 1849. Probably this case is inaccurately reported. If the deposition is put in, it is, by the rules of the judges, to be read by the officer, and the only real objection to the course proposed was that it was an attempt to get at the contents of the deposition without putting it in evidence. See Reg. v. Ford, *ante*, p. 554, and other cases there cited, which clearly overrule the supposed decision in Rex v.

Edwards.

(b) Reg. v. Barnett, 4 Cox, C. C. 269. Platt, B., after consulting Patteson, J., April 1850. Platt, B., added, 'We think you may place in a witness's hands anything that he has written or signed to refresh his memory; not to elicit from him what he may have stated before on the subject, but that, having refreshed his memory, you may put questions to him respecting the transaction itself.' The deposition was put in the witness's hands, and she read it to herself, after which the cross-examination was continued; but the deposition was not put in evidence. This case is overruled, except as to the point stated in the text by Reg. v. Ford.

(c) Reg. v. Maloney, 9 Cox, C. C. 26. No case was here cited.

(d) Reg. v. Shellard, 9 C. & P.

it was held that the counsel for the Crown must put in the deposition if he cross-examined the witness as to any statement contained in it. (e)

examining a witness for the defence.

But the rules only apply to what are strictly depositions taken in the regular course before a magistrate. Where, on an indictment for a rape, it appeared that the prosecutrix had twice charged the prisoner with the offence, and that on the first occasion the prosecutrix was sworn and her statement taken down, but not read over to her or signed either by the magistrate or the prosecutrix, and after this examination the prisoner was discharged, but was afterwards again apprehended, and committed by other magistrates; Coleridge, J., after conferring with Gurney, B., held that the counsel for the prisoner might ask the prosecutrix whether she had not said certain things on the first occasion when she was so examined without producing the writing which had been taken down. (f)

Where the rules do not apply.

When the prisoners were first brought before the magistrate charged with the felony the witnesses were sworn, examined by the magistrate, and cross-examined by the prisoners, and written minutes of the examination and cross-examination were made by the clerk to the magistrates under the inspection of the magistrates. These minutes were then sent to the office of the clerk to the magistrates, and there delivered to a clerk named Tasker, who proceeded to write the depositions from the minutes. The witnesses attended in the office, and in the course of writing the depositions Tasker put some questions to each of them, for the purpose of rendering the depositions more correct, clear, and complete. The answers given to these questions were inserted in the depositions. The magistrate was not present, nor were the prisoners at the office of the clerk to the magistrates. The depositions having been thus written, the witnesses appeared again before the magistrates, and in the presence of the prisoners were resworn; the depositions were read over to them, and a full opportunity was afforded for cross-examination before the depositions were signed by the witnesses. Upon these circumstances appearing on the trial, the counsel for the prisoners proposed to ask one of the witnesses for the Crown this question, 'Did you not tell Mr. Tasker that you were watching the prisoner Christopher till a quarter before one o'clock?' The question was material, and had reference to what was said by the witness in answer to some question put by Tasker, as above stated, in the course of writing the depositions, and the witness's answer would, according to the evidence, appear on the depositions. The depositions were not read or tendered in evidence. The question was overruled by the court; and it was contended, on a case reserved, that if it were a legal deposition, it only excluded an inquiry into what took place before the magistrate. It was answered that, if Tasker had taken down the answers, and the witness had signed them, that paper would exclude evidence of what was said, and that it was like a statement contained in a letter. (g) Wilde, C. J., 'We think the question proper and legal, and that an answer should

The depositions only exclude the actual matter which takes place before the magistrate. Where therefore minutes were taken of the examinations of witnesses before the magistrate, and then a clerk, in the absence of the prisoners and magistrate, drew up depositions from the minutes, asking the witnesses any question that occurred for the purpose of explanation, it was held that the prisoner's counsel had a right to ask what a witness said in answer to a question put by the clerk in the absence of the magistrate.

(e) Reg. v. Muller, 10 Cox, C. C. 43. Pollock, C. B., and Martin, B.

(f) Reg. v. Griffiths, 9 C. & P. 746.

(g) It was also contended that the de-

position was not a legal deposition at all; but no opinion was pronounced on this objection.



have been required. It is objected that the answer was to be found in a paper signed by the witness, which must be regarded as a deposition, having acquired that character from the circumstances under which it was made. But the ground upon which a deposition is exclusive evidence of a matter contained in it, is the presumption that the magistrate has done his duty, and taken down all that was material in the testimony of the witness. But Tasker was a mere stranger; he could not, by any act of his, attach to the writing a character which would exclude parol evidence of what was so written; it does not become primary evidence of such matter: the witness's own words are the primary evidence of the statement. Suppose the witness had said something, and had then written it down himself, his writing would not exclude his speech. Why then should Tasker's writing do so? The whole argument was founded on an incorrect analogy. The conviction, therefore, was wrong.' (*h*)

Whether a witness may be asked on cross-examination the general question, whether he has written a different account.  
*Query.*

A very distinguished writer on the Law of Evidence (*i*) has stated his opinion, that the determination of these points has left the question still open, whether counsel may be allowed to cross-examine a witness as to his having given a different account of the transaction, or as to his having written a letter containing a different account; because, in the *Queen's case*, the question put to the witness related to a variety of particular expressions, and entire passages, supposed to be contained in a letter, and the letter, which was supposed to contain such expressions, had been actually produced and shown by the counsel: whereas the question proposed above is quite general, namely, whether the witness has given any account in his letters, or otherwise, differing from his present account, and the question is proposed without any reference to the circumstance, whether the letter is or is not in existence, or whether it has or has not ever been seen by the cross-examining counsel. (*j*) And the eminent author above alluded to argues with great force and ability that such a question may be asked with propriety. (*k*)

What questions may be asked to lay a foundation for contradictory evidence.

In order to lay a foundation for contradicting a witness, the questions asked upon cross-examination must, in some way, be relevant to the matter in issue. Thus in an action for usury, the person with whom the contract, alleged to be usurious, had been made, was produced as a witness for the plaintiff, and the counsel for the defendant proposed to cross-examine him as to other contracts he had made with other persons, which were not usurious; intending, if the witness answered in the affirmative, to draw the conclusion that he had made the same contract with the defendant, and if the witness denied the nature of those other contracts, to

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(*h*) *Reg. v. Christopher*, 1 Den. C. C. 536. In the course of the argument Maule, J., said, 'Tasker usurped an authority. He can no more exclude parol evidence of the witness's statement by reducing it to writing than any one present at a seditious meeting can exclude parol evidence of words there spoken by choosing to make a memorandum of them.'

(*i*) 1 Phill. Ev. 299, 7th ed.

(*j*) Mr. Phillips applies the same reasoning to another resolution of the judges during the same proceedings, viz. that if a witness be asked whether he has re-

presented such a thing, they should direct the counsel to ask whether the representation had been made in writing or words. This opinion of the judges the above learned writer conceives to have been founded on the supposition that the witness's letter was actually in the possession of the cross-examining counsel, and on the circumstance of the question relating to particular expressions supposed to have been contained in the letter. See 2 Phill. Ev. 400.

(*k*) 1 Phill. Ev. 299, 7th ed. *et seq.* See also 1 Stark. Ev. 203, *et seq.*



call evidence to prove the contrary, and thereby destroy the witness's credit. But Lord Ellenborough refused to suffer the question to be put, conceiving it to be entirely irrelevant to the issue in the cause; and the Court of King's Bench were afterwards all of opinion that he had acted properly; and they laid down the rule, that it is not competent for counsel on cross-examination to question the witness concerning a distinct collateral fact, which, if answered affirmatively, is wholly irrelevant to the matter in issue, for the purpose of discrediting him, if he answers in the negative, by calling other witnesses to contradict him. (*l*) It need hardly be observed, if a question be wholly irrelevant, and therefore improperly asked on cross-examination, and the witness nevertheless give an answer to it, the cross-examining party may not call evidence to contradict that answer; but it is further to be remarked, that many questions may be asked with propriety on cross-examination, which are irrelevant to the matter in issue, yet are allowable because they go to the credit of the witness; but the distinction is, as to the right to call evidence to contradict answers given to questions put to shake a witness's credit, that if the questions go merely to his credit, and are in other respects collateral to the issue, evidence cannot be called to contradict the answers; if they not only go to his credit, but are also connected with the subject of inquiry, then it is allowable to call witnesses to contradict. Thus if a witness be asked, on cross-examination, whether he has been guilty of a crime, or any conduct which would discredit him as a witness, but is unconnected with the matters in issue, and he denies it, his answer is conclusive. (*m*)

In what cases evidence may be called to contradict.

So where on the trial of an information charging a maltster with having used a cistern for making malt without having previously entered it, a witness was asked on cross-examination whether he had not said that the officers of the Crown had offered him £20 to say that the cistern had been used, and he denied having said so; it was held that evidence was inadmissible to prove that he had said so; for the contradiction would be on a matter wholly irrelevant, and would in no way affect the character of the witness. (*n*)

Not on a matter wholly irrelevant.

Where on a trial for rape the prisoner called a witness, who stated that he could not speak English, and was accordingly sworn and examined in Irish, through an interpreter, and on cross-examination he again denied that he could speak English, and he also

As to speaking English.

(*l*) *Spencely v. De Willott*, 7 East, R. 108.

(*m*) *Ante*, p. 545.

(*n*) *A. G. v. Hitchcock*, 1 Exch. R. 91. Pollock, C. B., said, 'The test whether the matter is collateral or not is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence—if it have such a connection with the issue that you would be allowed to give it in evidence—then it is a matter on which you may contradict him. [But this seems to be much too narrow a rule, and so said O'Brien, J., in *Reg. v. Burke, infra*.] If you ask a witness whether he has not said so and so, and the matter he is supposed to have said would, if he had said it, contradict any other part of his testimony, then you may call another witness to prove that he

had said so, in order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he makes on oath in the witness box is not true (more accurately, in order that the jury may disbelieve or doubt the statement of the witness). It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness's testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of inquiry.' The editor has inserted the parts between brackets."

As to knowing the prisoner.

Palmer v. Trower.

Tolman v. Johnstone.

A witness may be contradicted as to facts showing his state of mind towards the opposite party.

Whether a witness is the mistress of the plaintiff.

denied that he had spoken in English to two girls within the last few days, and these girls were called, and proved that he had so spoken to them in English; upon a case reserved, it was held that the evidence of these girls ought not to have been admitted. (*o*) But where a woman, who was the only witness to prove an abominable offence, swore that she did not know the prisoner previously, evidence was admitted that they knew each other well, and were, in fact, intimately acquainted. (*p*)

Where in an action on a joint and several promissory note made by the father and grandfather of the defendant, who was sued as the administrator of his grandfather, the defence was that the plaintiff had forged the note in question, and also another note, in order to cover the forgery of the first note, and a charge had been preferred against the plaintiff for the forgery before the magistrates, but dismissed; the defendant was examined as a witness, and was asked on cross-examination whether his father had not, after the charge was preferred against the plaintiff, said in his presence that 'he was sorry he had forgotten that he had signed two notes.' The defendant answered in the negative. It was held that the plaintiff's counsel could not call a witness, in whose presence the father had made the statement, for the purpose of showing that the father had made the statement, and that the defendant had heard it; for the issue sought to be raised was purely collateral. (*q*) So where in an action for an assault on the plaintiff's wife, she swore that the assault was of an indecent character; the defendant denied it, and on cross-examination denied other indecent assaults on some young persons; and evidence on the part of the defendant was tendered to disprove these imputations, which was objected to unless evidence was admitted in support of them; it was held that such evidence on the one side or the other was inadmissible, as the matter inquired into was quite collateral to the issue to be tried. (*r*)

It is allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an unprejudiced state of mind, and whether he has not used expressions imputing that he would be revenged on some one, or that he would give such evidence as might dispose of the cause in one way or the other; and if he denies it, evidence may be given as to what he said, not with the view of having a direct effect, but to show what is the state of mind of that witness, in order that the jury may exercise their opinion as to how far he is to be believed. (*s*) Where therefore, in an action on a promissory note (in which the defence appears to have been that the note was forged), the female servant of the plaintiff, who was one of the attesting witnesses to the note, was asked on cross-examina-

(*o*) Reg. v. Burke, 8 Cox, C. C. 44. Three judges thought the evidence rightly received.

(*p*) Reg. v. Dennis, 3 F. & F. 502. The admissibility of the evidence was not disputed, and Byles, J., left it to the jury in favour of the prisoner.

(*q*) Palmer v. Trower, 8 Exch. R. 247. Alderson, B., said, 'It is a statement made in the presence of the defendant of a fact

not within his own knowledge; if it had been made in the presence of the grandfather, who is represented by the defendant, the case might have been different.'

(*r*) Tolman v. Johnstone, 2 F. & F. 66, Cockburn, C. J., after consulting the other judges of Q. B.

(*s*) Per Pollock, C. B., A. G. v. Hitchcock, *supra*.

tion whether she did not constantly sleep in the same bed with the plaintiff, which she denied; Coleridge, J., held that a witness might be called by the defendant to contradict her; as the question was whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to conspire with him to support a forgery; just in the same way as if she had been asked if she was the sister or daughter of the plaintiff, and had denied that. But if the question had been whether the witness had walked the streets as a common prostitute, that would have been a collateral issue, and, if she had denied it, she could not have been contradicted. (*t*)

If the imputed misconduct be relative to the subject of inquiry, as, if a witness for the Crown be asked whether he had not said that he would be revenged on the prisoner, and would soon fix him in gaol, (*u*) or whether he had not made declarations to procure persons corruptly to give evidence in support of the prosecution, (*v*) then evidence may be called to contradict him, if he denies the words or declaration imputed to him. Thus where on an indictment for an indecent assault on a girl, another girl denied in cross-examination that two letters were in her handwriting; and on the part of the prisoner, the suggestion was that the charge was the result of a conspiracy among the children and their parents; it was held that it might be proved that these letters were in the handwriting of the girl, and that the letters might be read; but that they were only evidence for the purpose of detracting from the credit of the girl. (*w*)

Where the misconduct relates to the subject of the inquiry.

Where on one trial the jury were discharged, and on the second trial a witness admitted in cross-examination that she had been in England and had prosecuted for a felony; it was held that it might be proved that on the former trial she had denied that she had ever been in England or had prosecuted there; for, no matter whether the question was relevant or irrelevant to the present issue, it went to the consistency of her evidence on the two trials. (*x*)

Contrary statement on a previous trial.

If the witness declines to give any answer to such a question proposed to him, by reason of the tendency thereof to criminate himself, and the court is of opinion that he cannot be compelled to answer, the adverse party has also, in this instance, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. (*y*)

When the witness declines to answer.

In one case, where a witness said on cross-examination that he had no recollection of a certain declaration one way or the other, without expressly denying it; Tindal, C. J., held that a person could not be called to prove such declaration; as he had never heard such evidence admitted in contradiction, except when the witness had expressly denied the declaration. (*z*) But in a later case where

(*t*) *Thomas v. David*, 7 C. & P. 350. In *Melhuish v. Collier*, 15 Q. B. 883, Coleridge, J., said, 'The principle I went upon in *Thomas v. David* was that the fact was one that the defendant might have proved in chief.'

(*u*) *Yewin's case*, 2 Campb. 638.

(*v*) *The Queen's case*, 2 B. & B. 311.

(*w*) *Reg. v. McGavaran*, 6 Cox, C. C. 64. Williams, J. The letters spoke of stick-

ing to the charge made against the prisoners, but there was no proof that they had been delivered to the persons to whom they were addressed.

(*x*) *Reg. v. Rorke*, 6 Cox, C. C. 196. Lefroy, C. J., and Monahan, C. J.

(*y*) *The Queen's case*, 2 B. & B. 313, 314.

(*z*) *Paine v. Beeston*, 1 M. & Rob. 20.



a witness neither admitted nor denied a verbal statement; Parke, B., held that evidence was admissible to show that the witness had made such a statement. (a)

Where a witness does not directly answer.

And now by the 28 & 29 Vict. c. 18, s. 4, 'if a witness on cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.'

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3. By proof of witness's acts and declarations touching the cause.

Previous cross-examination necessary.

3rdly. The credit of a witness may be impeached, not only by giving evidence to prove statements made by him at variance with his testimony, but by calling witnesses to prove his declarations and acts touching the subject-matter of inquiry. (b) And the rules above stated, as to the necessity of a previous cross-examination of the witness whom it is proposed to discredit, apply equally to this method of discrediting him as to the last. So that if it is intended to offer evidence of former declarations of a witness, or of acts done by him, though not with a view to contradict his statement upon oath in examination in chief, but with a view of discrediting him as a corrupt witness; in this case also it has been determined that the witness should be previously questioned as to such declarations, or such acts, on the cross-examination; (c) for in the one case as well as the other an opportunity must be afforded the witness of explaining his conduct before evidence can be adduced to impeach his credit by proof of the fact. Thus where the witness's moral character is relevant to the issue, expressions of the witness may be proved without the previous inquiry, if they tend merely to disgrace the witness by showing that he has made unbecoming declarations; but even if they be of such a nature, the introductory question must not be dispensed with, if they tend likewise to contradict some part of the witness's evidence. Therefore in an action for seducing the plaintiff's daughter, which the daughter proves, the defendant cannot give evidence that she has talked of another person as her seducer and the father of her child, unless she be first asked on cross-examination whether she ever used those expressions. (d)

(a) *Crowley v. Page*, 7 C. & P. 789. The learned Baron said, 'Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the testimony given by them on the trial, is always admissible, in order to impeach the value of that testimony; but it is only such statements as are relevant that are admissible, and in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, and, as I conceive, for that purpose only, the witness may be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he is supposed to have said it, or some other circumstance sufficient to

designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving other evidence of it; but if he says he does not recollect, that is not an admission, and you may give evidence on the other side to prove that the witness did say what is imputed, always supposing the statement to be relevant to the matter at issue. This has always been my practice, and if it were not so you could never contradict a witness who said he could not remember.'

(b) *The Queen's case*, 2 B. & B. 311.

(c) 2 B. & B. 311.

(d) *Carpenter v. Wall*, *supra*, 11 A. & E. 803.

Re-examination.

After a witness has been cross-examined respecting his former statements and declarations, for the purpose of affecting his credit, the counsel who called him has a right to re-examine him so as to give him an opportunity of explaining such statements and declarations. Thus if that which the witness has stated in answer to the question on his cross-examination arose out of the inquiries of the person with whom he had the conversation, the witness may be asked in re-examination what those inquiries were. (e) And he may also be asked what induced him to give to that person the account which he has stated in the cross-examination. (f)

But this, it should seem, is the limit of such a re-examination. Lord C. J. Abbott, in delivering his opinion in the *Queen's case*, said, 'I think the counsel has a right, upon a re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and, also, of the motive by which the witness was induced to use those expressions; but I think he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness.' (g)

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Conversations with a party to a suit and with a third person.

His lordship afterwards observed, 'I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject-matter of the suit, are, in themselves, evidence against him in the suit, and, if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination: provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion. But the conversation of a witness with a third person is not in itself evidence in the suit against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive under which he made them; but when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations has been laid before the court, the court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is, in my opinion, irrelevant and incompetent.' (h)

(e) 2 B. &amp; B. 295.

(f) Ibid.

(g) 2 B. &amp; B. 297.

(h) 2 B. & B. 297, 298. The other judges, except Mr. Justice Best, agreed with the Lord Chief Justice; but the Lord Chancellor and Lord Redesdale were of the same opinion with Mr. J. Best, and differed from the other judges,

inasmuch as they thought that the entire conversation ought to be admitted, not as evidence of any fact that might be asserted in the course of it, but solely and simply as explanatory of the witness's motives, and as setting his character and credit in a fair, full, and impartial point of view.

But the reasoning and the grounds of the supposed distinction have been since considered by the Court of Queen's Bench, and after full consideration that court overruled the distinction, and adopted the more safe and intelligible principle that the office of re-examination is to be confined to showing the true colour and bearing of the matter elicited by cross-examination, and that new facts or new statements, not tending to explain the witness's previous answers, ought not to be admitted. (*i*)

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Thus where an accomplice being cross-examined with a view to throw discredit on his testimony, confessed that he had committed two robberies the same night as the one charged in the indictment, and on re-examination it was proposed to ask him as to the particular circumstances attending those robberies, and the persons in whose company they were committed, in order to show that the prisoners were the persons; Littledale, J., refused to allow it, observing that the cross-examination having been only with a view to the witness's discredit, it was not competent to the counsel for the prosecution, on re-examination, to ask questions not arising out of such cross-examination, in order to criminate the prisoners. (*j*)

4. By proof  
of witness's  
character.

4thly. The credit of a witness may be impeached by proof of his general character. It is now completely settled with respect to this mode of discrediting a witness, that general evidence only, and not evidence as to particular facts, can be employed; (*k*) for if it were allowable to give evidence of particular collateral facts to affect his credit, the inquiry might branch out into an indefinite number of issues. Besides which, although a witness may be supposed capable of defending his general character, no man can come prepared to give an answer to particular facts, which might be sworn against him to impeach his character, without any previous notice given to him. (*l*) The proper mode, therefore, of examining a witness, who is called to discredit a previous witness by proof of his character, is to ask whether the present witness has had the means of knowing the former witness's general character, and whether, from such knowledge, he would believe him on his oath. (*m*) In order to answer this question negatively it is not necessary that the witness should ever have heard such person give evidence on oath, as the real question is whether the witness has such a knowledge of the person's character and conduct as enables him conscientiously to say that it is impossible to place any reliance on any statement that such person may make. (*n*) It has been held upon an indictment for perjury that a witness for the defendant could not be asked whether, from having heard a witness for the prosecution give evidence on the trial of a former cause, he considered that the

(*i*) 2 Phill. Ev. 443, citing *Prince v. Samo*, 7 A. & E. 627, where in an action for a malicious arrest, a witness called for the plaintiff stated on cross-examination that the plaintiff had instituted a prosecution for perjury against a witness examined against him in the action in which he had been arrested, and that the plaintiff had said that he had been remanded by the Insolvent Debtors' Court; on his re-examination it was proposed to ask him whether the plaintiff had not also, on the trial of the indictment, sworn that

the advance in question was a gift and not a loan; but Lord Denman, C. J., ruled that the question could not be put, and the court held that the ruling was right.

(*j*) Fletcher's case, 1 Lew. 111.

(*k*) *Rex v. Watson*, 2 Stark. N. P. C. 143. Bull. N. P. 296. 2 Phill. Ev. 430. 1 Stark. Ev. 237.

(*l*) Bull. N. P. 296.

(*m*) *Mawson v. Hartsink*, 4 Esp. N. P. C. 102.

(*n*) *Rex v. Bispham*, 4 C. & P. 392. Parke, J., and Garrow, B.



testimony of that witness could be relied on; nor whether he ever heard him commit perjury; nor whether he would not believe the witness because he had heard him commit perjury; as the witness must speak from the general character. (o)

Where upon an indictment for stealing money it was opened on the part of the Crown that an accomplice and one Mercer would be called as witnesses; Parke, J., both before and after those persons were called, allowed the prisoner's counsel to ask the other witnesses for the prosecution whether the accomplice and Mercer were not persons of very bad character. (p)

In answer to such evidence against character, the other party may cross-examine the witness as to his means of knowledge, and the grounds of his opinion, or may attack his general character. (q)

Where a witness on cross-examination stated that he had become bail for a witness who had been previously examined, and he believed it was on a charge of keeping a gaming-house; in order to prevent any impression being thereby made against the character of the previous witness, Gaselee, J., and Taunton, J., allowed the previous witness to be recalled, and asked whether the charge of keeping the gaming-house was in fact a true charge or not. (r)

A party cannot bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses. (s) Thus in a case where a witness for one party asserts one thing, and a witness for the other party asserts the contrary, and direct fraud is not imputed to either, evidence to the good character of either witness is not admissible. (t) But if the character of a witness has been impeached (although, according to some authorities, upon cross-examination only), evidence on the other side may be given in support of the character of the witness by general evidence of good conduct. (u) So in a case where two attesting witnesses to a will, which was impeached on account of fraud in procuring it, were dead, and a surviving attesting witness was called, and spoke to a fraudulent execution, it was held allowable to call evidence to the general good character of the deceased witnesses: (v) and Lord Ellenborough, in approving of that decision, observed, that if they had been alive they might have been produced, and their characters would have appeared on cross-examination; and being dead, justice required that an opportunity should be given of showing what credit was to be given to their attestation. (w) Whether in answer to proof of statements made by a witness in variance with his testimony at the trial, evidence may be given by the party who called the witness, that he affirmed

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Character of witness, how supported.

Previous similar statements.

(o) *Rex v. Hemp*, 5 C. & P. 468. Lord Denman, C. J.  
(p) *Rex v. Nichols*, 5 C. & P. 600.  
(q) 1 Stark. Ev. 238.  
(r) *Rex v. Noel*, 6 C. & P. 336.  
(s) *Bishop of Durham v. Beamont*, 1 Campb. 207. 1 Stark. Ev. 252.  
(t) 1 Campb. 207.  
(u) 1 Stark. Ev. 252. *Bate v. Hill*, 1 C. & P. 100. *Rex v. Clarke*, 2 Stark. N. P. C. 241, where the prosecutrix, upon an indictment for an attempt to commit

a rape, having been cross-examined as to having been sent to the house of correction on a charge of theft, evidence of her subsequent good conduct was admitted in support of the prosecution: *cor.* *Holroyd, J.*; but see *Dodd v. Norris*, 3 Campb. 519.  
(v) By Lord Eldon in *Doe v. Stephenson*, 3 Esp. 284. By Lord Kenyon in *Doe v. Walker*, 4 Esp. 50. *Provis v. Reed*, 5 Bingh. R. 435.  
(w) 1 Campb. 210.

the same thing on other occasions, and is still consistent with himself, is a point on which there are conflicting authorities. (*x*) The better opinion seems to be that such evidence is not admissible, except in cases where the counsel on the other side impute a design to misrepresent from some motive of interest or relationship; there, in order to repel such imputation, it may be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. (*y*) Thus where Neville was indicted for perjury committed on the trial of Barnes for setting fire to a rick, and Heming swore that Barnes was with him at a distance from the rick, but on cross-examination admitted that, on the trial for arson, he had given a different account, which tended to support the charge against Barnes; he said, however, that the day after the fire he had told the facts to Morgan, a constable, as he now stated them, and that he had been induced to make a false statement on the trial for arson; it was held that Morgan might be called to prove that Heming had made a statement to him the day after the fire for the purpose of setting up the witness, but that the particulars of the statement could not be asked by the counsel for the Crown. (*z*)

Party may not discredit his own witness by proof of his character; but he may prove his case by other witnesses.

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If a party calls a witness to prove a fact, he cannot, when he finds the witness proves the contrary, give general evidence to show that that witness is not to be believed on his oath: (*a*) for that would be to enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him. (*b*) But if a witness gives evidence contrary to that which the party calling him expects, the party is at liberty to make out his own case by other witnesses, and to show that the facts which his own witness had stated contrary to his interests were otherwise; (*c*) for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only. (*d*) Still a party is not at liberty to set up so much of his witness's testimony as makes for him, rejecting and disproving so much as makes against him. (*e*)

Whether a party may prove contrary statements made by his own witness.

Whether it be competent to a party to prove that a witness called by him, who has given evidence against him, has made at other times a statement contrary to that made by him at the trial, is a question on which there has been some difference of opinion. Such a contrary statement, it is clear, can only be admitted, if

(*x*) Gilb. Ev. 135. Bull. N. P. 294.

(*y*) 2 Phill. Ev. 445. 1 Stark. Ev. 253. See also the opinion expressed by Bayley, J., in *Withen v. Law*, 3 Stark. N. P. C. 63. See also *ante*, chap. 1, s. 3, *Of Hearsay Evidence*.

(*z*) Reg. v. Neville, 6 Cox, C. C. 69. Williams, J.

(*a*) *Ewer v. Ambrose*, 3 B. & C. 750.

(*b*) Bull. N. P. 297.

(*c*) 3 B. & C. 749, 750, 751. *Friedlander v. The London Assurance Company*, 4 B. & Ad. 193. *Richardson v. Allan*, 2 Stark. N. P. C. 334. *Alexander v. Gibson*, 2 Campb. 555. Particularly

where the witness is forced on a party by law; as, for instance, a subscribing witness to a will or deed. Thus in *Lowe v. Jolliffe*, 1 W. Bl. 365, the subscribing witness to a deed swore to the testator's insanity; yet the plaintiff was allowed to examine other witnesses in support of his case, to prove that the testator was sane. So in *Pike v. Badmering*, cited in 2 Stra. 1096, where the three subscribing witnesses to a will denied their hands, the plaintiff was permitted to contradict that evidence.

(*d*) Bull. N. P. 297.

(*e*) 2 Campb. 556.

admissible at all, for the purpose of neutralising or raising doubt and suspicion as to those parts of the witness's testimony with which the contrary statement is at variance. (f) In *Wright v. Beckett*, (g) which was an action of trespass, the plaintiff, having called four witnesses to prove that the plaintiff and his predecessors had immemorially exercised acts of ownership over the place in question, called a fifth person with a view to establish the same fact; he, however, contradicted the other four witnesses, and the plaintiff's counsel thereupon asked him whether he had not given a different account of the facts to the plaintiff's attorney two days before; this question was objected to on the ground that its obvious tendency was to discredit the witness. But Lord Denman held that the question might be put. The witness gave an evasive answer to the question. The plaintiff's attorney was then called, and, although the course was objected to, proved that the witness had given him, upon the occasion referred to, an account of the facts different from that given by him to the court, and that he took down in writing the account so given, and that he read it over to the witness, who said it was correct; and this account he read to the jury. And the jury were told that they were not to look upon the statement given to the attorney as evidence of the facts therein stated, but only by way of neutralising the effect of the evidence which the witness had unexpectedly given in court. And after argument, on a motion for a new trial, on the ground that the evidence of the attorney had been improperly received, and time taken to deliberate, Lord Denman, C. J., held that the course adopted at the trial was correct; but Bolland, B., was of the contrary opinion. (h) And in an action on the warranty of a horse, where a witness, who was necessarily called by the plaintiff to prove a resale of the horse, although subpœnaed by the defendant, stated a great many facts on cross-examination tending to show that the warranty had not been broken; Lord Denman, C. J., held that the plaintiff's counsel might ask the witness on re-examination whether he had not been living with the defendant, and the defendant's witnesses, since he had been in the assize town; his lordship referred to the preceding case, in which he had expressed an opinion, formed after much consideration, that the plaintiff might show that the witness had given a different account of the matter, by which different account he had been induced to call him, and stated that he remained of the same opinion; and thought, on the same principle, that a party calling a witness might examine him as to any fact tending to show that he had been induced to betray that party. (i)

But where, in order to prove a plea of fraud and covin in obtaining a bond, the defendant called a witness who had taken part in giving the bond, who on cross-examination said that the transaction of giving the bond was, as far as he knew, an honest and correct transaction, and on re-examination the defendant's counsel was allowed to ask the witness whether he had not told the defendant's attorney that it was a shameful transaction, which he denied, and the counsel then proposed to call the attorney

*Wright v.  
Beckett.*

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*Dunn v.  
Aslett.*

*Holdsworth v.  
Mayor of  
Dartmouth.*

(f) 2 Phill. Ev. 450.

(g) *Wright v. Beckett*, 1 M. & Rob.

414.

(h) See this case commented on with great ability, 2 Phill. Ev. 454, *et seq.*

(i) *Dunn v. Aslett*, 2 M. & Rob. 122.



and ask him whether he had so said; and this was objected to. Parke, B., said, 'Upon consideration, I think the evidence inadmissible. My doubt at first was whether, as the fact was elicited in cross-examination, the witness was not made for this purpose the witness of the plaintiff: and whether, as to this particular fact, not asked to in chief, the party calling him might not show he had given a different account. I am now satisfied that it makes no difference that the fact is elicited on cross-examination. The effect and object of the evidence is to discredit the witness. It goes to his general credit to show that he has given a different account of the matter before; and it is a clear rule that a party has no right to put a witness into the box as a witness of credit, and when he gives unfavourable evidence to call testimony to discredit him.' (j)

Winter v.  
Butt.

And so where a witness called for the plaintiff failed to prove the facts expected, and on cross-examination stated very important facts for the defendant, by whom she appeared also to have been subpoenaed, and it was proposed in re-examination to ask her as to a statement she had made to the plaintiff's attorney; Erskine, J., said, 'I am decidedly of opinion that you cannot ask the question. Mr. B. Parke has, I know, so ruled: and I recollect ruling the same way myself on the Oxford Circuit, with the approbation of Mr. J. Patteson, whom I consulted; and I have since talked with several of the other judges on the point, and they are generally of opinion that Mr. B. Parke's decision is right.' (k)

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If a witness unexpectedly gives evidence adverse to the party calling him, such party may ask him if he has not, on a particular occasion, made a contrary statement, and the question and answer may be stated by the judge to the jury with the rest of the evidence, the judge cautioning the jury not to infer merely from the question that the fact suggested by it is true.

On the trial of an action for an assault a witness for the plaintiff stated that the defendant's wife and the plaintiff were clinging together, and, as the defendant was endeavouring to part them, the plaintiff fell over a chair; but the witness did not speak to any act of violence committed on the plaintiff by the defendant. The plaintiff's counsel then questioned the witness, as in cross-examination, and asked her whether she had not seen defendant take the plaintiff by the hair. She denied this; and the plaintiff's counsel then asked, referring to an examination before the magistrates, which was attended by the plaintiff's attorney, whether on that occasion she had not said that she saw it. She answered that, if she did say so, it was all lies; that she had said things that were false on that occasion; that J. Melhuish, the prochein amy of the plaintiff, who was then present, had told her what to say, and had threatened to send her to gaol if she did not say so and so. She was then asked whether she did not say to the plaintiff's attorney that she had seen the defendant push his wife upstairs, taking her by the shoulder and pushing her with his knee. The defendant's counsel objected, and contended that the plaintiff's counsel was by it attempting to discredit his own witness, and that the kind of question put conveyed suggestions of facts which the jury might be led to believe in opposition to her present testimony, though, if she denied them, the plaintiff would not be entitled to contradict her; Williams, J., after conferring with Cresswell, J., held that

(j) *Holdsworth v. The Mayor of Dartmouth*, 2 M. & Rob. 153. His lordship said, he never had any doubt but that the opinion of Bolland, B., in *Wright v. Bickett*, was right if the fact were asked

to in the examination in chief.

(k) *Winter v. Butt*, 2 M. & Rob. 357. The same question arose in *Allay v. Hutchings*, 2 M. & Rob. 358, and *Wightman, J.*, ruled the same way.

the questions might be put, not to discredit, but to remind the witness, and that the inconvenience apprehended from a suggestion of facts by the questions must be removed by cautioning the jury that the assertions supposed to have been formerly made by the witness were not to be taken as evidence of the facts. The plaintiff's counsel then asked the witness, in detail, whether she had not told the plaintiff's attorney of certain acts of violence committed by the defendant; and she denied it in each instance. On cross-examination she said that Mrs. Melhuish had promised to give her a sum of money if she would say at the trial what she had already said to the plaintiff's attorney. She also stated that, before the time of the alleged assault, the plaintiff had complained to her of a hurt now said to have been inflicted by the defendant, and had said that it was caused by a fall while she was romping with her brother. J. Melhuish was then called for the plaintiff, and stated, among other facts, an admission by the defendant that he had struck the plaintiff. He was then asked if he had ever held out any threat to the witness to induce her to give evidence. This question was objected to, as contradicting the plaintiff's own witness; but Williams, J., admitted it, and Melhuish denied having used any such threat. Mrs. Melhuish was also called, and asked if she had ever promised the witness any money to induce her to give evidence. This question was objected to, on the ground last taken, but admitted; and Mrs. M. denied having made such promise. The plaintiff's brother was also called, and stated (after objection made and overruled) that the romping between him and the plaintiff, referred to by the witness, never took place. Williams, J., told the jury that, although he had allowed the witness to be questioned as to the statements she had made to the plaintiff's attorney, in order to remind her of the facts, yet nothing that she had stated to the attorney was to be taken as proof of these facts; so far her evidence was to be rejected; as to the rest, the jury were to judge of its credibility. As to the other witnesses, he said, it had been contended that the plaintiff could not, after examining the first witness, produce evidence which showed that her evidence was wilfully untrue, or was erroneous; but the law was not so unreasonable; and it was competent to the plaintiff, after examining one witness, to call others—not indeed for the sole purpose of discrediting her, but to show the truth of the facts, although differing from her statement, and also to negative her statement as to their supposed attempts to tamper with her evidence; and the Court of Queen's Bench held, upon a motion for a new trial after a verdict for the plaintiff, that the questions were properly allowed to be put, and the jury properly directed. There was a distinction between asking questions of a witness as to statements he may have formerly made, and calling other witnesses to say, in contradiction to him, that he made such statements; and, at all events, the counsel was properly allowed to ask whether the witness had not made different statements before. As to the other witnesses, they were witnesses to be called in the cause, and the plaintiff was not to let them lie under imputation merely because the witness who was first examined had made the statements. The evidence in denial of the tampering was not given to discredit her, but to set them up, and

to show that they were not persons who had discredited themselves. This was not a collateral matter, but was very relevant to the issue. And so was the question as to the injury which the plaintiff was supposed to have attributed to a fall. And where a witness alleges a fact contrary to the interest of the party calling him, it is clear that that party may bring others to prove opposite facts relevant to the case. (*l*)

Farr's case.

Where a witness called on the part of the prosecution to prove that he received the note, with the forgery of which the prisoner was charged, from the prosecutor, swore on his cross-examination that he went with the prisoner to the house of the prosecutor, with a blank paper, duly stamped, to get a bill accepted by the prosecutor, and that the prosecutor took the paper, and returned it to the prisoner, with his name upon it; but this witness, before the committing magistrate, had merely stated that he received the bill from the prisoner; the counsel for the prosecution stated that he was instructed that the fresh statement was untrue, and that he had witnesses to prove other statements made by the witness, to show that it was made in order to make the prosecutor pay the bill, and proposed to cross-examine the witness; Patteson, J., said, 'I cannot allow you to do that; he is your witness, and you must treat him as such.' (*m*) So where a witness, called for the prosecution in a case of robbery, stated on cross-examination that the prosecutor had given her seven shillings, which he had previously denied, it was held that the counsel for the prosecution could not ask whether she had not said to A. B. that the prosecutor had not given her any money. (*n*)

How far a party may discredit his own witness.

But now by the 28 & 29 Vict. c. 18, s. 3, 'a party producing a witness shall not be allowed to impeach his character by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.'

The judge may put in the deposition of a witness who gives a contrary statement on the trial.

The following case, however, shows that where a witness for the prosecution gives a different statement on the trial from that which he gave before the magistrate, the judge is warranted in directing his deposition to be read in order to do away with the effect of the statement made on the trial. Upon an indictment for murder, the counsel for the prosecution at first declined examining the prisoner's mother, but the judge thought it right to have her examined (her name being on the back of the indictment as having been examined before the grand jury), which was

(*l*) *Melhuish v. Collier*, 15 Q. B. 878. This case still leaves unsettled the question whether a person to whom a former statement was made may be called to contradict the witness, as to which Erle, J., said, 'The point is one upon which judges have differed, and opinions may vary to the end of time.' See *Greenough v. Eccles*, 5 C. B. (N. S.) 786.

(*m*) *Reg. v. Farr*, 8 C. & P. 768. The consequence was the prisoner was acquitted. The witness was Wm. Griffiths, and he was himself convicted of forgery, Monmouth Spr. Ass. 1843, *cor.* Wightman, J.

(*n*) *Reg. v. Clayfield*, Gloucester Spr. Ass. 1840, MSS. C. S. G. Gurney, B.



accordingly done, and she gave her evidence in favour of the prisoner; the judge ordered her deposition before the coroner to be read, in order to show its inconsistency with her present testimony. And the twelve judges afterwards were of opinion, that the judge had a right to call for the deposition, in order to impeach the witness's credit; and Lord Ellenborough and Mansfield, C. J., thought that the prosecutor had the same right. (o)

SEC. IV.

*How many Witnesses are necessary.*

IN general, the testimony of a single witness is a sufficient legal ground for conviction of a crime or misdemeanor, (a) even though that single witness may have been the accomplice in guilt of the accused person. (b) But there are two exceptions to this rule, viz., the cases of treason and perjury.

[944]  
Single witness  
generally  
sufficient.

The evidence of one witness is not sufficient to convict the defendant on an indictment for perjury; as in such case there would be only one oath against another. (c)

In case of per-  
jury.

In high treason, no one can be convicted, unless by the oaths and testimony of two witnesses, either both to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; unless the party indicted shall willingly, without violence, in open court confess the same. (d) The confession contemplated, is a confession in open court, or pleading guilty; any other confession, whether made to persons in authority or not, is evidence in the case, and must be proved, like other facts, by two witnesses, and it will have its weight with the jury according to the circumstances, as confessions have in all criminal cases. (e) However, by 39 & 40 Geo. 3, c. 93, 'in all cases of high treason, when the overt act alleged in the indictment is the assassination of the King, or any direct attempt against his life, or against his person, the prisoner shall be tried according to the same order of trial, and upon the like evidence, as if he stood charged with murder.'

High treason.

Two witnesses  
not necessary  
in cases of  
personal at-  
tacks on the  
King.

(o) Oldroyd's case, R. & R. 88. See the cases on this subject, *ante*, p. 491.  
(a) 4 Black. Com. 357. 2 Hawk. c. 46, s. 3.

(b) *Post*, p. 600.

(c) *Ante*, p. 77.

(d) By the 1 Edw. 6, c. 12, s. 22. 6 Edw. 6, c. 11, s. 12. 7 & 8 Will. 3, c. 3. In high treason concerning the coin, or the King's seals, or sign manual, one witness was sufficient, as at common

law before the reign of Edward VI.; by the 1 & 2 Ph. & M. c. 10, s. 12, and 1 & 2 Ph. & M. c. 11, s. 3 (now repealed). It was agreed by all the judges, that these statutes extended to all offences touching the impairing of coin, which should afterwards be made treason. *Gahagan's case*, 1 Leach, 42. 1 East, P. C. 129, S. C.

(e) 1 East, P. C. 131. *Foster's Crown Law*, 240, &c.

## SEC. V.

*How the Attendance of Witnesses is to be compelled and remunerated.*

[945]  
Attendance of  
witnesses,  
how com-  
pelled.

THERE are two methods in which the attendance of witnesses in criminal cases may be compelled: 1st—which is the more ordinary and effectual means—the justice or coroner that takes the examination of the person accused, and the information of the witnesses, may at that time, or at any time after and before the trial, bind over the witnesses to appear. (a) 2ndly, by process of subpœna.

By recogni-  
zance.

1st. If a witness does not appear, according to the terms of the recognizance in which he is bound, at the court at which the trial is intended to be, to give evidence against the party accused, the recognizance may be estreated, and the penalty levied. Justices have authority by the 11 & 12 Vict. c. 42, s. 20, to bind all persons by recognizance to give evidence in all cases of treason, felony, and misdemeanor, and coroners have the like authority, by the 7 Geo. 4, c. 64, s. 4, in cases of murder and manslaughter. By the 11 & 12 Vict. c. 42, s. 20, if a witness who has been examined before a justice of the peace refuses to be bound over, the justice may commit him until the trial of the accused, unless in the meantime he duly enters into a recognizance to prosecute or give evidence; and as this is merely an enactment of the previously existing law, it should seem that a coroner has the same power where a witness refuses to enter into a recognizance before him. (b) And where before the 11 & 12 Vict. c. 42, the witness was a married woman, and therefore under a legal disability to enter into a recognizance, the justice was held justified in committing her, upon her refusal to appear to give evidence or to find sureties for her appearance. (c)

Misdemean-  
ors.

Witness com-  
mitted for re-  
fusing to enter  
into recogni-  
zance.

By subpœna.

2nd. The attendance of witnesses, if they have not entered into recognizances, may be compelled by process of subpœna, which may either be issued from the Crown Office, (d) or may be made out by the clerk of the peace of the sessions, or the clerk of assize. (e) And by the 45 Geo. 3, c. 92, s. 3, the service of a subpœna on a witness in any one of the parts of the United Kingdom, for his appearance on a criminal prosecution in any other of the parts of the same, shall be as effectual as if it had been in that part where he is required to appear. (f)

45 Geo. 3,  
c. 92, s. 3.

(a) 2 Hale, P. C. 282. 7 Geo. 4, c. 64, s. 4.

(b) 2 Hale, P. C. 282. *Bennet v. Watson*, 3 M. & S. 1. In *Evans v. Rees*, 12 A. & E. 55, it was held that a warrant to bring a witness before a justice to find sufficient bail to appear and give evidence at the next assizes was bad; as it did not appear that the witness had been examined before the justice, or refused to enter into a recognizance; but Lord Denman said, 'I throw no doubt on the power of the magistrate to do all that is neces-

sary to compel the attendance of those witnesses whom he knows to be material.'

(c) *Bennet v. Watson*, *supra*.

(d) *Rex v. Ring*, 8 T. R. 585.

(e) 1 Chit. C. L. 608. It is more prudent to sue it out of the Crown Office, if an application for an attachment for non-attendance is likely to become necessary. See *post*, p. 575.

(f) 'Parts' in this Act mean England, Scotland, and Ireland; and not counties &c. *Rex v. Brownell*, 1 A. & E. 598.

The prosecutor ought not to include more than four persons in one subpoena. (*g*) And as soon as the writ is obtained, a copy should be made out for each witness, and served on him personally, and at the same time the writ should be shown him. (*h*) The service must be personal, and made a reasonable time before the day of trial; for witnesses ought to have a convenient time to put their own affairs in such order that their attendance on the court may be of as little prejudice to themselves as possible. (*i*)

Service of subpoena.

If a witness have in his possession any deeds or writings, which it is deemed necessary to produce at the trial, there should be a special clause inserted in the subpoena, called a *duces tecum*, commanding the witness to bring them with him. (*j*) The writ of *subpoena duces tecum* is the regular and established process of the court; and though it was formerly doubted, yet it is now settled, that this process is of compulsory obligation on the witness to produce the deeds or writings required of him, which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the court, and not the witness, is to judge. (*k*) And a person in possession of any paper, who is served with a *subpoena duces tecum*, is bound to produce it, whether the paper belong to him or not, or though there be a regular way prescribed by law for obtaining it; (*l*) and if he refuse to do so, the Court of Queen's Bench will grant an attachment against him. (*m*) The court, however, in all such cases, will exercise their discretion in deciding what papers shall be produced, and under what qualifications as respects the interest of the witness. (*n*) But the court will not allow counsel for the witness to argue against his liability to produce the documents. (*o*) A person bringing papers under a *subpoena duces tecum* may be compelled to produce them without being sworn. (*p*)

[946]  
Subpoena  
*duces tecum*.

If a witness who is sworn to give evidence has a document in his possession in court, he may be compelled to produce it; for he is just as much under the control of the court as if he had brought the document under a *subpoena duces tecum*. (*q*)

Person present in court.

In a criminal case, if a person is in court, he may be compelled to be examined as a witness, although he has neither been bound by recognizance nor served with a subpoena to give evidence, and an

(*g*) Doe v. Andrews, Cowp. 845. Tidd. 855.

(*h*) In order to save expense, it is settled that service of a ticket, containing the substance of a writ, will be as effectual as service of the writ itself. 2 Phill. Ev. 373.

(*i*) 2 Phill. Ev. 373.

(*j*) 2 Phill. Ev. 371.

(*k*) Amey v. Long, 9 East, 473. 2 Phill. Ev. 371.

(*l*) Tidd. 856. Corsen v. Dubois, Holt, N. P. C. 239.

(*m*) Reg. v. Greenaway, 7 Q. B. 126.

(*n*) Tidd. 856. 2 Phill. Ev. 371. It will be observed, that there is a distinction between the obligation of a witness to answer, though it may subject him to a civil responsibility, and the obligation to produce writings under a subpoena. See ante, p. 525. If a *subpoena duces tecum*

be served, the party must bring his deeds in obedience to the subpoena; but if he states them to be his title deeds, no judge will ever compel him to produce them. Pickering v. Noyes, 1 B. & C. 263, Rex. v. Hunter, 3 C. & P. 591, and MSS. C. S. G. So an attorney having a lien on a deed for costs of drawing, it is not bound to produce it. Kemp v. King, 2 M. & Rob. 437. Lord Denman, C. J.

(*o*) Doe dem. Rowcliffe v. Earl of Egremont, 2 M. & Rob. 386. Rolfe, B.

(*p*) Davis v. Dale, M. & Malk. 514. Tindal, C. J. Rex v. Murlis, ibid. note. Gaselee, J., and Taunton, J. Perry v. Gibson, 1 A. & E. 48.

(*q*) Snelgrove v. Stevens, C. & M. 508. Cresswell, J. Doe dem. Loscombe v. Clifford, 2 C. & K. 448. Alderson, B. Reg. v. North, 1 Cox, C. C. 258. Dwyer v. Collins, 7 Exch. R. 639.



indictment for the obstruction of a public footway is considered as a criminal prosecution for this purpose. (*r*)

Bench warrant.

The court will not grant a Bench warrant to compel the attendance of a witness, who is keeping out of the way in collusion with the defendants. (*s*)

*Habeas corpus ad testificandum.*

When a witness is in custody, or on board a ship under the command of an officer who refuses to permit his attendance, the subpoena is ineffectual, but a *habeas corpus ad testificandum* may be obtained to bring him up; for which an application may be made to any one of the judges or barons of the Courts of King's Bench, Common Pleas, and Exchequer, in England or Ireland, who have discretionary power to grant it to any part of the United Kingdom, to bring a witness before any court of record, to be examined before such court, or any grand, petit, or other jury, in any cause or matter, civil or criminal. (*t*) The application for this writ must be made upon an affidavit sworn to by the party applying, stating that the party is a material witness and willing to attend; (*u*) and if he be at a distance, it should be shown how he is material. (*v*) The writ being sued out should be left with the sheriff, or other officer, in whose custody the witness is detained, who will bring him up, upon being paid his reasonable charges. (*w*) If a witness be a prisoner of war, a *habeas corpus* will not lie to bring him up, but an order from the secretary of state must be obtained. (*x*)

[947]

Upon an affidavit that a person confined as a lunatic is not dangerous, but in a fit state to be brought up, a *habeas corpus* may be granted in order that he may be examined as a witness. (*y*) And where a witness is under duress of some third person, as a sailor on board a man-of-war, his attendance may be obtained by the same means. (*z*) A subpoena requiring the witness to attend on the commission day of the assizes to give evidence on a trial extends to the whole assizes, which are but one day in contemplation of law. (*a*)

Secretary of state may issue his warrant for bringing up a prisoner (not in custody on civil process) to give evidence.

But now by the 16 & 17 Vict. c. 30, s. 9, 'it shall be lawful for one of Her Majesty's principal secretaries of state, or any judge of the Court of Queen's Bench or Common Pleas, or any baron of the Exchequer, in any case where he may see fit to do so, upon application by affidavit, to issue a warrant or order under his hand for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence or under commitment for trial or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or determined in or before such court, judge, justice, or judicature; and the person required by any such warrant or order to be so brought before

(*r*) *Rex v. Sadler*, 4 C. & P. 218. Littledale, J.

(*s*) *Reg. v. Crawford*, 6 Cox, C. C. 481.

(*t*) 43 Geo. 3, c. 140. 44 Geo. 3, c. 102. 2 Phill. Ev. 374, 375.

(*u*) *Rex v. Roddam*, Cowp. 672.

(*v*) Tidd. 858. It is said in 1 Chitt, C. L. 610, that the affidavit of readiness

to attend only applies when the party is on board ship, and not then in all cases.

(*w*) 2 Phill. Ev. 375.

(*x*) *Furly v. Newnham*, 2 Dougl. 419.

(*y*) *Fennell v. Tait*, 5 Tyrw. R. 218.

(*z*) *Rex v. Roddam*, Cowp. 672. 1 Stark. Evid. 105.

(*a*) *Scholes v. Hilton*, 10 M. & W. 15.

such court, judge, justice, or other judicature, shall be so brought under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of *habeas corpus* awarded by any of Her Majesty's superior courts of law at Westminster to be brought before such court to be examined as a witness in any cause or matter depending before such court is now by law required to be dealt with.'

At common law, a defendant in capital cases had no means of compelling the attendance of witnesses without the special order of the court; (*b*) although in misdemeanors the defendant has always been allowed to take out subpoenas. (*c*) But the 7 Will. 3, c. 3, s. 7, provided, that in cases of high treason, where corruption of blood might be worked, the persons indicted shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them; and since the 1 Anne, st. 2, c. 9, s. 3, by which it is provided that witnesses for the prisoner, in case of treason or felony, shall be sworn in the same manner as witnesses for the Crown, and be subject to the same punishment for perjury, the process by subpoena is allowed to defendants in cases of felony as well as in other instances. (*d*)

Subpœna for prisoner.

If a party, having been served with a subpoena, neglect to appear in obedience to it, an application may be made to the Court of Queen's Bench, if the subpoena issued from the Crown Office, for an attachment against him; (*e*) and where the process is served in one part of the United Kingdom for the appearance of the witness in another of the parts, the court issuing the same may, upon proof to their satisfaction of the due service of the subpoena, transmit a certiorari of the default of the witness, under the seal of the court, or under the hand of one of the justices thereof, to the Court of King's Bench if the service were in England, to the Court of Justiciary if in Scotland, and to the Court of King's Bench in Ireland, if in Ireland; which courts are empowered to punish the witness in the same way as if he had disobeyed a subpoena issued out of those courts, provided the expenses have been tendered. (*f*) It has been doubted whether in all cases, as well as in those within the last-mentioned statute, a witness may not lawfully refuse to obey a subpoena in a criminal prosecution, as well as a civil suit, unless he has a tender of his reasonable expenses; but the better opinion seems to be, that witnesses making default on criminal prosecutions are not exempted from attachment, on the ground that their expenses were not tendered at the time of the service of the subpoena; although the court would have good reason to excuse them for

Remedy against person neglecting to appear on subpoena.

Expenses need not be tendered.

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(*b*) 4 Black. Com. 359. 2 Hawk. c. 46, s. 170. If they had attended they could not have been sworn before the 1 Ann. st. 2, c. 9, s. 3.

(*c*) 2 Hawk. P. C. c. 46, s. 170.

(*d*) 2 Hawk. P. C. c. 46, s. 172.

(*e*) *Rex v. Ring*, 8 T. R. 585. And a witness who refuses, after being subpoenaed, to attend to give evidence for a defendant, is liable to an attachment as

in the case of being subpoenaed by a prosecutor. 1 Stark. Ev. 86.

(*f*) 43 Geo. 3, c. 92, ss. 3, 4. 1 Chit. Cr. L. 614. It is said to be doubtful whether the justices at sessions, &c., have authority to issue an attachment, and that the only mode of proceeding against a witness in such a case is by indictment. Archb. Cr. L. 248.

not obeying the summons, if in fact they had not the means of defraying the necessary expenses of the journey. (g)

Attendance of witnesses, how remunerated.

Courts may order payment of the expenses in all cases of felony.

Formerly the law provided no means for reimbursing the witnesses on criminal prosecutions. At length, by the 27 Geo. 2, c. 3, 18 Geo. 3, c. 19, and 58 Geo. 3, c. 70, in cases of felony, certain provisions were made for that purpose. These, however, did not extend to cases of misdemeanors; but now by the 7 Geo. 4, c. 64, s. 22 (repealing the above-mentioned statutes) it is enacted, 'that the court before which any person shall be prosecuted or tried for any felony is hereby authorized and empowered, at the request of the prosecutor or of any other person, who shall appear on recognizance or subpoena to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein; and, although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall, in the opinion of the court, *bonâ fide* have attended the court in obedience to any such recognizance or subpoena, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expenses which he or she shall have *bonâ fide* incurred by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpoena, and also to compensate such person for trouble and loss of time; and the amount of the expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate or magistrates, granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner herein-after mentioned.'

[949]

In certain

And by sec. 23, after reciting that for want of power in the court

(g) 2 Phill. Ev. 383; but see 1 Chit. Cr. L. 613. At York Summer Assizes, 1820 Bayley, J. ruled that an unwilling witness, who required to be *paid* before he gave evidence, could not demand it. He said, 'I fear I have not the power to order you your expenses.' And on asking the bar if any one recollected an instance, Scarlett answered, 'It is not done in criminal cases.' MS. 1 Chetw. Barn. 1001. In *Reg. v. Cousins*, Gloucester S. J. Ass. 1843, Wightman, J., directed an officer of the Ecclesiastical Court, who had brought a will from London under a *subpoena duces tecum*, to go before the grand jury, although he objected on the ground that his expenses had not been paid. In

*Rex v. Cooke*, 1 C. & P. 321, an indictment for a conspiracy removed into the King's Bench by *certiorari*, a witness called by the defendant stated before he was examined, that at the time he was served with a subpoena, no money was paid him; he therefore asked that the judge would order the defendant to pay him his expenses before he was examined. Park, J. A. J., having consulted with Garrow, B., said they were of opinion that the judge had no power in a criminal case to order a defendant to pay a witness his expenses although subpoenaed, and though the indictment came to be tried as a civil record. See also *Pell v. Dabbeny*, 5 Exch. R. 955.



cases of misdemeanor.

to order payment of the expenses of any prosecution for a misdemeanor, many individuals are deterred by the expense from prosecuting persons guilty of misdemeanors, it is further enacted, 'that where any prosecutor or other person shall appear before any court on recognizance or subpoena, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury; every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have *bonâ fide* attended the court, in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony: provided, that in cases of misdemeanor the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate.' (h)

The 14 & 15 Vict. c. 55, s. 1, repeals the proviso in the preceding section, which provides that the payment of expenses and compensations shall not extend to the attendance before the examining magistrate.

14 & 15 Vict.  
c. 55.

Sec. 2. 'All the provisions of the 7 Geo. 4, c. 64, as amended by

Power of

(h) Sec. 24 provides that the order for the payment of the expenses shall be made out by the clerk of the assizes, &c., and paid by the county treasurer; and sec. 25 provides how the expenses shall be paid in places not contributing to the county rate. Sec. 26 empowered the Courts of Quarter Sessions to make regulations as to the rate of costs and expenses. But this section is repealed by the 14 & 15 Vict. c. 55, s. 4. The 7 Geo. 4, c. 64, s. 27, empowers the judge of the Court of Admiralty in felonies and misdemeanors of the denominations before mentioned, committed upon the high seas, 'to order the assistant to the counsel for the affairs of the admiralty and navy, to pay such costs, expenses, and compensation to prosecutors and witnesses in like manner as other courts may order the treasurer of the county to pay the same.' The Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 113, provides that all sums directed to be paid by virtue of the 7 Geo. 4, c. 64, in respect of felonies and misdemeanors committed, or supposed to have been committed, in any borough

in which a separate Court of Quarter Sessions shall be holden, shall be paid out of the borough fund; and the order of the court shall be directed to the treasurer of the borough. Sec. 114 provides for the treasurers of counties keeping accounts of the expenses of prosecutions of offenders sent from boroughs for trial at the assizes, and for the payment of them by the boroughs. As to the construction of this section, see *Reg. v. Johnson*, 10 A. & E. 740. The 2 & 3 Vict. c. 82, which provides for the trial of offenders in detached parts of counties, by sec. 2 provides for the treasurers of counties keeping an account of the expenses of prosecutions, in detached parts of counties, and for the payment of the same by the county to which the detached parts belong. The 5 & 6 Vict. c. 98, ss. 18, 19, and 20, contains also provisions for the payment by boroughs of the expenses of the prosecution of borough prisoners confined in county gaols, and for the manner of paying the expenses of the conveyance and maintenance of such prisoners.

courts to allow expenses in prosecutions for certain misdemeanors extended to other misdemeanors.

this Act, authorizing and empowering courts to order payment of costs and expenses, and compensation for trouble and loss of time, in cases of the several misdemeanors enumerated in section twenty-three of the said Act of King George the Fourth, and concerning orders for payment of such costs, expenses, and compensation, and the payment thereof, and all the provisions of any other Act for, concerning, or applicable to the payment of such costs, expenses, and compensation in cases of the said misdemeanors, shall extend and be applicable in the case of any of the misdemeanors herein-after mentioned; namely, unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years; unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; (i) conspiring to charge any person with any felony, or to indict any person of any felony; conspiring to commit any felony.'

Sec. 4 repealed the power of the Quarter Sessions to establish and alter regulations as to the rate of any costs and expenses in criminal cases.

Secretary of state may make regulations as to costs, expenses, and compensations, and certificates to be granted by examining magistrates.

Sec. 5. 'It shall be lawful for one of Her Majesty's principal secretaries of state to revoke any regulations made under the provision hereinbefore repealed, and to make regulations as to the rates or scales of payment of all or any costs, expenses, and compensations to be allowed or ordered to be paid under the said Act or any other Act or this Act to prosecutors and witnesses, and to persons attending the court in obedience to any recognizance or subpœna, in cases of criminal prosecutions, and (except as hereinafter mentioned) to persons who may have been active in or towards the apprehension of persons charged with offences, and also regulations as to the rates or scales of payment according to which certificates may be granted by the examining magistrate or magistrates in respect of the expenses of any prosecutor, or witness or witnesses for the prosecution, or other person, of attending before such magistrate or magistrates, and of any compensation for trouble and loss of time therein, in any case where any court or judge is empowered under the said Act of the seventh year of King George the Fourth or any other Act or this Act to order payment of such expenses or compensation, and concerning the forms of such certificates and the details or particulars to be inserted therein of the expenses, trouble, and loss of time to which such certificates relate, and it shall be lawful for one of Her Majesty's principal secretaries of state from time to time to alter any such regulations, or make new regulations in relation to any of the matters aforesaid, and such regulations for the time being shall be binding on all courts and persons whomsoever.'

Expenses and compensations to be ascertained according to such regulation, and magistrate's certificate not to be conclusive.

Sec. 6. 'Where any court or judge empowered under the said Act of the seventh year of King George the Fourth, or under any other Act or this Act, in this behalf, shall order payment to any prosecutor, or witness or witnesses for the prosecution, or to any person attending the court in obedience to any recognizance or subpœna, in the case of any prosecution for felony or any misdemeanor or offence, of any costs or expenses incurred, or of

(i) The preceding cases are now provided for by the 24 & 25 Vict. c. 100, s. 77.

any compensation for trouble or loss of time, or order payment (except as hereinafter mentioned) to any person who may appear to have been active in or towards the apprehension of any person charged with any offence of compensation for expenses, exertions, and loss of time in or towards such apprehension, the amount of such costs, expenses, or compensation shall be ascertained by the proper officer of the court according to the regulations made under this Act; and where the expenses and compensation in respect of attending before any examining magistrate or magistrates are so ordered to be paid, such expenses and compensation shall also be ascertained by the proper officer of the court according to such regulations, but the amount thereof as so ascertained shall not exceed the amount mentioned in the certificate of the examining magistrate or magistrates, and, save as aforesaid, the certificate of any examining magistrate or magistrates shall not be conclusive as to the amount to be allowed for expenses of attendance before him or them, or for compensation for trouble or loss of time therein.'

The Larceny Act, 24 & 25 Vict. c. 96, s. 121, the Malicious Injuries Act, 24 & 25 Vict. c. 97, s. 77, and the Forgery Act, 24 & 25 Vict. c. 98, s. 54, contain the like provisions as to costs in the case of misdemeanors, which are in the following terms:—

The court before which any indictable misdemeanor against this Act shall be prosecuted or tried, may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

By the Coin Act, 24 & 25 Vict. c. 99, s. 42, 'in all prosecutions for any offence against this Act in England, which shall be conducted under the direction of the solicitors of Her Majesty's treasury, the court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony; and in all prosecutions for any such offence in England which shall not be so conducted it shall be lawful for such court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.' (j)

Costs under the Criminal Law Consolidation Acts.

The costs of the prosecution of misdemeanors against this Act may be allowed.

Costs of prosecutions in Mint cases.

(j) Before the passing of this Act the costs of Mint prosecutions were paid by the treasury wherever they were conducted by the solicitors of the treasury; but in no other case. As the solicitors of the treasury were accustomed to employ attorneys in the country to conduct these prosecutions, and they did not always like to pay the witnesses before they had received the costs of the prosecution from the treasury, it sometimes happened that the witnesses did not get their expenses till a considerable time after the trial, and the earlier part of this clause was introduced in order that the attorneys might at once obtain the costs of the prosecution, and pay the witnesses their ex-

penses; and as in all Mint prosecutions so conducted the expenses were invariably paid, the first part of the clause is imperative, and the court must allow the expenses.

It sometimes also happened that private individuals conducted Mint prosecutions, after the officers of the Mint had declined to prosecute, and, considering the importance of bringing offenders in such cases to justice, it was thought expedient to give the costs in some of these cases; the second part of the clause therefore gives the court a *discretion* to grant the costs in such cases, provided a conviction takes place, but not otherwise. This provision will on the one



Guardians and overseers may be required to prosecute in certain cases of offences against the Person Act.

Costs of prosecution.

Clerk of guardians may be bound over to prosecute.

On a conviction for assault the court may order payment of the prosecutor's costs by the defendant.

Such costs may be levied by distress.

By the Offences against the Person Act, 24 & 25 Vict. c. 100, s. 73, 'where any complaint shall be made of any offence against section twenty-six of this Act, *(h)* or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom such complaint is heard shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or, where there are no guardians, by the overseers of the poor of the place, in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of any court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and, where there is a board of guardians, the clerk or some other officer of the union or place, and, where there is no board of guardians, one of the overseers of the poor, may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute.' *(l)*

Sec. 74. 'Where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry and examination ascertain to be reasonable; and, unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence.' *(m)*

Sec. 75. 'The court may, by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from

hand encourage prosecutions where there are substantial grounds for them, and on the other hand it will prevent speculative prosecutions where the evidence is unsatisfactory.

*(h)* This clause relates to ill-treating apprentices and servants. See it in full *ante*, vol. 1, p. 1015.

*(l)* This clause is taken from the 14 & 15 Vict. c. 41, ss. 6, 7.

*(m)* This and the following clauses are new in England; they are taken from the 10 Geo. 4, c. 34, ss. 33, 34 (1). It had long been the practice in England in such cases for the courts, after a conviction for an assault, to allow compo-

mises to be made between the parties, and such compromises were legal. *Beeley v. Wingfield*, 11 East, 46; *Keir v. Leeman*, 6 Q. B. 308; 9 Q. B. 371. Such compromises were usually made by the defendant paying a sum of money to the prosecutor to indemnify him for his expenses; but where there was an obstinate defendant, it frequently happened that no compromise could be effected, and the court was sometimes placed in an invidious position. These clauses place it in the power of the court to do full justice, without regard to the wishes or consent of either party.

such sale shall be paid to the owner; and in case such sum shall be so levied, the imprisonment awarded until payment of such sum shall thereupon cease.'

Sec. 77. 'The court before which any misdemeanor indictable under the provisions of this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.' (n)

The costs of the prosecution of misdemeanors against this Act may be allowed.

It may be as well to observe that the 14 & 15 Vict. c. 19, s. 14, is only in force in one case, as all the other clauses creating offences in that Act are repealed. By sec. 11 of that Act any person may apprehend any person committing any indictable offence by night, and by sec. 12, any person liable to be apprehended under that Act assaulting or offering violence to any person authorized to apprehend or detain him, or to any person acting in his aid and assistance, is guilty of a misdemeanor: and by sec. 14, 'in all prosecutions for any offence against the provisions of this Act, it shall be lawful for the court before which any such offence shall be prosecuted or tried to allow the expenses of the prosecution in all respects as in cases of felony.' (o)

Costs of assaults under the 14 & 15 Vict. c. 19.

The 14 & 15 Vict. c. 55, s. 3, recites the 9 Geo. 4, c. 31, s. 27, by which, where any person shall assault or beat any other person, two justices of the peace, upon the complaint of the party aggrieved, might hear and determine the offence; and sec. 29, by which, in case the justices find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is from any other circumstance a fit subject for prosecution by indictment, they shall deal with the case as they would have done before the 9 Geo. 4, c. 31, and enacts that 'in every case of assault so brought before such justices for summary decision, in which the justices shall be of opinion that the same is a fit subject for prosecution by indictment, and shall thereupon bind the complainant and witnesses in recognizance to prosecute and give evidence at the assizes or sessions of the peace, every such court is hereby authorized and empowered at its discretion to order payment of the costs and expenses of the prosecutor and witnesses so appearing before such court under such recognizance, together with compensation for their trouble and loss of time, in the same manner as courts are authorized and empowered to order the same in cases of felony.'

Costs of assaults under the 14 & 15 Vict. c. 55, s. 3.

In order to obtain costs under this section, it must be proved

(n) This clause is old, as far as relates to the costs of misdemeanors against the 14 & 15 Vict. c. 19, 14 & 15 Vict. c. 11, 12 & 13 Vict. c. 76. It is new as to any misdemeanor created by this Act. The words of the clause originally were, 'any indictable misdemeanor against this Act,' but in the committee of the Commons they were altered to 'any misdemeanor indictable under the provisions of this Act,' in order merely to exclude common assaults, and nothing more; and it should seem that that is the only case where

costs cannot be given; for wherever it is necessary to insert in an indictment the particular words of any clause in this Act in order to warrant the punishment given by that clause, the misdemeanor plainly is 'indictable under the provisions of this Act.' Thus, under sec. 47, the indictment must allege actual bodily harm, and therefore in that case the court may allow the costs.

(o) See sec. 11, *ante*, vol. I, p. 648, and sec. 12, *ante*, vol. I, p. 1049.

that the case was taken before two justices for summary adjudication; but a summons calling on the defendant to appear before justices of the peace to answer a complaint for an assault against the form of the statute, and to be further dealt with according to law, is sufficient for that purpose. (*p*)

Assaults on  
poor law  
officers.

By the 13 & 14 Vict. c. 101, s. 9, 'where any person shall be charged with and convicted of any assault upon any officer of a workhouse or relieving officer in the due execution of his duty, or upon any person acting in aid of such officer, the court may sentence the offender to the same punishment as is provided by law for an assault upon a peace officer or revenue officer in the due execution of his duty, and shall have the same power as in case of such last-mentioned assault to order payment of the costs and expenses of the prosecution.' And by the 14 & 15 Vict. c. 105, s. 18, the preceding provision is extended 'to an assault upon any person included under the word "officer" in the 4 & 5 Will. 4, c. 76, or upon any other person acting in his aid.'

Costs in per-  
jury.

We have seen that the 14 & 15 Vict. c. 100, s. 19, provides that any court, justice, &c., may direct a person guilty of perjury in any evidence, &c., to be prosecuted, and may bind any person to prosecute, and may give to the party so bound to prosecute a certificate of the same being directed, which is to be deemed sufficient proof of such prosecution having been directed as aforesaid, and 'upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned court shall specially otherwise direct; and when allowed by any such court in Ireland, such sum as shall be so allowed shall be ordered by the said court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland: provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.' (*q*)

Court may  
appoint pro-  
secutor in  
bankruptcy.

By the Bankruptcy Act, 24 & 25 Vict. c. 134, s. 223, 'the court may direct that the creditor's assignee, or, if there be no creditor's assignee, the official assignee, or any of the creditors of the bankrupt, shall act as the prosecutor in respect of such offence, (*r*) and shall give to such assignee or creditor a certificate of the court having so directed, which certificate shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production of such certificate the costs of such prosecution shall be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction, unless such last-mentioned court shall specially otherwise direct.

Costs of pro-  
secution.

(*p*) *Reg. v. M'Gavaron*, 3 C. & K. 320, Williams, J. It may, perhaps, be doubted whether the 14 & 15 Vict. c. 55, s. 3, be not impliedly repealed by the repeal of the 9 Geo. 4, c. 31; but, if that be the case, it seems very immaterial; for it is hardly conceivable that a case can occur which would have fallen within that pro-

vision, and in which the costs may not be granted under the 24 & 25 Vict. c. 100, s. 73, or s. 75.

(*q*) See the section in full, *ante*, p. 38.

(*r*) That is, any offence mentioned in sec. 221; which is given in vol. 2, p. 521; and see note (*b*), p. 522.



and when allowed by any such court, such sum so allowed shall be ordered by the said court to be paid and borne in all respects in the same manner as the expenses of prosecutions for felonies are now paid and borne, and the same shall be paid and borne accordingly; and any expenses incurred by such prosecutor, other than those so defrayed in accordance with the next following clause, shall be paid out of the account intituled "The Chief Registrar's Account."

Sec. 224. 'The court may direct the assignees to lay the papers before the attorney-general (or the solicitor-general during a vacancy in the office of attorney-general) for his direction thereon, either while the bankruptcy is pending before the court or when it has been brought to a conclusion.'

Power to court to direct reference to attorney-general.

By the 7 & 8 Vict. c. 2, s. 1, 'Her Majesty's justices of assize or others Her Majesty's commissioners, by whom any court shall be holden under any of Her Majesty's commissions of oyer and terminer or general gaol delivery, shall have severally and jointly all the powers which by any Act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the jurisdiction of the Admiralty of England, and it shall be lawful for the first-mentioned justices and commissioners, or any one or more of them, to inquire of, hear, and determine all offences alleged to have been committed on the high seas and other places within the jurisdiction of the Admiralty of England, and to deliver the gaol in every county and franchise within the limits of their several commissions of any person committed to or imprisoned therein for any offence alleged to have been committed upon the high seas and other places within the jurisdiction of the Admiralty of England; and all indictments found, and trials and other proceedings had, by and before the said justices and commissioners, shall be valid; and it shall be lawful for the court to order the payment of the costs and expenses of the prosecution of such offences, in the manner prescribed by an Act of the seventh year of King George the Fourth, intituled "An Act for Improving the Administration of Criminal Justice in England, in the case of felonies tried in the High Court of Admiralty."

Justices of oyer and terminer may try offences committed on the high seas, and order the payment of the costs of the prosecution.

7 G. 4, c. 64.

By the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 267, 'all offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is or within three months previously has been employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishment respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.' By sec. 518, the court before which any misdemeanor under that Act 'is tried, may in England make the same allowances and order payment of the same costs and expenses as if such

Cost of prosecutions under Merchant Seamen's Act.

misdemeanor had been enumerated in the 7 Geo. 4, c. 64, or any other Act that may be passed for the like purpose; and may in any other part of Her Majesty's dominions make such allowances and order payment of such costs and expenses (if any) as are payable or allowable upon the trial of any misdemeanor under any existing Act or ordinance, or as may be payable or allowable under any Act or law for the time being in force therein.'

Expenses of the prosecution and rewards may be ordered to be paid where cases are removed to Central Criminal Court.

By the 19 & 20 Vict. c. 16 (which empowers the Court of Queen's Bench to order certain offenders to be tried at the Central Criminal Court), s. 13, 'whenever any indictment or inquisition shall have been transmitted or removed to the said Central Criminal Court, under the provisions of this Act, it shall be lawful for the said Central Criminal Court to order such expenses of the prosecutor and witnesses, and such other expenses, and such of the several rewards payable in pursuance of any statute made or to be made, as to such Central Criminal Court shall seem reasonable and sufficient, to be paid by and to the same persons and in the same manner as if such Central Criminal Court were holden under commissions of oyer and terminer and gaol delivery for the county or place in which such indictment shall have been found or such inquisition shall have been taken.'

Where the Crown obtains a trial at the Central Criminal Court, the expense of witnesses shall be advanced to the defendant.

Sec. 25. 'Whenever any application shall be made on behalf of Her Majesty or of any prosecutor to the said Court of Queen's Bench, or to any judge thereof, for an order that any person charged with any offence shall be tried at the said Central Criminal Court under the provisions of this Act, it shall be lawful for the said Court of Queen's Bench in term time, or for the said judge in vacation, to issue a certificate, upon the production of which the commissioners of Her Majesty's treasury may order to be paid out of any monies provided by parliament for law charges in England to the person so charged a sum not exceeding twenty pounds, to enable such person to defray the charges and expenses of the attendance of his witnesses: provided, that the sum so advanced shall be allowed for in the sum which in the event of the acquittal of such person may become payable under the order hereinafter mentioned.'

Power to court to order expenses of any person acquitted to be paid.

Sec. 26. 'In case any person who shall be tried at the said Central Criminal Court under the provisions of this Act, upon an application on behalf of Her Majesty or of any prosecutor, shall be there acquitted, it shall be lawful for the justices and judges of the said Central Criminal Court before whom any such acquittal shall have taken place, or for any two or more of them, to order reimbursement to the person so acquitted of such sum as shall appear to them to have been properly expended for such removal of the trial of such person, and the commissioners of Her Majesty's treasury shall upon receipt of such order pay such sum or sums out of any monies provided by parliament for law charges in England.' (s)

4 & 5 Will. 4, c. 36, s. 12.

The Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 12, enacts, that 'it shall be lawful for any two of the said justices and

(s) By sec. 24 the Court of Queen's Bench may impose terms on the prosecutor or person charged as to costs, &c. By sec. 27, the treasurer of the county

where the offence was committed is to pay for the prisoner's maintenance in Newgate.

judges of oyer and terminer and of gaol delivery to order and direct the costs and expenses of prosecutors and witnesses, in all cases where prosecutors and witnesses may be by law entitled thereto, to be paid by the treasurer of the county, in which the offence of any person prosecuted would have been tried but for this Act; and that every such treasurer, or some known agent, shall attend the said justices and judges of oyer and terminer and gaol delivery during the sitting of the court, to pay all such orders.'

[950]

The 38 Geo. 3, c. 52, ss. 2, 3, provides for the trial in the next adjoining county of offences committed or charged to have been committed in certain cities and towns corporate; and by sec. 8, 'in all cases of indictments and other proceedings, which may be tried before his Majesty's justices of oyer and terminer or general gaol delivery for any county, in pursuance of the provisions contained in this Act, it shall and may be lawful for such justices to order the expenses of the prosecution, and of the witnesses, and of the several rewards payable in pursuance of the statutes in such cases made and provided on the conviction of offenders, to be paid by and to the same persons, and in the same manner, as the same would be payable if such indictment had been tried in the court of oyer and terminer or general gaol delivery of the county of such city or town corporate.' (t) The 51 Geo. 3, c. 100, s. 2, extends the preceding clause to the expenses of maintaining the prisoner and carrying his sentence into execution in the adjoining county. The 14 & 15 Viet. c. 55, s. 19, provides that in the counties of cities and towns named in the first column of Schedule (C.) to the 5 & 6 Will. 4, c. 76, prisoners may be committed and tried in the counties declared by sec. 24 to be the next adjoining counties, and which are those mentioned in the second column of the said schedule, and sec. 23 provides that all the provisions of the 51 Geo. 3, c. 100, applicable to convictions in pursuance of the provisions of the 38 Geo. 3, c. 52, 'and to the execution of the sentences passed upon any convicts on such convictions, and all the provisions of the said Acts respectively concerning the payment of expenses, shall be applicable in all cases of persons who may be tried in or removed for trial to any adjoining county in pursuance of the provisions of this Act, in like manner as in cases of persons tried in or removed for trial to any adjoining county in pursuance of the provisions of the said Act of the thirty-eighth year of King George the Third.'

Costs of prosecutions in adjoining counties.

The 60 Geo. 3 and 1 Geo. 4, c. 14, s. 1, authorizes justices of the peace to commit any person charged with any capital offence committed within any exclusive jurisdiction, not being a county, to the gaol of the county within which such exclusive jurisdiction is situated, to be tried at the next assizes for such county; and by sec. 3, 'in all cases of any commitment to the county gaol, under the authority of this Act, all the expenses to which the county may be put by reason of such commitment, together with all such expenses of the prosecution and witnesses as the judge shall be pleased to allow by virtue of any law now in force, shall be borne and paid by the said town, liberty, soke or place within which

Costs of the prosecution of capital cases in exclusive jurisdictions not being counties.

(t) Sec. 9 makes Yorkshire the next adjoining county to Kingston-upon-Hull, and Northumberland to Newcastle-upon-

Tyne. Sec. 10 of this Act is repealed by the 5 & 6 Will. 4, c. 76, s. 109.



such offence shall have been committed, in like manner and to be raised by the same means whereby such expenses would have been raised and paid if the offender had been prosecuted and tried within the limits of such exclusive jurisdiction; and that the judge, or court of oyer and terminer and general gaol delivery, shall have full power and authority to make such order touching such costs and expenses as such judge or court shall deem proper; and also to direct by whom and in what manner such expenses shall in the first instance be paid and borne, and in what manner the same shall be repaid and raised within the limits of such exclusive jurisdiction, in case there be no treasurer or other officer within the same, who by the custom and usage of such place ought to pay the same in the first instance.'

The following cases relative to the allowance of costs under these statutory provisions may properly be introduced in this place.

A party bound over by the sessions to prosecute at a superior court is entitled to his expenses under the 7 Geo. 4, c. 64. The prosecutor was bound over by the Court of Quarter Sessions for Surrey, to prosecute for a burglary at the Central Criminal Court, and it was held that he was entitled to his expenses. (*u*)

Where the prosecutor and his witnesses had been bound by recognizance to prosecute and give evidence at the assizes, but by a mistake the prisoner had been discharged by proclamation at the adjourned sessions, which preceded the assizes; and the prosecutor and his witnesses had appeared at the assizes and preferred an indictment, which had been found by the grand jury; Taunton, J., held, that as the bill had been preferred and found, he might, under the word 'prosecuted,' in sec. 22, order the expenses; but if the witnesses had merely appeared at the assizes according to their recognizances, and no bill had been preferred, he should have had no authority. (*v*)

Where a prosecutrix and witnesses were bound over to prosecute and give evidence against a prisoner for feloniously administering a destructive thing to the prosecutrix, but, by the advice of counsel, no indictment for felony was preferred, but only an indictment for a common law misdemeanor, the costs of the attendance of the prosecutrix and witnesses were allowed under the 7 Geo. 4, c. 64, s. 23. (*w*)

Where a prisoner, who was committed on a charge of felony during the assizes, did not reach the assize town until after the grand jury were discharged, Hullock, B., after reference to the statute, allowed the witnesses their expenses. (*x*)

Where an indictment for a riot was found at one assizes, and the trial took place at the subsequent assizes, but no person was bound over to prosecute at these assizes, but the witnesses were subpoenaed to appear at both the assizes; the Court of King's Bench were clearly of opinion that the judge had authority to order the costs of the witnesses to be paid; but it was doubted whether the judge had authority to grant the prosecutor his

(*u*) *Rex v. Paine*, 7 C. & P. 135, Lord Denman, C. J., Park, J. A. J., and Bolland, B.

(*v*) *Rex v. Reddy*, 5 C. & P. 552.

(*w*) *Reg. v. Hansen*, 2 C. & K. 912.

Williams, J. The charges in the indictment were of misdemeanors, for which no costs could have been allowed.

(*x*) Anonymous, 1 Lew. 12E.

A binding by the sessions is sufficient.

Cases in which the costs have been allowed.

Indictment for misdemeanor after binding to prosecute for felony.

[951] Where the prosecutor was not bound by recognizance.

costs. (y) But where the prosecutor, in a case of perjury, was not bound over to prosecute by any magistrate, but he had included his own name in a subpoena, which he had caused to be issued, the court were of opinion that the words of the Act did not limit the allowance of the expenses of the prosecutor to those which he incurred as a witness, but that he was entitled to receive them in his character of prosecutor; and they made an order accordingly. (z)

Sheering's  
case.

Where the prisoner had been apprehended by a Bench warrant, and the prosecutor was under no recognizance to prosecute, and none of the witnesses were under recognizances, but one of them had been subpoenaed; on a motion for the costs of the prosecution, Parke, B., at first thought that he could only grant the costs of the witness who had been subpoenaed, but said he would consider the point; and on the following day his lordship said that on comparing the words of the 7 Geo. 4, c. 64, s. 22 (relating to felonies) with those of the subsequent section (relating to misdemeanors), it appeared to him that the court had authority, in prosecutions for the former class of offences, to award the prosecutor his costs, even though he is not under any recognizance; and his lordship accordingly granted the costs of the prosecution generally, including the witnesses. (a)

Butterwick's  
case.

A prosecution upon the 8 & 9 Vict. c. 109, s. 17, (b) for winning money by unlawful devices, is one in which the costs can be ordered under the words 'knowingly and designedly obtaining any property by false pretences,' in the 7 Geo. 4, c. 64, s. 23. (c)

Gaming.

Where in a case of manslaughter the father of the deceased gave a retainer to an attorney to prosecute, and he prepared briefs and delivered them to counsel, and obtained and paid for copies of the depositions before the coroner; but the magistrates, who committed the prisoner for trial, bound over a constable of the county police to prosecute, and as was usual in such cases, and in pursuance of general orders given to the attorney of the police force by the constabulary committee for the county, he prepared a brief, which he delivered to another counsel; it was held that the person who was bound over to prosecute was really the prosecutor, and that he must be allowed the expenses of the prosecution, but that the attorney retained by the father could not be allowed any costs. (d)

The person  
bound over to  
prosecute is  
the prosecu-  
tor; another  
cannot be  
allowed costs  
as prosecutor.

Where an engine driver on a railway had been committed by the coroner for manslaughter, and the grand jury ignored the bill, and no evidence was offered on the coroner's inquisition with the sanction of the judge, and an attorney, acting on the instructions of the relations of the deceased, had carried on the prosecution.

An attorney  
employed by  
the relations of  
the deceased.

(y) *Rex v. Jeyes*, 3 A. & E. 416. It was contended that the words must be read *reddendo singula singulis*; and the statute therefore applied where the prosecutor appeared on recognizance or the witness on subpoena. Littledale, J., said, 'There is much doubt in my mind as to the expenses of the prosecutor. At present I think that he is not entitled to them; it seems likely that the legislature meant to give the expenses to the prosecutor only where he goes before a magistrate, who binds him over. A magistrate

on hearing the complaint frequently dismisses it: if the prosecutor then goes to the grand jury, I think he ought not to be paid by the treasurer.'

(z) *Rex v. Sheering*, 7 C. & P. 440, *cor. Park, J. A. J., and Coleridge, J.*

(a) *Reg. v. Butterwick*, 2 M. & Rob. 196.

(b) *Ante*, vol. 1, p. 624.

(c) *Reg. v. Gardner*, 5 Cox, C. C. 140. Talfourd, J., after consulting Patteson, J.

(d) *Reg. v. Yates*, 7 Cox, C. C. 361. Martin, B., and Bramwell, B.

Everything had been done which was necessary, and the secretary of state had expressed his opinion that it should be a government prosecution. But the superintendent of police had been bound over to prosecute, and this had been reported to the deputy clerk of the peace, who was authorized to prosecute at the expense of the county, but had declined to do so because the costs allowed by the treasury were insufficient. It was held that as no authority was given by the superintendent of police to the attorney to prosecute, he could not be allowed the costs. (*e*)

Where not allowed.

An indictment charging that the defendant assaulted J. S., and unlawfully and indecently (not saying publicly) exposed his person to J. S., with intent to incite J. S. to commit an unnatural offence with the defendant, is not an offence within the 7 Geo. 4, c. 64, s. 23, and therefore the court cannot allow the prosecutor his expenses under that clause. (*f*)

Apprehending abroad.

Neither the committing magistrate nor the judge at the trial has power to order the costs of apprehending a prisoner on a charge of felony in Scotland (*g*) or in America; (*h*) nor has the court any authority to order payment of the expenses of taking a prisoner who is in custody in Millbank penitentiary to an assize town under a *habeas corpus*, in order that he may be tried for a felony. (*i*)

Removing from Millbank.

Johnson's case.  
Indictment for riot removed by the prosecutor by *certiorari*.

Where an indictment for riot was found at the Quarter Sessions, and removed by the prosecutor into the Court of King's Bench by *certiorari*, and the record sent down for trial at Nisi Prius, made a *remand*, and again entered at the following assizes, when the defendants were convicted. No recognizance had been returned to the Crown Office, and the prosecutor was not bound by recognizance to prosecute in the Court of King's Bench. The witnesses were subpœnaed, but their expenses were not prayed by them, but by the prosecutor, as having been defrayed by him; the prosecutor also had caused himself to be subpœnaed. The consideration of the judges was desired whether, in such case of an indictment for a misdemeanor, removed by the prosecutor himself from the Quarter Sessions into the King's Bench, an order of Nisi Prius might legally be made for any and what costs, or whether the application must not be elsewhere; and the judges determined that no costs were allowable under the statute. (*j*)

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Rex v. the Treasurer of Exeter.

Where six indictments for felony were removed by the prisoner, one of which only was tried, and at the trial the judge doubted whether he had any power to give the prosecutor his costs, the Court of King's Bench refused to order the treasurer of the county

(*e*) Reg. v. Cook, 1 F. & F. 389. Bramwell, B.

(*f*) Reg. v. ——— 8 A. & E. 589.

(*g*) Reg. v. Seaton, 6 Cox, C. C. 78, note, Crosswell, J.

(*h*) Reg. v. Barrett, 6 Cox, C. C. 78. Williams, J., suggested that the proper course was to memorialize the secretary of state, and then probably the judge would be referred to, and would report whether it was a fit case for the allowance.

(*i*) Reg. v. Waters, 8 Cox, C. C. 350. Channell, B., after consulting Keating, J.

(*j*) Rex v. Johnson, R. & M. C. C. R. 173. The same point was decided by

the judges in Rex v. Oates, mentioned in R. & M. C. C. R. 175. In Rex v. Ellis, convicted at Nisi Prius, at Exeter, in 1826, for a felony committed before the 7 Geo. 4, c. 64, was in operation, and whilst the 58 Geo. 3, c. 70, was in force, the Court of King's Bench made a rule absolute, ordering the city and county of Exeter to pay the expenses. The 7 Geo. 4, c. 64, was in force at the time of the trial. R. & M. C. C. R. 175. See Rex v. The Treasurer of the County of the City of Exeter, *infra*, where the court seem to have been of opinion that the costs had been improperly allowed in this instance, and to have overruled this case.



of the city of Exeter to pay the prosecutor the expenses of the prosecution; as, if the costs of the prosecution could be granted at all, they ought to be granted by the judge who tried the prisoner. (*k*)

Where, in pursuance of a recognizance, the prosecutor at the Quarter Sessions preferred an indictment for a riot, and he afterwards removed it into the Court of King's Bench, it was held that the prosecutor was not entitled to his costs; and Lord Tenterden, C. J., said, that the matter had been considered by the twelve judges, who were all of opinion that the Act did not apply to cases where the indictment had been removed into the Court of King's Bench by *certiorari*. (*l*)

Rex v.  
Richards.

But where an indictment was found at the Middlesex Quarter Sessions, and removed by the defendant by *certiorari* into the Queen's Bench, and tried at the sittings after term, when Lord Denman, C. J., made an order for the payment to the prosecutor or his attorney of the expenses of the prosecution and the witnesses, and that order was afterwards made a rule of court; upon showing cause against a rule to show cause why that rule should not be discharged, it was contended that the words of the statute applied to any court, and that the reason of the decision in *Rex v. Jeyes* (*m*) was, that the statute was passed to indemnify persons unable to bear the expense, and that inability was not likely to exist where the party voluntarily removed the indictment to the superior court, and that the view taken by Littledale, J., in *Rex v. The Treasurer of Exeter* (*n*) was incorrect. In support of the rule it was contended that the statute ceased to apply after a removal by *certiorari*, and that there was no distinction as to the party removing the indictment; the court, however, did not express any opinion upon this point. (*o*)

Quære whether costs can be granted after a removal by *certiorari* by the defendant.

Under the 7 Geo. 4, c. 64, s. 22, the court, upon a trial for murder or manslaughter, has no power to allow the costs of the attendance of witnesses at the inquest held upon the body of the deceased, (*p*) or of a surgeon for examining the body by order of the coroner. (*q*)

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No costs of attending a coroner's inquest.

(*k*) *Rex v. The Treasurer of Exeter*, 5 M. & Ry. 167. Littledale, J., added, 'even the judge has no power where the case has been removed by *certiorari*. There is no difference in substance between an indictment removed by the prisoner and an indictment removed by the prosecutor.' 'The Act only applies to indictments tried before the courts in which they were found.'

(*l*) *Rex v. Richards*, 8 B. & C. 420. It is not stated that the prosecutor or the witnesses attended the trial under subpoena or recognizance.

(*m*) *Supra*.  
(*n*) *Supra*.  
(*o*) *Reg. v. ———* 8 A. & E. 589. See this case, *ante*, p. 588.

(*p*) *Rex v. Rees*, 5 C. & P. 302.  
(*q*) *Rex v. Taylor*, 5 C. & P. 301. The 6 & 7 Will. 4, c. 89, however, after by sec. 1 providing that the coroner may summon medical witnesses, and by sec. 2, that a majority of the jury may require the coroner to summon additional medical witnesses, if the first are not satis-

factory, enacted by sec. 3 that legally qualified practitioners attending in obedience to such summons should receive such remuneration and fees as were specified in the schedule to that Act, which were in Great Britain, to be paid out of the funds collected for the relief of the poor; but by sec. 4, no fee is to be paid if the examination takes place without the order of the coroner; or by sec. 5, where the death was in any hospital, infirmary, &c. By the 1 Vict. c. 68, s. 1, the justices of the peace at Quarter Sessions, and the town council of any borough having a coroner, are to make a schedule of the fees to be paid by the coroner holding an inquest (other than the fees payable to medical witnesses under the 6 & 7 Will. 4, c. 89). Sec. 2 repeals so much of the 6 & 7 Will. 4, c. 89, as relates to the payment of the fees to medical witnesses out of the funds raised for the relief of the poor, and provides that the coroner shall pay them; and by sec. 3, the coroners of counties are to lay their accounts before the Quar-

Where the grand jury ignored a bill of indictment for concealing the birth of a child, and the coroner's clerk, who was also under-clerk to the magistrates, was bound over to prosecute, Maule, J., refused to allow the costs. (*r*)

Extra expenses allowed under particular circumstances.

Where a witness was brought to bed during her attendance under a recognizance at the assizes, Parke, J., allowed her the difference between the expenses which would have been incurred had she been at home and those actually incurred at the assize town; (*s*) and so where a witness who had come to the assizes at York, under a recognizance to give evidence in a case of forgery, became insane, and it was thought necessary to convey him to the lunatic asylum at Wakefield; Patteson, J., upon the authority of the preceding case, ordered a similar allowance as to the expenses of medical attendance during the time the witness remained at York after he was attacked, and also for the expenses of conveying him to the asylum at Wakefield. (*t*)

Bringing a woman to be identified.

Where in a case of bigamy the prisoner's first wife had been brought from a distance in order to be identified, if necessary, by a witness who was willing to take her back, but could not well afford to do so, and she was in very poor circumstances, but it did not become necessary to identify her; Rolfe, B., allowed the witness all the reasonable expense of bringing the wife and returning her home, in the same manner as a party who had brought a register or book would be allowed all the reasonable cost of producing it in court and restoring it to its former place of custody. (*u*)

Expenses of 'otherwise carrying on the prosecution.'

Where in a case of murder it appeared that the offence was committed in a small township, the inhabitants of which were a small community, and extremely poor, and had shown great zeal and activity in getting up the case, and had been put to considerable expense in so doing, which they were but ill able to afford; the court was applied to that certain expenses might be allowed over and above those usually allowed by the officer of the court, and it was submitted that the words 'in otherwise carrying on the prosecution' were sufficiently large to include the expenses applied for; Lord Denman, C. J., after time taken to consider, granted the application, and the clerk of assize made out the order for all the expenses incurred, except the attendance of the witnesses before the coroner. (*v*)

Costs of cases reserved.

Upon the trial of a felony a case was reserved for the opinion of the judges at the York Winter Assizes, and at the following Winter Gaol Delivery at York Williams, J., who had reserved the case,

ter Sessions, and the coroners of boroughs to lay them before the town council, and the coroner is to be repaid in the former case out of the county rates, and in the latter out of the borough fund. It may be proper to observe that it is the bounden duty of a coroner, wherever the death has arisen under such circumstances as lead to the conclusion that the party has died from the criminal acts of another, to cause a *post mortem* examination of the body to be made by some medical practitioner. In *Reg. v. Webb*, Hereford Spr. Ass. 1843, on an indictment for murder by violence inflicted upon the head, no *post mortem* examination had taken place, and

Wightman, J., commented in strong terms on the great impropriety of neglecting such a course, and observed that it was clearly the duty of a coroner to order such an examination to take place.

(*r*) *Reg. v. Hodgson*, 1 Cox, C. C. 43. No ground is stated for the refusal.

(*s*) Anonymous, cited, 1 Lew. 133.

(*t*) *In re Mallison*, 1 Lew. 132.

(*u*) *Reg. v. Thomas*, 1 Cox, C. C. 44.

(*v*) *Lewen's case*, 2 Lew. 161. The depositions taken before the coroner were allowed for.

after reading the 7 Geo. 4, c. 61, s. 22, allowed the costs of the argument before the judges as expenses in otherwise carrying on the prosecution. (*w*) So where a prisoner had been convicted of obtaining money by false pretences, and a point reserved, which was decided against the prisoner, and the costs of the prosecution had been ordered on the conviction of the prisoner; Williams, J., after passing sentence on the prisoner at the assizes after the conviction was affirmed, allowed the costs of the case reserved. (*x*) But it has since been held that the court which reserves the case may at the time allow the costs to be incurred in the court above as well as the other costs of the prosecution. And, although the court above has no power to make an order for the costs, it would be convenient for the officer of that court to examine into the costs incurred in that court; and, although his certificate could not in law bind the taxing officer below, those officers would no doubt consider it as binding upon them. (*y*)

In one case it was said that when a trial for felony is postponed, the practice is not to allow the prosecutor his expenses till the assize at which the trial comes on, and the expenses were in that case refused at the assizes at which the trial was postponed. (*z*) So where a defendant did not appear in pursuance of his recognizances, and the prosecutor's recognizances were enlarged until the defendant could be apprehended; Patteson, J., declined to make any order for costs until the case was finally disposed of. (*a*) But where the coroner had bound over the prosecutor and witnesses to appear at the assizes to give evidence in a case of manslaughter, but the prisoner, who had neither been apprehended nor was under recognizance, did not appear at the assizes; Alderson, B., after ordering him to be called, and directing the trial to be put off till the next assizes, allowed the expenses of the prosecutor and witnesses. (*b*) So in a case of murder, which was postponed until the following assizes, on the application of the prisoner, and in which the costs of the prosecution were very heavy; Alderson, B., made an order for their payment. (*c*) So where a prisoner charged with murder had been removed to a lunatic asylum under the 3 & 4 Vict. c. 54, and a bill was found against him for the murder; Pollock, C. B., directed the trial to be postponed to the next assizes, and the recognizances of the witnesses to be respited until then, and thought that the costs of the witnesses should not be allowed until it should be seen whether the prisoner could then

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Cases where  
the trial has  
been postponed.

(*w*) Reg. v. Cluderoy, 3 C. & K. 205. A.D. 1849. See 1 Den. C. C. 514, for the case before the judges.

(*x*) Reg. v. Woolley, 4 Cox, C. C. 452. Lord Campbell, C. J., probably was consulted on this point.

(*y*) Reg. v. Lewis, D. & B. 326; and though the court spoke of drawing up a rule, it has not been done, and no doubt the practice will be in future according to this opinion of the court. In Reg. v. Dolan, Dears. C. C. 436, and Reg. v. Hornsea, Dears. C. C. 291, the court above held that they had no jurisdiction over the costs.

(*z*) Rex v. Hunter, 3 C. & P. 591,

Park, J. A. J.

(*a*) Reg. v. Young, 2 Cox, C. C. 280. The bill in this case was found at the Summer Assizes, 1846, and the defendant's bail obtained an enlargement of his recognizances on the ground of his ill health. At the Spring Assizes, 1847, his recognizances were estreated, and the application for costs was at the Summer Assizes, 1847, when every endeavour had been made in vain to procure his apprehension.

(*b*) Flannery's case, 1 Lew. 133, and in a similar case Gurney, B., allowed the costs, *ibid.* note.

(*c*) Bolam's case, Rosc. Cr. Ev. 220.



be brought up. (*d*) But at the next assizes, on an affidavit that the prisoner was in a hopeless condition of insanity and never likely to be better; Patteson, J., allowed the costs, and bound the witnesses to appear when called upon. (*e*)

Costs ordered out of the funds of a borough.

Hayward and others were convicted upon an indictment for forging a will at the Shrewsbury assizes. The offence was laid as having been committed at the parish of W. in the county of Salop. An order was made 'by the court' and signed by the clerk of assize, requiring the treasurer of the stock of the borough of Oswestry, in the county of Salop, to pay the prosecutor and his witnesses the costs. The borough of Oswestry does not contribute to the county rate, but raises a rate of the same nature within itself, which is applicable to the costs of prosecutions for offences committed within the borough. The body of the will appeared to have been written, and the supposed mark of the testatrix and signature of the first witness affixed, in the borough of Oswestry. The second signature was added at Wrexham in Denbighshire. Hayward was apprehended at L. in Shropshire, where he had had the will, but, before his apprehension, he had brought the will to Oswestry, and sent it to St. Asaph for probate. The prosecutor and witnesses were bound over by magistrates of Shropshire to give evidence of an offence stated by the recognizances and commitment to have been there committed. The treasurer having refused to obey the order, the Court of Queen's Bench held that the order was conclusive, and granted a mandamus to enforce it; and, assuming that the validity of the order could be inquired into, Lord Denman, C. J., and Patteson, J., held that it was rightly made. The offence appeared to have been committed partly in Shropshire and partly in Denbighshire; and, therefore, the case was rightly tried in Shropshire under the 7 Geo. 4, c. 64, s. 12. And no act appeared to have been done in any part of Shropshire but Oswestry; then as between the county and Oswestry, for the purpose of this order, the offence was one committed in Oswestry. (*f*)

7 Geo. 4, c. 64, s. 28. Courts may order compensation to those who have been active in the apprehension of certain offenders.

The 7 Geo. 4, c. 64, s. 28, 'for the better remuneration of persons who have been active in the apprehension of certain offenders,' enacts, that 'where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded firearms at any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property, knowing the same to have been stolen; every such

(*d*) Reg. v. Dwerryhouse, 2 Cox, C. C. 291.

(*e*) *Ibid.* p. 446.

(*f*) Reg. v. Oswestry, 12 Q. B. 239.

At all events there seems to have been an uttering in Oswestry. See the case as Reg. v. Hayward, 2 C. & K. 234, and as Reg. v. Jones, 1 Den. C. C. 166.

court is hereby authorized and empowered in any of the cases aforesaid to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with receiving stolen property, knowing the same to have been stolen, such court shall have power to order compensation to such person in the same manner as the other courts hereinbefore mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation as courts are by this Act empowered to allow to prosecutors and witnesses respectively.' (g)

Sec. 30. 'If any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences hereinbefore last mentioned, it shall be lawful for the court before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children, in case his wife shall be dead, or to his father or mother, in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court; and every such order shall be paid by and repaid to the sheriff in the manner hereinbefore mentioned.'

By the 14 & 15 Vict. c. 55, s. 7, 'nothing in this Act or in any regulations under this Act shall interfere with or affect the power of any court to order payment to any person who may appear to such court to have shown extraordinary courage, diligence, or exertion in or towards any such apprehension as hereinbefore mentioned of such sum as such court shall think reasonable and adjudge to be paid in respect of such extraordinary courage, diligence, or exertion.'

Sec. 8. 'When any person appears to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with any of the offences in the said enactment mentioned which such sessions may have power to try, such court of sessions shall have power to order compensation to be paid to such person in the same manner as the other courts in the said enactment mentioned: provided, that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation be made out and delivered by the proper officer of the court unto such person without fee or payment for the same.'

If any man is killed in attempting to take certain offenders, the court may order compensation to his family.

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Act not to interfere with payments in respect of extraordinary courage, diligence, and exertions.

Powers given to judges by 7 Geo. 4, c. 64, to order payments in respect of the apprehension of certain offenders extended to courts of sessions of the peace.

(g) Sec. 29 provides that such orders shall be paid by the sheriff, who may obtain immediate re-payment on application to the treasury.

Sacrilege.

Bullock-stealing.

Burglary.

Attempt to murder.

Stealing from the person.  
'Exertions.'

Where no expense or loss of time.

Affidavit may be necessary.  
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The 7 Geo. 4, c. 64, s. 28, does not authorize the court to award compensation to persons who have been active in and towards the apprehension of a person guilty of sacrilege. (*h*) And upon the authority of this case, Bolland, B., refused to allow compensation in a similar case; though, in the absence of such authority, both he and Parke, J., would have been disposed to put a different construction upon the statute. (*i*) But it has been held that a person who has been active in the apprehension of a prisoner charged with stealing a cow is entitled to a reward under this section, as the words bullock-stealing, horse-stealing, and sheep-stealing are intended to describe the kind or class of offences in connection with which rewards were to be allowed. (*j*) Where the prosecutrix's brother-in-law, who lived in her house, was attacked and wounded in bed by some burglars, but he made a gallant resistance and got outside the door of his room and shut it, keeping the burglars inside, and shouting aloud for assistance, and some neighbours came and secured the prisoners, who were still in the room; Talfourd, J., held that giving a liberal construction to the 7 Geo. 4, c. 64, s. 28, the case was within it, and ordered a reward accordingly. (*k*) And where a prisoner was indicted for an attempt to murder her child by suffocating it, and an application was made to allow the extra expenses incurred by the constable in apprehending the prisoner, and for his loss of time, and the attention of the court was directed to the case not being one within the words of sec. 28; Patteson, J., was of opinion that it was within the spirit and intention of the Act, though not within the words, and therefore allowed the expenses. (*l*) But stealing from the person is not included within the words 'robbery from the person.' (*m*) And where on a trial for robbery it appeared that the prosecutor had displayed great courage in apprehending the prisoner; Parke, B., ordered him to be paid a reward, under the word 'exertions.' (*n*)

The rewards which may be given under this section are not confined to cases where the party has been put to expense or loss of time, but have been ordered to be paid to persons who have displayed great courage in the apprehension of offenders, although they have neither been put to expense nor loss of time. Thus they have been granted where the person has apprehended the prisoner in the actual commission of a burglary; (*o*) and also where the party came downstairs when a burglary was committed, but did not apprehend the prisoners, who were three in number, but was able to give such a description of them as caused their apprehension. (*p*)

Where it does not appear upon the evidence given on the trial that the party has been active in the apprehension, an affidavit is necessary to be laid before the judge, in order to induce him to

(*h*) *Robinson's case*, 1 Lew. 129, Hurllock, B., who said that 'The word "sacrilege," if used alone in a statute, would not be construed to come within the words "burglary" or "housebreaking;" and that wherever, in a penal statute, churches are intended to be included, the word "sacrilege" is introduced.'

(*i*) *Anonymous*, 1 Lew. 130.

(*j*) *Rex v. Gilbrass*, 7 C. & P. 444, Law, Recorder.

(*k*) *Reg. v. Dunning*, 5 Cox, C. C. 142.

(*l*) *Durkin's case*, 2 Lew. 163.

(*m*) *Reg. v. Thompson*, 1 Cox, C. C. 42. Maule, J., Rose, C. E. 225.

(*n*) *Womersly's case*, 2 Lew. 162.

(*o*) *Rex v. Barnes*, 7 C. & P. 166, Coleridge, J.

(*p*) *Rex v. Blake*, 7 C. & P. 166, Williams, J. And rewards were ordered in a similar way at the Bristol Special Commission. See 7 C. & P. 167.



grant a reward. (q) Thus where in a case of horse-stealing a constable had used great exertions in apprehending the prisoner, and establishing the case against him, and had gone various journeys and been at considerable expense; Lord Campbell, C. J., held that the application must be founded on an affidavit of the party, stating the amount of money actually expended, &c. (r)

The entire order of a court to pay the costs of a prosecution made under the 7 Geo. 4, c. 64, s. 26, must be served on the county treasurer, and if the part served only contain a portion of the order, the treasurer is not bound to obey it. (s)

The entire order for costs must be served on the treasurer.

By the 6 & 7 Vict. c. 96, s. 8, 'in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried.'

On prosecution for private libel, defendant entitled to costs on acquittal.

The Court of Queen's Bench has no authority in a case where an indictment for libel has been tried on the Crown side under a commission of oyer and terminer, to direct the clerk of assize to review his taxation of the costs under the preceding section; but it seems that one of the judges named in such a commission might direct a review of the taxation at any time before that commission was superseded by a new one. (t)

The Queen's Bench cannot review the taxation of costs under a commission of oyer and terminer.

A person subpoenaed as a witness, or bound over by recognizance, either to prosecute or give evidence, or attending voluntarily for the *bonâ fide* purpose of giving evidence, is privileged from arrest during the necessary time occupied in going to the place where his attendance is required, in staying there for the purpose of such attendance, and in returning from that place. (u) And in allowing witnesses time sufficient for these purposes, the courts are always disposed to be liberal. (v) If a witness under these circumstances be arrested, the court out of which the subpoena issued, or the judge of the court in which the cause has been or is to be tried, will, upon application, order him to be discharged. (w)

Protection of witness from arrest.

When any offence has arisen in India, which is tried in this country, the evidence of witnesses resident in India may be obtained in the manner prescribed by the 13 Geo. 3, c. 63, ss. 40, 44. (x) And in case of a prosecution for any offence committed

Evidence of witnesses resident abroad.

(q) *Rex v. Jones*, 7 C. & P. 167, Park, J. A. J.

(r) *Reg. v. Haines*, 5 Cox, C. C. 114.

(s) *Reg. v. Jones*, 2 M. C. C. R. 171.

(t) *Reg. v. Newhouse*, 1 Bail Court C. 129. Erle, J.

(u) *Meekins v. Smith*, 1 H. Bl. 636. *Lightfoot v. Cameron*, 2 Bl. 1113. *Childerton v. Barrett*, 11 East, 439. *Arding v. Flower*, 8 T. R. 536. But this pri-

vilage does not extend to arrests by his bail, for the purpose of being surrendered; for he is supposed to be in their custody even while attending as a witness. *Ex parte Lyne*, 3 Stark, N. P. C. 132.

(v) 1 Phill. Ev. 4.

(w) Archb. Cr. Pl. 248.

(x) See *ante*, p. 498, as to depositions or interrogatories by consent.

abroad by any person employed in the public service, the evidence of witnesses resident abroad may be obtained in the mode pointed out by the 42 Geo. 3, c. 85.

## SEC. VI.

### Of Accomplices.

Evidence  
against pri-  
soner.

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Indicted se-  
parately.

Promise of  
pardon or  
reward.

Approvement.

ALTHOUGH it had been shown by a witness's own admission that he had been guilty of an infamous crime, he was not deemed incompetent without other proper proof that he had been convicted of it: (*a*) from which it necessarily followed that the testimony of an avowed accomplice with the prisoner at the bar was not to be excluded from being given against him; and accordingly it had been long a settled rule that an accomplice might give evidence against his associates, provided he had not been already convicted: (*b*) so he might indeed, even after a conviction, if judgment had not passed, for it was not the conviction, but the judgment, that created the disability. (*c*) But we shall see hereafter that such disability no longer exists. (*d*) And not only if two or more persons were accomplices might one, who was not indicted, be a witness against the others, but he might also be so, it seems, when he was indicted jointly with his partners in guilt (*e*) (although it was not usual or proper to include him in the indictment, (*f*)) provided he had not been put on his trial at the same time with the others. (*g*) It was formerly thought that an accomplice *separately* indicted for the same offence could not be a witness against his associate, unless he had first pleaded guilty to his indictment; (*h*) but the rule is now otherwise. (*i*) It was also perfectly settled, though contrary to one great authority, (*j*) that no promise of pardon or reward, whether absolute or conditional, will render an accomplice incompetent, (*k*) although the circumstances under which his evidence is given ought to have great weight with a jury in considering the credit to which such evidence is entitled. The practice of admitting the testimony of accomplices and the promise of pardon, express or implied, under which they usually give their evidence, were introduced instead of the ancient system of approvement, which Lord Hale, in his pleas of the Crown, speaks of as having been already long disused. (*l*)

(*a*) *Rex v. Castell Carcinion*, 8 East, R. 77.

(*b*) 2 Hawk. P. C. c. 46, ss. 94, 95. Tong's case, Kel. 17, 18. 1 Hale, P. C. 303, 304.

(*c*) 1 Phill. Ev. 28. And the information of a dead accomplice, taken by a justice of the peace, may be read in evidence against the prisoner. *Rex v. West-licher*, 1 Leach, 12. *Rex v. Russell*, R. & M. C. C. R. 356.

(*d*) *Post*, p. 622.

(*e*) 1 Hale, P. C. 305. If A., B., and C. be indicted of perjury on three several indictments concerning the same matter. A. pleads not guilty, B. and C. may be examined as witnesses for A.,

for yet they stand unconvicted, although they are indicted. *Bilmore's case*, 1 Hale, 305. *Rex v. Clark*, *ibid.* note.

(*f*) *Ibid.*

(*g*) 2 Stark. Ev. 12. The learned author adds a *quære*. And see *Reg. v. Lyons*, 9 C. & P. 555.

(*h*) *Sir Percy Cresby's case*, 1 Hale, P. C. 303.

(*i*) 1 Phill. Ev. 28.

(*j*) Lord Hale, 2 P. C. 280.

(*k*) Tong's case, Kel. 17. *Laver's case*, 6 St. Tr. 259. 2 Hawk. P. C. c. 46, s. 135. 1 Hale, P. C. 304. 1 Phill. Ev. 27.

(*l*) 2 Hale, 226.

Approvement was when a prisoner, arraigned for treason or felony, confessed the fact before plea pleaded, and appealed or accused others his accomplices of the same crime, in order to obtain his pardon. (*m*) He was also bound to discover on oath, not only the particular crime charged upon him, but all treasons and felonies of which he could give any information. (*n*) It was purely in the discretion of the court to permit the approvement or not; if they allowed it, the party accused was put on his trial: whereon, if he was convicted, the approver had his pardon *ex debito justitiæ*: (*o*) if he was acquitted, the approver received judgment of death upon his own confession of the indictment. (*p*)

All the good that could be expected from this method of approvement is now more fully provided for and secured by one of the following methods: (*q*) 1st, By special proclamation in the Gazette or otherwise, pardon is sometimes promised upon certain conditions. Accomplices within this class have a *right* to pardon. (*r*) 2ndly, By the practice most usually adopted accomplices are admitted to give evidence for the Crown, under an implied promise of pardon, on condition of their making a full and fair confession of the truth. (*s*) On a strict and ample performance of this condition, to the satisfaction of the judge presiding at the trial (although they are not of right entitled to pardon), they have an equitable title to a recommendation for the Queen's mercy. (*t*) They cannot plead this in

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(*m*) 4 Black. Com. 330.

(*n*) 2 Hale, P. C. 227.

(*o*) 4 Black. Com. 330.

(*p*) Ibid.

(*q*) In the case of offences relating to coining and uttering counterfeit money, the 6 & 7 Will. 3, c. 17, s. 12, and 15 Geo. 2, c. 28, s. 8, enacted, that if any such offender, being out of prison, should discover two or more persons who had committed the like offences, so as they might be convicted thereof, he should be entitled to a pardon; but these statutes were repealed by the 2 Will. 4, c. 34, s. 1.

(*r*) *Rex v. Rudd*, Cowp. 334, by Lord Mansfield, in giving judgment. S. P. S. C. 1 Leach, 118, 4th ed. But the promise of a pardon by proclamation in the Gazette does not give the party a legal right to exemption from punishment. Where, therefore, a prisoner convicted of murder was brought up to the Court of King's Bench, and asked why execution should not be awarded against him, and pleaded that the King, by proclamation in the Gazette, had promised pardon to any person, except the actual murderer, who should give information whereby such murderer should be convicted, and that he, not being the actual murderer, had given such information, and thereby entitled himself to a pardon, the plea was held insufficient. *Rex v. Garside*, 2 Ad. & E. 266. The proper course in such a case seems to be to apply to the judge to postpone the execution, in order that an application may be made to the secretary of state for a pardon. C. S. G.

(*s*) *Rex v. Rudd*, *supra*.

(*t*) Ibid. The equitable claim to pardon does not protect an accomplice from prosecutions for other offences, in which he was not concerned with the prisoner, but it is entirely in the discretion of the judge whether he will recommend the prisoner to mercy. *Rex v. Lee*, R. & R. 361. *Rex v. Brunton*, *ibid.* 454. S. C. MS. Burn's Just. by Chetwynd, tit. *Approver*. With respect to such offences, therefore, he is not bound to answer on his cross-examination. West's case, MS. 1 Phill. Ev. 28. If, however, the prisoner having been admitted as an accomplice as to one felony, be thereby induced to suppose that he has freed himself from the consequences of another felony, the judge will recommend the indictment for such other felony to be abandoned. Where an accomplice made a disclosure of property, which was the subject-matter of a different robbery by the same parties, under the impression that by the information he had previously given as to the robbery of other property he had delivered himself from the consequences of having the property he so disclosed in his possession; Coleridge, J., recommended the counsel for the prosecution not to proceed against the accomplice for feloniously receiving such property. *Garside's case*, 2 Lew. 38. The judges will not in general admit an accomplice as King's evidence, if it appear that he is charged with any other felony than that on the trial of which he is to be a witness. This was stated by Park, J. A. J., in several cases on the Oxford Spring Circuit, 1826, Carr. Crim. L. 67. It has been held in America that if an



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Mode of  
admitting  
accomplices.

bar to an indictment against them, nor can they avail themselves of it as a defence on their trial, though it may be made the ground of a motion for putting off the trial, in order to give the prisoner time for an application in another quarter. (*u*) And if an accomplice, after being received as a witness against his companions, breaks the condition on which he is admitted, and refuses to give full and fair information, he will be sent to trial to answer for his share of guilt in the transaction. (*v*) It is not a matter of course to admit an offender as witness on the trial of his associates, not even after he has been so allowed by the committing magistrate. The practice is (where the accomplice is in custody) for the counsel for the prosecution to move that the accomplice be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that his testimony is essential. (*w*) And it is in the discretion of the court, under all the circumstances of the case, whether the application be granted or refused. (*x*) And where

accomplice appears to have been the principal offender, he will be rejected. The *People v. Whipple*, 9 Cowen, 707, Greenl. Ev. 426; but in England principals have frequently been allowed to become witnesses against accessories. See Wild's case, *post*, p. 600, note (*f*). And cases frequently occur where the accessory is far the more guilty party; as where young persons have been induced to commit crimes by the procurement of old offenders: and in such cases the young persons are not unfrequently admitted as witnesses for the Crown.

(*u*) 1 Phill. Ev. 28.

(*v*) *Ibid.* Moore's case, 2 Lew. 37. In one instance a prisoner, who had made a confession after a representation made to him by a constable in gaol, that his accomplices had been taken into custody, which was not the fact, and who, after having been admitted as a witness against his associates, on a charge of maliciously killing sheep, upon the trial denied all knowledge of the subject, was afterwards tried and convicted upon his confession. *Rex v. Burley*, *cor.* Garrow, B., Leicesters Lent Assizes, 1818. And the conviction was afterwards approved of by all the judges. MS. 2 Stark. Ev. 13. So where an accomplice when sworn pretended that he knew nothing of the stealing of a sheep, Coleridge, J., committed him for trial at the next assizes, when he was convicted and transported, upon proof of his statement made to a policeman before he was called as a witness. *Reg. v. Smith*, Gloucester Spr. and Sum. Ass. 1841. So where an accomplice, who was called as a witness against several prisoners, gave evidence which showed that all, except one, who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty; Parke, B., thinking that the accomplice had refused to state that the particular prisoner was present in order to screen

him, ordered the accomplice to be kept in custody till the next assizes, and then tried for the robbery. *Rex v. Stokes* and others, Stafford Spr. Ass. 1837. It has been held in America, that if an accomplice, having made a private confession, upon a promise of pardon made by the attorney-general, should afterwards refuse to testify, he may be convicted upon the evidence of that confession. *Commonwealth v. Knapp*, 10 Pick. 477, as cited Greenl. Ev. 426. And where an accomplice, who had made a full disclosure of the facts attending the commission of a burglary when before the committing magistrate, refused before the grand jury to give any evidence at all; Wightman, J., ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. *Reg. v. Holtham* and five others, Stafford Spr. Ass. 1843.

(*w*) 2 Stark. Ev. 2. If, however, the accomplice be taken before the grand jury, by means of a surreptitious and illegal order, the indictment so found is good. *Doctor Dodd's case*, 1 Leach, 155. It is not usual to admit more than one accomplice. *Barnsley Rioters' case*, 1 Lewin, 5, Parke, J. But under peculiar circumstances three have been admitted. *Scott's case*, 2 Lew. 36, Lord Denman, C. J. In this case the accomplices spoke to different facts, and no one could prove the whole. See *Rex v. Noakes*, 5 C. & P. 326.

(*x*) 1 Phill. Ev. 29. The court usually considers not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the court will refuse to admit him as a witness. Thus where several prisoners were committed as prin-

one prisoner pleaded guilty, and an application was made to admit him as a witness against the other; Hill, J., directed the witnesses, who were relied upon to corroborate him, to be called first, and, if their evidence was sufficiently strong, then the accomplice might be examined as a witness. (*y*)

This application is usually made before the bill is taken before the grand jury, and if the application is granted, the accomplice is not included in the indictment; but where he has been included with his confederates in a joint indictment, he may still be used as a witness with the consent of the court. (*z*) Upon an indictment for conspiracy the court allowed an acquittal to be taken against some of the defendants in order that they might be called as witnesses for the prosecution. (*a*) And the same course may be adopted, with the permission of the court, in a case of felony. (*b*) Upon an indictment for rape, as soon as the jury were sworn, it was proposed, on the part of the prosecution, that one of the prisoners should be acquitted before the case was gone into, as he was intended to be called as a witness against the other prisoners, and upon this being objected to, on behalf of the other prisoners; Williams, J. (having conferred with Alderson, B.) said, 'I had little doubt as to the course I ought to take, and my learned brother entirely agrees with me that this is a matter very much of ordinary occurrence. In cases of this kind the court, if it sees no cause to the contrary, is in the habit of relying on the discretion of the counsel who conduct the prosecution. I shall, therefore, in this case, intrust it to the discretion of the counsel whether he will have the prisoner acquitted before the case is gone into or not. I think it almost of course.' (*c*)

Where he is jointly indicted.

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It may be proper to observe that it is the duty of magistrates in all cases where there may be an intention to call an accomplice as a witness for the prosecution, to commit and not to bail him. (*d*)

In prosecutions for a misdemeanor in receiving stolen goods, on the repealed statute 22 Geo. 3, c. 58, the principal felon, though not convicted or pardoned, was a competent witness against the receiver. (*e*) So the principal felon might be a witness under the 4 Geo. 1, c. 10, s. 4, against a party indicted for taking a

Principal felon a witness.

principals, and several as receivers, but no corroboration could be given as to the receivers, against whom the evidence of the accomplice was required; Gurney, B., refused to permit one of the principals to become a witness. *Rex v. Mellor* and others, Stafford Sum. Ass. 1833. So in *Reg. v. Saunders* and others, Worcester Spr. Assizes, 1842, on a motion to admit an accomplice, Patteson, J., said, 'I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification, and there is no corroboration, that will not do.' And in *Reg. v. Salt* and others, Stafford Spr. Ass. 1843, where there was no corroboration of an accomplice, Wightman, J., refused to allow him to become a witness.

(*y*) *Reg. v. Sparks*, 1 F. & F. 388.

(*z*) 1 Phill. Ev. 29.

(*a*) *Rex v. Rowland*, R. & M. N. P. R.

401. So formerly if an accomplice jointly indicted with others pleaded guilty, and was fined by the court, and paid the fine (in a case where such fine might be imposed by way of punishment, and where the suffering the punishment restored the competency), he might be called as a witness by the other prisoners. *Rex v. Fletcher*, 1 Str. 633. See also *Rex v. Sherman*, C. T. H. 303.

(*b*) 1 Phill. Ev. 29.

(*c*) *Reg. v. Owen*, 9 C. & P. 83. At the conclusion of the opening, the prisoner was asked whether he would give evidence, and refused, and the case proceeded against all the prisoners. See 2 Hawk. P. C. c. 46, s. 95.

(*d*) *Rex v. Beardmore*, 7 C. & P. 497, *Patteson*, J. *Rex v. Rudd*, 1 Leach, 115.

(*e*) *Ante*, vol. 2, p. 571.

Information for bribery.

reward to help to stolen goods. (*f*) So on an information under 2 Geo. 2, c. 24, for bribery at an election, a person who had received a bribe might be a witness against the defendant, though in case of a conviction he would be indemnified from the penalties of the Act. (*g*)

Accomplice's evidence alone sufficient in point of law, but in practice corroboration is always deemed essential.

It being established that an accomplice is a competent witness, the consequence is inevitable, that if credit be given to his evidence, it requires no confirmation from another witness. (*h*) And therefore, in strictness, if the jury believe the evidence of an accomplice, they may legally convict a prisoner upon it, though it stands totally uncorroborated. (*i*) But from a consideration of the situation of an accomplice, this doctrine has been greatly modified in practice; and it has long been considered as a general rule of practice that the testimony of an accomplice ought to receive confirmation, and that, unless it be corroborated in some material part by unimpeachable evidence, the presiding judge ought to advise the jury to acquit the prisoner. (*j*) It has been laid down that this practice of requiring some confirmation of an accomplice's evidence must be considered in strictness as resting only upon the discretion of the judge. (*k*) And this, indeed, appears to be the only mode in which it can be made reconcileable with the doctrine already stated, that a legal conviction may take place upon the unsupported evidence of an accomplice. But it may be observed that the practice in question has obtained so much sanction from legal authority, that it 'deserves all the reverence of law,' (*l*) and a deviation from it in any particular case would be justly considered of questionable propriety. (*m*) This confirmation need not extend to every part of the accomplice's evidence, for there would be no occasion to use him at all

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(*f*) See *ante*, vol. 2, p. 575. Jonathan Wild's case, 1 Leach, 17, note (*a*).

(*g*) Bush v. Rawlins, cited by Lord Mansfield in Clarke v. Shee, Cowp. 199. Mead v. Robinson, Willes, 422.

(*h*) By Lord Ellenborough in Rex v. Jones, 2 Campb. 133. Rex v. Hastings, 7 C. & P. 152, Lord Denman, C. J., Park, J., and Alderson, B.

(*i*) Rex v. Atwood, 1 Leach, 464, also cited by Grose, J., in Jordaine v. Lashbrooke, 7 T. R. 609. Rex v. Durham, 1 Leach, 478. Reg. v. Andrews, 1 Cox, C. C. 183. Reg. v. Avery, 1 Cox, C. C. 206. Reg. v. Stubbs, Dears. C. C. 555.

(*j*) 1 Phill. Ev. 31. Smith and Davis's case, 1 Leach, 479, in note (*a*) to Durham's case. They were tried for robbing George Hunter. During the night the prosecutor was attacked by four ruffians, whose persons he was unable to identify; but during the scuffle he had torn a piece of the coat which one of them had on, who, on being discovered by this means, turned King's evidence, and implicated the two prisoners. But the court, although it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to suffer a conviction to take place on his unsup-

ported testimony, and the prisoners were acquitted. See per Lord Abinger, C. B., in Reg. v. Farler, *post*, p. 603, and Reg. v. Dunne, 5 Cox, C. C. 507.

(*k*) 1 Phill. Ev. 32. By Lord Ellenborough, Rex v. Jones, 2 Campb. 132. Rex v. Durham, *supra*.

(*l*) Per Lord Abinger, C. B., in Reg. v. Farler, *post*, p. 603.

(*m*) 1 Phill. Ev. 32. In Greenl. Ev. 426, the learned author observes, that it is now so generally the practice to advise juries not to convict without corroboration of the accomplice, 'that its omission would be regarded as an omission of duty on the part of the judge.' It is well observed that 'the substantial result appears to be the same as if the practice had depended upon a rule of law, instead of being only the exercise of the discretion of the judge. The only distinction appears to be that if the judge were to submit a case of this nature to the jury without any such recommendation, and a conviction ensued, or if a jury were to convict in opposition to the recommendation of the judge, it could not properly be said in either case, consistently with the authorities on the subject, that the conviction would be illegal.' 1 Phill. Ev. 32.



as a witness if his narrative could be completely proved by other evidence, free from suspicion. But the question is, whether he is to be believed upon points which the confirmation does not reach. And if the jury find some part of his evidence satisfactorily corroborated, this is a good ground for them to believe him in other parts as to which there is no confirmation. (*n*) So far all the authorities agree; the only point on which any difference of opinion has been supposed to exist, relates to the particular part or parts of the accomplice's testimony which ought to be confirmed. (*o*)

In some cases it seems to have been considered that if the accomplice was confirmed as to some of the prisoners, though not as to all, it was sufficient to entitle the accomplice to credit, and to warrant the judge in leaving the case to the jury without a recommendation to acquit those prisoners as to whom there was no confirmation. Accordingly, where an accomplice was examined on the part of the prosecution, who was confirmed in the testimony which he gave as to some of the prisoners, but not as to the rest; Bayley, J., told the jury that if they were satisfied by the confirmatory evidence which had been given, that the accomplice was a credible witness, they might act upon that testimony with respect to others of the prisoners, although, as far as his evidence affected them, it had received no confirmation; and all the prisoners were convicted. (*p*) To the same effect is a case mentioned by Lord Ellenborough in *Rex v. Jones*, (*q*) as having been within a few years referred to the twelve judges, where four men were convicted of burglary on the evidence of an accomplice, who received no confirmation concerning any of the facts which proved the criminality of one of the prisoners; but the judges were unanimously of opinion that the conviction of all four was legal, and upon that opinion they all suffered the sentence of the law. (*r*) So in the report of the York trials under a special commission, it was laid down by Thompson, C. B., that 'confirmation need not be of circumstances, which go to prove that the accomplice speaks truth with respect to all the prisoners, when several are tried, and with respect to the share they have each taken in the transaction; for if the jury are satisfied that he speaks truth in those parts in which they see unimpeachable evidence brought to confirm him, that is a ground for them to believe that he speaks also truly with regard to the other prisoners, as to whom there may be no confirmation.' (*s*) Upon these cases it has been well observed, that 'it would be difficult

Corroboration as to some, but not as to all the prisoners, considered sufficient formerly.

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(*n*) 1 Phill. Ev. 34. 2 Stark. Ev. 14.

(*o*) 1 Phill. Ev. 34.

(*p*) *Rex v. Dawber*, 3 Stark. N. P. C. 34; in note (*a*) to which the learned reporter remarks, that in judging of the credit due to the testimony of an accomplice, it seems to be a necessary principle that his testimony must be wholly received as that of a credible witness, or wholly rejected. But this is a palpable fallacy; for though the jury may believe him as to what criminales himself, they may well disbelieve him as to what affects another, either from his prevarication in the box or otherwise. C. S. G.

(*q*) 2 Campb. 133.

(*r*) So in *Birkett's case*, R. & R. 251, the judges were of opinion 'that an accomplice did not require confirmation as to the person he charged, if he was confirmed in the particulars of his story.' This is the whole statement in the report. But all these cases amount to is, that *in point of law* the jury might act on the uncorroborated testimony of the accomplice. It is no more than *Reg. v. Stubbs*, Dears. C. C. 555, *post*, p. 606. C. S. G.

(*s*) *Reg. v. Swallow*, report of the trials at York in 1814, cited 1 Phill. Ev. 35.

to assign a satisfactory ground for requiring confirmation as to a prisoner indicted alone, and dispensing with confirmation as to prisoners jointly indicted; the same reasons which render confirmation necessary in the former case appear to require it in the latter: if a distinction between the two cases were to be allowed, a prisoner's acquittal or conviction upon an accomplice's testimony might depend upon the mere accident of his being indicted alone or jointly with others. (t)

Hastings' case.

Upon an indictment for larceny, the counsel for the prosecution, in stating the case, said that he should call an accomplice as a witness, and admitted that he should not, according to the depositions, be able to confirm his testimony as to the particular prisoners charged, yet he could confirm him as to the general circumstances of the case, and as to the mode in which the robbery had been committed. Lord Denman, C. J., said, in the presence of Park, J. A., and Alderson, B., 'I consider, and I believe my learned brothers agree with me, that it is altogether for the jury, and they may, if they please, act upon the evidence of the accomplice without any confirmation of his statement. But one would not, of course, be inclined to give any great degree of credit to a person so situated.' The accomplice was examined and several other witnesses, but the other witnesses rather contradicted than confirmed him in anything, and the prisoners were acquitted. (u)

But the rule now is that where there is one prisoner there must be confirmation as to him, and where there are several, as to each.

But it is now well established by the current of recent authorities, that it is not sufficient to corroborate an accomplice as to the facts of the case generally, but that he must be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged. And where several prisoners are jointly indicted, and the accomplice is corroborated as to some of them, although the jury may give credit to him as to those to whom the corroboration applies, they ought to be directed to pay no attention to the evidence of the accomplice as to those against whom there is no corroboration.

Webb's case. Corroboration as to the circumstances of the case insufficient.

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Upon an indictment for breaking into a warehouse and stealing a quantity of cheese, an accomplice proved that the thieves took a ladder from certain premises, and it was proved by a witness that the ladder was so taken away, and it was proposed to call other witnesses to confirm the accomplice as to the mode in which the felony was committed. Williams, J., 'You must show something that goes to bring home the matter to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice, is not such confirmation as will entitle his evidence to credit, so as to affect other persons. Indeed, I think it is really no confirmation at all, as every one

(t) 1 Phill. Ev. 37, 8th ed.

(u) Rex v. Hastings, 7 C. & P. 152. This case is stated to be 'a distinct decision' to the extent 'that it is not necessary to have any confirmation of an accomplice,' note 7, C. & P. 153. It is submitted that all that the learned chief justice intended to say was that *in point of law* the jury might act upon the unconfirmed testimony of an accomplice, but that *in point of fact* the jury, as

reasonable persons, ought not to give credit to persons so situated. It must be presumed that this was the meaning of the observation, as it was made in the presence of the two learned judges, who have so often expressed opinions to that effect. In this view the observation is in perfect harmony with all the more recent authorities. The report does not state in what way the case was left to the jury. C. S. G.

will give credit to a man who avows himself a principal felon, for, at least, knowing how the felony was committed. It has been always my opinion that confirmation of this kind is of no use whatsoever. (v) So where the prisoner was indicted for stealing a lamb, and an accomplice proved that he assisted the prisoner in stealing the lamb, but the only evidence to confirm his statement was that of a witness, who found the skin of the lamb in the field where the lamb had been kept; it was held that the confirmation was insufficient; and upon its being submitted that there was evidence to go to the jury, and *Rex v. Hastings* (w) being cited as showing that the confirmation of the accomplice need not be as to the party accused: Gurney, B., said, 'Although in some instances it has been so held, you will find that in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the charge. I think that it would be highly dangerous to convict any person of such a crime on the evidence of an accomplice, unconfirmed with respect to the party accused.' (x)

Dyke's case.

The corroboration ought to be as to some fact or facts, the truth or falsehood of which goes to prove or disprove the offence charged against the prisoner. Upon an indictment for murder, it appeared that a party of poachers were found in the night in a wood, and that the deceased, who was an assistant keeper, and others pursued them, and tried to apprehend them: upon which one of the poachers turned round and shot the deceased, and an accomplice was called to prove that the prisoner was the person who shot the deceased; and other witnesses were called who corroborated him as to collateral facts; but none of those facts went to connect either the prisoner and the accomplice together, or the prisoner with the transaction. Patteson, J., 'The corroboration of an accomplice ought to be as to some fact or facts, the truth or falsehood of which goes to prove or disprove the offence charged against the prisoner.' (y)

Addis' case. The corroboration should go to prove the offence against the prisoner.

The corroboration must not only connect the prisoner and the accomplice together, but must be such as to show that the prisoner was engaged in the transaction which forms the subject-matter of the charge under investigation. Upon an indictment on the 9 Geo. 4, c. 69, s. 9, for night-poaching, it was proved that three persons were found in a wood by night in the pursuit of game, and an accomplice, who was taken on the spot, swore to the prisoner being one of the persons in the wood, but the only corroboration of his statement was, that the prisoner had been seen on the night in question drinking with the accomplice at a public-house which was four miles from the preserve, and that they were there till the public-house shut up, when they left together; but it also appeared that the prisoner was in the habit of drinking at the same public-house, and lived within one hundred and fifty yards of it. Upon the opening of the case, Lord Abinger, C. B., said, 'I am clearly and decidedly of opinion, and always have been, and always

Farler's case. The corroboration ought to affect the identity of the party accused, and connect him with the crime charged.

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(v) *Rex v. Webb*, 6 C. & P. 595. The prisoners were acquitted.

(w) *Ante*, p. 602.

(x) *Reg. v. Dyke*, 8 C. & P. 261.

(y) *Rex v. Addis*, 6 C. & P. 388. The

prisoner was acquitted. In *Kelsey's case*, 2 Lew. 45, Patteson, J., said, 'I think an approver should be confirmed not only in some facts generally, but in some particularly, which affect the prisoner.'



shall be, that there must be a corroboration as to the particular prisoner; and in summing up, the very learned chief baron said, 'I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoner's guilt, but the rules of law must be applied to all men alike. It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstance. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration at all. If a man were to break open a house, and put a knife to your throat, and steal your property, it would be no corroboration that he had stated all the facts correctly; that he had described how the person did put the knife to the throat, and did steal the property; it would not at all tend to show that the party accused participated in it. Here you find that the prisoner and the accomplice are seen together at the public-house. If they were found together under circumstances that were extraordinary, and where the prisoner was not likely to be unless there were concert, it might be something. But he lives within one hundred and fifty yards, and there is nothing extraordinary in his being there; and he left when they were shutting up the house. It is perfectly natural that he should have been there, and have left when he did. The single circumstance is, that the prisoner was seen in a house which he frequents, where he may be seen once or twice a week, and there the case ends against him; all the rest depends on the evidence of the accomplice. The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others. I would suggest to you that the circumstances are too slight to justify you in acting on this evidence.' (c)

'There is a great difference between confirmations as to the circumstances of the felony and those which apply to the individual charged; the former only prove that the accomplice was present at the offence; the latter show that the prisoner was connected with it. This distinction ought always to be attended to.' (a) Wilkes and Edwards were charged with stealing a lamb, and an accomplice proved the case against both the prisoners, and stated that they threw the skin of the lamb into a whirley hole, the situation of which he described; and a constable proved that he found the skin in the whirley hole. A quantity of meat was found of a kind corresponding with that of the stolen lamb in the house of Edwards, but could not be positively identified, and a witness proved that Wilkes had come to him to borrow a pair of shears, and had then made a statement to him to the same effect as the evidence of the accomplice. Alderson, B., said in summing up, 'The confirmation of the accomplice as to the commission of the felony is really no confirmation at all, because it would be a confirmation

Wilkes' case. The distinction is between confirmations as to the circumstances of the offence, and those which go to fix the person charged.

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(c) Reg. v. Farler, MSS. C. S. G. 8 C. & P. 106.

(a) Per Alderson, B., Rex v. Wilkes, *infra*.

as much if the accusation were against you and me as it would be as to those prisoners who are now upon their trial. The confirmation, which I always advise juries to require, is a *confirmation of some fact which goes to fix the guilt upon the particular person charged*. You may legally convict on the evidence of an accomplice only, if you can safely rely upon his testimony; but I advise juries never to act on the evidence of an accomplice unless he is confirmed as to the particular prisoner who is charged with the offence. With respect to Edwards it is proved that meat of a similar kind was found in his house. The meat cannot be identified, but it is similar; that is, therefore, some confirmation of the accomplice as to Edwards more than any one else. It is also proved that the skin was found in a whirley hole; that is no confirmation, because it does not affect the prisoners more than it affects any other persons. With respect to Wilkes, it is proved by the witness that he told him nearly the same story as the accomplice has told you to-day. If you believe that witness, there is confirmation as to Wilkes. You will say whether, with these confirmations, you believe the accomplice or not. If you think that his evidence is not sufficiently confirmed as to one of the prisoners, you will acquit that one; if you think he is confirmed as to neither, you will acquit both; and if you think that he is confirmed as to both, you will find both guilty.' (b)

Upon an indictment for receiving a sheep knowing it to have been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, one a large, the other a small one, and that the brother gave one of them to the prisoner, who carried it into the house in which the prisoner and his father lived, and the accomplice stated where the skins were hid; on the houses of the prisoner's father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep corresponding in size with those stolen; and the skins were found in the place named by the accomplice. Patteson, J., 'If the confirmation had merely gone to the extent of confirming the accomplice as to matters connected with himself only, it would not have been sufficient. For example, the finding the skins at the place at which the accomplice said they were would have been no confirmation of the evidence against the prisoner, because the accomplice might have put the skins there himself. But here we have a great deal more; we have a quantity of mutton found in the house in which the prisoner resides, and that I think is such a confirmation of the accomplice's evidence as I must leave to the jury.' (c)

Where the principal witness against two prisoners was an accomplice who was supported by other evidence in his statement against one of the prisoners, but not against the other; Alderson, B., told the jury that 'where there is one witness of bad character giving evidence against both prisoners, a confirmation of his testimony with regard to one is no confirmation of his testimony as to the other. If, therefore, you find there is a corroboration appli-

Birkett's case. Finding mutton in the prisoner's house corresponding in size with that which was lost.

Corroboration as to one prisoner is insufficient against another.

(b) *Rex v. Wilkes*, 7 C. & P. 272.

(c) *Reg. v. Birkett*, 8 C. & P. 732. The prisoner was acquitted. Assuming that the confirmation in this case showed

the prisoner to have been connected with the transaction, the fact of his being the receiver and not the principal seems to have been wholly uncorroborated. C.S.G.

cable to one prisoner, take it as against him; but unless it exists with regard to both, it seems to me that it would be unjust to give it a general effect.' (*d*)

Where Stubbs, Wardle, and Wraithman were indicted for larceny of copper, and three accomplices were examined, but their evidence was not corroborated as to Stubbs, but only as to the other prisoners, it was urged on behalf of Stubbs that the jury ought to be directed that the evidence of the accomplices ought to have been corroborated as to Stubbs; but the chairman directed the jury that it was not necessary that the accomplices should be corroborated as to each individual prisoner; that their being corroborated as to material facts tending to show that the other prisoners were connected with the larceny was sufficient as to the whole case, but that the jury should look with more suspicion at the evidence in Stubbs' case, where there was no corroboration, but that it was a question for the jury; and upon a case reserved upon the question whether this direction was right, Jervis, C. J., said, 'We cannot interfere in this case, although we may regret the result that has been arrived at. It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is usual in practice for the judge to advise the jury not to convict on the testimony of an accomplice alone, and juries generally attend to the direction of the judge, and require confirmation. There is a further point in this case. Where an accomplice speaks as to the guilt of three prisoners, and is confirmed as to two of them only, the jury may no doubt, if they please, act on the evidence of the accomplice alone as to the third prisoner: but it is proper for the judge in such case to advise the jury that it is safer to require confirmation as to the third prisoner, and not to act on the accomplice's evidence alone; for nothing is so easy as for the accomplice, speaking truly as to all the other facts of the case, to put the third man in his own place; but a jury may, if they choose, act on the unconfirmed testimony of an accomplice: in this case they have acted on the evidence before them, and we cannot interfere.' Parke, B., 'During the time I have been on the bench, now more than a quarter of a century, I have uniformly laid down the rule of practice as it has been stated by the Lord Chief Justice. I have told the jury that it was competent for them to find a prisoner guilty upon the unsupported testimony of an accomplice, but that great caution should be exercised, and I have advised them, and juries have acted on that advice, not to find a prisoner guilty on such testimony unless it was confirmed. There has been a difference of opinion as to what corroboration is requisite, but my practice has always been to direct the jury not to convict unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the identity of the prisoner. An accomplice necessarily knows all the facts of the case, and his story, when the question of identity is raised, does not receive any support from its consistency with these facts. The chairman in this case has departed from the usual practice, but the jury having acted upon the

(*d*) Reg. v. Jenkins, 1 Cox, C. C. 177.

The proper course where there is only one prisoner is to advise the jury not to convict him unless the evidence of the accomplice be confirmed, not merely as to the circumstances of the offence, but also as to the participation of the prisoner in it; and where there are several prisoners, the proper course is to advise the jury not to convict any one, with respect to whom there is no such corroboration, although there may be such corroboration as to the others.



evidence, the secretary of state can only interfere.' Crosswell, J., 'I agree in the view of the question taken by my brother Parke, and have always acted upon it. You may take it for granted that the accomplice was present when the offence was committed, and there may therefore be no difficulty in corroborating him as to the facts, but that has no tendency to show that any particular person who may be accused was there.' (e)

Where on an information for bribery which contained eight counts, each charging a distinct act of bribing different voters, it appeared that the witnesses went successively into a house, and into a back room, in which the defendant was seated, and after an interview with the defendant each of them passed into another room in which another person was seated, from whom each received the several sums mentioned in the several counts of the information, and then passed into the street and to the hustings and voted; it was objected that there was no corroborative evidence of each of the witnesses, and that the jury ought to be directed not to act upon the evidence of each of the witnesses, but to acquit the defendant. Martin, B., however, left the case to the jury as follows: 'Assume, for the purposes of the present discussion, that this man was speaking the truth. Is there any law which prohibits a jury from believing a man who (it must be assumed for the sake of argument) spoke the truth simply because he is not corroborated? I know of none. I know of *no rule of law* myself, but there is a *rule of practice* which has become so hallowed as to be deserving of respect; I believe these are the very words of Lord Abinger—it deserves to have all the reverence of the law. (f) This case is distinguishable from *Reg. v. Stubbs*, for they were there accessories properly so called, and all the persons were concerned in the same offence in which they came to give evidence; in this particular case it is not so, because all of these cases are separately gone into, and it is not one and the same offence; and if you think that all these witnesses have spoken the truth, then it is clear that each case is separate; each person giving money is a distinct offence. I own I think also that this is a very important point, and that it may be very doubtful whether or not the evidence in this case will be found to be of that corroborative character which the law requires.' (g) The jury found a verdict of guilty on one count only; and on a motion for a new trial, the court held that the direction to the jury was right, even supposing the witnesses could be considered as accomplices of the defendant. The law on this subject was correctly laid down in *Reg. v. Stubbs*. It is not a rule of law that an accomplice must be corroborated in order to render a conviction valid, but it is a rule of general and usual practice to advise juries not to convict on the evidence of an accomplice *alone*. The application of that rule, however, is matter for the discretion of the judge by whom the case is tried. Moreover, in this case the court thought there was corroborative evidence. It was not necessary that there should be corroborative evidence as to the very fact; it

Corroboration in a case of bribery by several persons separately bribed.

(e) *Reg. v. Stubbs*, Dears. C. C. 555.

(f) See *Reg. v. Farler*, *ante*, p. 604.

(g) This summing up is taken from

the report in 5 Law T. R. 147, where it is much better given than in the report in 1 B. & S. 311.

is enough if there be such as to confirm the jury in the belief that the accomplice is speaking the truth. (*h*)

Of the nature  
of the con-  
firmation.

Where it was strongly contended that two accomplices had not been corroborated; Maule, J., said, 'I quite agree that the confirmation of an accomplice as to the mere fact of a crime having been committed, or even the particulars of it, is immaterial unless the fact of the prisoner being connected with it is proved. It often happens that an accomplice is a friend of those who committed the crime with him, and he would much rather get them out of the scrape and fix an innocent man than his real associates. Confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary. If, for instance, a burglary had been committed, and an accomplice gave evidence that a person charged was present when it was effected; if that person had been seen hovering about the premises some time before, or was seen in possession of some of the stolen property shortly after, that might be reasonable confirmation of the statement that the prisoner helped to commit the crime.' (*i*)

Confirmation  
by the wife of  
an accomplice.

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It has been held that confirmation by the wife of an accomplice is no confirmation at all. Upon an indictment for stealing a sheet it appeared that the sheet was found in the house of the accomplice, who gave evidence to prove that the prisoners stole the sheet, and the wife of the accomplice was the only person to confirm the accomplice's statement; Park, J. A. J., 'Confirmation by the wife is, in a case like this, really no confirmation at all. The wife and the accomplice must be taken as one for this purpose. The prisoners must be acquitted.' (*j*)

Confirmation  
as to principal,  
but none as to  
the receiver.

Where a principal and receiver are jointly indicted, and an accomplice is confirmed as against the principal, but not as against the receiver, this is not sufficient to support the case against the receiver. The two Moores were indicted for stealing, and Spindlo for receiving some ducks, and an accomplice proved that the Moores and himself went to the house of Spindlo, at Wantage, and sold him the stolen ducks, at the same time telling him from whom they had been stolen, and a witness proved that he saw the accomplice at Wantage in company with the Moores. Alderson, B., 'The corroboration you should have is a corroboration affecting Spindlo. Confirming the evidence of the accomplice as against the Moores does not advance the case as against Spindlo.' (*k*) So

(*h*) Reg. v. Boyes, 1 B. & S. 311. As to the distinction taken between Reg. v. Stubbs and this case, it seems to make no difference. If a man is charged with several offences in the same indictment, the evidence to prove each ought to be the same as if each were the subject of a separate indictment. In this case each act of bribery appears to have been proved by the party bribed alone; there, therefore, was no corroboration at all as to any one act of bribery. Suppose a servant were indicted for three larcenies from his master within six months, and three receivers gave evidence against him, but they were the only witnesses, it seems clear the case ought wholly to fail for want of any corroboration. See Reg.

v. Pratt, 4 F. & F. 315, Appendix.

(*i*) Reg. v. Mullins, 3 Cox, C. C. 526. Wightman, J., was present.

(*j*) Rex v. Neal, 7 C. & P. 168. Mr. Phillippis, vol. 1, p. 33, observes, that in this case 'the circumstances of the case might have been such as to warrant this decision. But it may often happen that the evidence of the wife is so free from all suspicion, so independent of the evidence of the husband, so manifestly unconcerted and uncontrived, and so undesignedly corroborative of his evidence, that it might be proper not to consider the accomplice and his wife as one, but to act upon her evidence as sufficient confirmation.'

(*k*) Rex v. Moores, 7 C. & P. 270.

confirmation as to the receivers, without confirmation against the principal, is insufficient. One prisoner was indicted for stealing, and two other prisoners for receiving, several pairs of shoes, knowing them to have been stolen, and the only witness to prove the felony was an accomplice, and she also proved the case against the receivers; she was confirmed as to the latter, but there was no confirmation whatever as to her testimony against the principal; it was objected that even as to the receivers the confirmation was not sufficient in itself; but if it was, it would still be necessary to confirm the witness as against the principal; for if the case failed against her, the receivers would be entitled to an acquittal. Little-dale, J., 'The confirmation as to the receivers is slight; but as there is no confirmation against the principal felon, I think the case fails altogether; there ought to be confirmation on that point before the jury can be asked to believe the witness's testimony.' (*l*)

Confirmation as to receivers but none as to principal.

So where on an indictment against a prisoner for receiving stolen oats, a quantity of oats were found on the prisoner's premises, which the prosecutor believed to be his, but could not positively identify them, as they were mixed with peas, and the only other evidence was that of the thief, who had pleaded guilty; Pollock, C. B., advised the jury to acquit the prisoner, it being perilous to convict a person as receiver on the sole evidence of the thief. This would put it in the power of a thief, from malice or revenge, to lay a crime on any one against whom he had a grudge. And here there was no adequate confirmation of the thief's evidence. (*m*)

The thief a witness against the receiver.

The practice of requiring confirmation where the case for the prosecution is supported by one accomplice, applies equally when two or more accomplices are brought forward against a prisoner. (*n*) Upon an indictment for assisting in the illegal landing of uncustomed goods, some part of the evidence depended upon the testimony of two accomplices, and Littledale, J., in summing up, said, 'Then was the prisoner there. Two of his accomplices speak distinctly to him. If these statements were the only evidence against him, I should not advise you to convict upon their testimony. It is not usual to convict upon the evidence of one accomplice without confirmation; and in my opinion it makes no difference that there are more than one.' (*o*)

Where there are several accomplices.

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A married woman who consents to her husband committing an unnatural offence with her is an accomplice in the felony, and as such her evidence requires confirmation. (*p*) And the same would

(*l*) *Rex v. Wells*, M. & M. 326. All the prisoners were acquitted. It is not stated what the form of the indictment was, but it is conceived it must have alleged the receipt to be of the shoes 'so stolen as aforesaid,' so that an acquittal of the principal necessarily caused an acquittal of the receivers. See *Rex v. Woolford*, 1 M. & Rob. 384, *ante*, vol. 2, p. 556. If there had been counts charging the receivers with a substantive felony, there seems no reason why the receivers

might not have been convicted, though the principal was acquitted. See *ante*, vol. 2, p. 557, and *Rex v. Field*, *post*, p. 611. C. S. G.

(*m*) *Reg. v. Robinson*, 4 F. & F. 43.

(*n*) 1 Phill. Ev. 33. *Reg. v. Stubbs*, Dears. C. C. 555, *ante*, p. 607.

(*o*) *Rex v. Noakes*, 5 C. & P. 326, *cor.* Littledale, J., Bolland, B., and Alderson, J.

(*p*) *Reg. v. Jellyman*, 8 C. & P. 604.



be the case if the party with whom the offence was committed was a male, and consented. (*q*)

Cases where  
confirmation  
is not required.

There are some persons who, although themselves in point of law participators with the prisoner in the crime with which he is charged, have been considered as not in such a situation as to make it requisite that their evidence should be confirmed. Thus, although all persons who are present aiding and assisting at a prize fight are in point of law principals in the second degree in manslaughter if death ensues, yet they have been holden not to be such accomplices as to require any evidence to confirm their testimony. (*r*)

A spy.

Where on an indictment against certain Chartists under the 11 & 12 Vict. c. 12, two witnesses admitted that they joined the conspirators simply for the purpose of betraying them, and each did so without the knowledge of the other, but both had been as active as any of the conspirators, endeavouring to persuade strangers to join them, and urging those who were members to deeds of violence: it was held that there was no rule of law which declared that their evidence required confirmation, nor any rule of practice which said that juries ought not to believe them. A spy may be an honest man; he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and, if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, there is no impropriety in his taking upon himself the character of informer. The government are justified in employing spies, and a person so employed does not deserve to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished in fact and in principle from accomplices. (*s*)

Jarvis' case.

Where upon an indictment against two prisoners for maliciously shooting, and against a third as an accessory after the fact, a person proved that he had been employed by the accessory to remove the principals out of the way, and for this he had received money, and had hidden the principals in an outhouse, and there was no corroboration by any other witness as to these facts; and it was contended that as the witness was an accomplice he ought to be corroborated; Gurney, B., observed, in summing up, that 'with regard to the necessity of confirming an accomplice much might depend upon the nature of the crime in question: it was for the jury to consider whether there was anything in the witness's conduct to warrant their disbelieving him.' (*t*)

Where the  
accomplice  
has been sum-

It has been holden that the fact of a party having been summarily convicted for poaching in the night under the 9 Geo. 4, c. 69, s. 1, does not dispense with the necessity of producing confir-

(*q*) Per Patteson, J., *ibid*.

(*r*) *Rex v. Hargrave*, 5 C. & P. 170, Patteson, J.

(*s*) *Reg. v. Mullins*, 3 Cox, C. C. 526. Maule, J., and Wightman, J.

(*t*) *Rex v. Jarvis*, 2 M. & Rob. 40. In *Rex v. Durham*, 1 Leach, 478, where a receiver was admitted as a witness against some burglars, and was uncorroborated, the court observed that the receiver was to be considered rather as an accessory

after the fact than as an accomplice in the facts; but this distinction seems never to have been acted upon in any case, and the case in which it was taken was decided on the authority of *Rex v. Atwood*, *ante*, p. 600, on the ground that the circumstance of his being an accomplice went to his credit only, and that his evidence might be left to the jury, although it was entirely uncorroborated. See *Reg. v. Robinson*, *ante*, note (*m*).

matory evidence of his testimony when produced as a witness against his companions upon an indictment, under the 9th section of the same statute, founded upon the same transaction. (*u*)

marily convicted.

The practice of requiring confirmation has been stated not to extend to misdemeanors, (*v*) but it has been well observed that there appears to be no sound reason for such a distinction, (*w*) and the case of *Reg. v. Farler* (*x*) is a distinct authority that the practice does extend to misdemeanors.

In cases of misdemeanor.

Upon a review of the cases, the utmost that can properly be deduced from them seems to be that on the trial of a prisoner, against whom an accomplice appears as a witness, there should be (for warranting a judge in advising the jury to give credit to such a witness, and to warrant the jury in convicting) some confirmatory evidence, that is, some proof independent of the evidence of the accomplice, from which it may be reasonably inferred that the prisoner was concerned with the accomplice in the commission of the crime. And on the trial of several prisoners charged as being jointly concerned in a crime there should be some unimpeachable independent evidence, from which the jury may reasonably be satisfied that the accomplice speaks truly as to all the prisoners, and that they were all jointly concerned with him. But it would be going much too far to bind the discretion either of a judge or jury by any fixed rigid rule as to the quantity or kind of confirmatory evidence which ought to be given. This, however, is settled, that the confirmation required should not be a confirmation merely of those parts of the narrative which implicate the accomplice alone, and which may be true without involving the prisoners in any share in the transaction; but such a corroboration by unimpeached evidence as may satisfy the jury that those persons whom he charges with a participation of the crime were in truth, as he represents, his confederates and associates in guilt. (*y*)

Result of the cases.

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Whether the evidence brought forward to confirm the accomplice is a satisfactory and sufficient confirmation is a question which the jury are to determine. (*z*)

Where an accomplice is confirmed as to some of the prisoners, but not as to all, the jury may be recommended not to rely on his testimony as to the latter, but to give it credence as to the former. In a case of great importance where an accomplice swearing positively to several prisoners was confirmed as to some and not confirmed as to others; Vaughan, B., recommended the jury to acquit the latter, and they were accordingly acquitted, while those as to whom the accomplice was confirmed were convicted and executed. (*a*)

The jury may convict some and acquit others upon the evidence of the same accomplice.

An accomplice is a competent witness for his associates as well as against them, even when they are severally indicted for the same offence, whether he is convicted or not. (*b*) Where there is not any or very slight evidence against one of several prisoners

Accomplice evidence for prisoner.

(*u*) *Reg. v. Farler*, 8 C. & P. 106, *ante*, p. 603.

(*v*) *Per Gibbs*, Attorney-General, in *Rex v. Jones*, 31 How. St. Tr. 315.

(*w*) 1 Phill. Ev. 32, note.

(*x*) *Supra*, note (*u*). And see *Reg. v. Boyes*, 1 B. & S. 311. *Ante*, p. 608.

(*y*) 1 Phill. Ev. 37, 38.

(*z*) 1 Phill. Ev. 38.

(*a*) *Rex v. Field*, Dick. Q. S. 520. See *per Alderson, B.*, in *Rex v. Wilkes*, *ante*, p. 604.

(*b*) 2 Stark. Ev. 13. 2 Hale, P. C. 280, citing the case of *Bilmore, Gray*, and *Harbin*, 2 Roll. Abr. 685, pl. 3. *Bath and Montague's case*, cited in *Lock v. Hayton*, Fortesc. 246.

Acquittal to  
become a  
witness.

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indicted and tried together, the court will sometimes direct the jury to give their verdict as to him, and upon their acquittal of him admit his testimony for the others. (*c*) In a case where one of the defendants on an indictment for an assault submitted and was fined, and paid the fine; Pratt, C. J., allowed him to be a witness for the other, considering the trial at an end with respect to him. (*d*) But on a joint indictment against several for a misdemeanor, a defendant who suffered judgment by default has been held not to be a witness for the other defendants. (*e*) Where, however, one of two prisoners charged with housebreaking pleaded guilty; Coltman, J., held that this prisoner might be called as a witness by the other prisoner to prove that he was not present at the committing of the offence; (*f*) and in another case Erle, J., allowed a prisoner who pleaded guilty to an indictment for uttering a forged note, and against whom a previous conviction was proved, to be called as a witness for another prisoner; but he was previously sentenced, which Erle, J., considered to be the proper course. (*g*)

## SEC. VII.

### *What Witnesses are Competent.*

Of the compe-  
tency of  
witnesses.

By the competency of a witness is meant his admissibility to give evidence; if he is incompetent (of which the court is to judge) (*a*) he is to be totally excluded from giving his testimony; if he is competent, it will then be for the jury to decide whether his evidence, when given, is entitled to credit.

All persons are admissible witnesses who have the use of their reason, and such religious belief as to feel the obligation of an oath, and who are not interested in the manner hereafter mentioned. (*b*) The causes of incompetency, therefore, to be considered are—1. Defect of understanding. 2. Defect of religious belief. 3. Interest; and therewith of the incompetency of husband and wife.

Want of un-  
derstanding.  
Idiots.

Deaf and  
dumb.

1. Persons incompetent from want of understanding. Idiots (*c*) are not admissible to give evidence. By the word 'idiot' is meant a fool or madman from his nativity, who never has any lucid intervals. (*d*) A person deaf and dumb from his nativity (though in presumption of law an idiot), (*e*) if he is capable of conversing by signs, and has a proper sense of the obligation of an oath, may be admitted as a witness and examined with the assistance of an interpreter. (*f*) But however intelligent and capable of communicating and receiving information by signs he may be, he cannot be

(*c*) 2 Hawk. P. C. c. 46, s. 98. Rex v. Boddier, 1 Sid. 237. 2 Stark. Ev. 13.

(*d*) Rex v. Fletcher, 1 Str. 633. Rex v. Sherman, Cas. temp. Hardw. 303. 1 Phill. Ev. 68.

(*e*) Rex v. Lafone and others, 5 Esp. N. P. C. 155; but this case has been doubted, and, as it should seem, on very good grounds. 1 Phill. Ev. 68.

(*f*) Reg. v. George, C. & M. 111.

(*g*) Reg. v. Jackson, 6 Cox, C. C. 525.

(*a*) 2 Hale, P. C. 277.

(*b*) Per Lawrence, J., in Jordaine v. Lashbrooke, 7 T. R. 610.

(*c*) Com. Dig. Testmoign, A. 1.

(*d*) See ante, vol. 1, p. 11.

(*e*) Ibid.

(*f*) Ruston's case, 1 Leach, C. C. 408.



admitted as a witness if it does not appear that he clearly understands the nature of an oath. (*g*) So lunatics are incompetent; that is, persons usually mad, but if they have intervals of reason (*h*) they are competent during those times. (*i*) And in such cases it is for the judge to determine whether the insane person has the sense of religion in his mind, and whether he understands the nature and the sanction of an oath, and then the jury are to decide on the credibility and the weight of his evidence. (*j*) With respect to children, the rule now seems to be that their competency does not depend on their age, but that a child of any age may be examined, if capable of distinguishing between good and evil; (*k*) but whatever be its age, it cannot be examined without being sworn. (*l*) Whether the infant be competent or not is a question for the discretion of the court. (*m*) Before a child is examined the judge must be satisfied that the child feels the binding obligation of an oath from the general course of its religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to it for the purposes of a trial. Where, therefore, on an indictment for murder it appeared that, previous to the happening of the circumstances, to which a child came to speak, she had had no religious education whatever, and had never heard of a future state, and she had been twice visited by a clergyman who had given her some instruction as to the nature and obligation of an oath, but she had no intelligence as to religion or a future state at the time of trial; her testimony was rejected. (*n*) There is no difference in respect of the competency of children between capital cases and misdemeanors. (*o*) Where the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary for the purposes of justice to put off the trial of a prisoner, directing that the child in the meantime should be properly instructed. (*p*) It is entirely in the discretion of the court whether the trial should be postponed for this purpose or not: and where the want of understanding the nature and obligation of an oath arose from no neglect, but from

Lunatics.

Children.

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Postponing the trial in order that a child may be instructed.

(*g*) *Reg. v. O'Brien*, 1 Cox, C. C. 185, Jackson, J.

(*h*) *Ante*, vol. 1, p. 12.

(*i*) *Com. Dig. Testmoign*, A. 1.

(*j*) *Reg. v. Hill*, 2 Den. C. C. 254. See this case, *post*, p. 636.

(*k*) *Ante*, vol. 1, p. 931. By such capability must be understood a belief in God, or in a future state of rewards and punishments; from which the court may be satisfied that the witness entertains a proper sense of the danger and impiety of falsehood, *ibid*. 'It certainly is not law that a child under seven cannot be examined as a witness. If he shows sufficient capacity on examination, a judge would allow him to be sworn.' Per Alderson, B., *Reg. v. Perlins*, 2 Moo. C. C. R. 135.

(*l*) See further on this subject, *ante*, vol. 1, p. 931.

(*m*) 1 Stark. Ev. 94.

(*n*) *Rex v. Williams*, 7 C. & P. 321,

*Patteson, J.* In *Reg. v. Holmes*, 2 F. & F. 788, *Wightman, J.*, seems to have thought it sufficient to allow a child of six years old to be sworn, that to the question, 'Is it a good or bad thing to tell a lie?' the child answered, 'A bad thing.' But the following questions and answers were also put and given: 'Do you say your prayers?' 'Yes.' 'What becomes of a person who tells lies?' 'If he tells lies he will go to the wicked fire;' and the child was then sworn. And *Wightman, J.*, admitted a child of about the same age, who answered the question, 'Is it a good or bad thing to tell a lie?' by saying it was a bad thing. Anonymous in the note, *ibid*.

(*o*) *Rex v. Travers*, 2 Stra. 700.

(*p*) *Ante*, vol. 1, p. 931. 1 Phill. Ev. 5. But this must not be done in order that an adult may become capable, *ibid. post*, p. 617.

the child being only six years old, and therefore being too young to have been taught: Pollock, C. B., refused to postpone the trial, as he doubted whether the loss in point of memory would not more than countervail the gain in point of religious education. (*q*) But an application to postpone the trial on this ground ought properly to be made before the child is examined by the grand jury, or, at all events, before the trial has commenced; for if the jury are sworn, and the prisoner is put upon his trial before the incompetency of the witness is discovered, the judge cannot discharge the jury, but should direct an acquittal. (*r*) When the child is incompetent to be sworn, the account which it has given of the transaction to others is inadmissible. (*s*)

Defect of religious belief.

2. Of incompetency from defect of religious belief. The rule as now settled appears to be, that as far as regards this kind of incompetency, infidels of this and all other countries, who yet believe in a God, the avenger of falsehood, are admissible as witnesses, and the only persons incompetent are those who do not believe in a God, the dispenser of future rewards and punishments; (*t*) and it should seem that it makes no difference whether the belief is that such dispensation is to take place in a present or in a future state of existence. 'Such infidels,' says Lord C. J. Willes, in the case of *Omichund* and *Barker*, (*u*) 'who either do not believe a God, or, if they do, do not think that He will either reward or punish them *in this world or in the next*, cannot be witnesses in any case, nor under any circumstances—for this plain reason, because an oath cannot possibly be any tie or obligation to them.'

Where a plaintiff being called as a witness was sworn on the *voire dire*, and was questioned and answered as follows:—'Do you believe in a God?'—'I do not.' 'Do you believe in the obligation of an oath?'—'I believe my word is my bond.' 'Do you believe that there is an obligation attached to the oath?'—'I do not believe in an obligation of an oath any more than on that of my word.' 'Do you believe in a future state of rewards and punishments?'—'I do not.' 'Do you believe that you are bound to speak the truth?'—'I do.' 'Do you believe you are responsible if you tell a falsehood?'—'I do, to my fellow men and to my own conscience.' 'Do you believe in a moral obligation to speak the truth?'—'I do.' 'Do you believe that you are morally bound to speak the truth by the solemn declaration you have taken?'—'I do.' It was held that the judge rightly refused to permit her to be examined. (*v*)

Method of administering the oath.

The proper method, however, of administering the oath must vary according to that which the proposed witness himself considers most obligatory; (*w*) for, 'as the purpose is to bind his conscience, every man of every religion should be bound by that form

(*q*) *Reg. v. Nicholas*, 2 C. & K. 246. Pollock, C. B., observed that he could easily conceive that there might be cases where the intellect of the child was much more ripened, as in the cases of children of nine, ten, or twelve years old, where their education had been so utterly neglected that they were wholly ignorant on religious subjects; and in these cases a postponement of the trial might be very

proper.

(*r*) 1 Phill. Ev. 5, citing *Rex v. Wade*, *post*, p. 617.

(*s*) *Reg. v. Nicholas*, 2 C. & K. 246. 1 Phill. Ev. 5.

(*t*) 1 Phill. Ev. 10.

(*u*) Willes's Rep. 549.

(*v*) *Madan v. Catanach*, 7 H. & N. 360.

(*w*) Willes's Rep. 549.

which he himself thinks will bind his own conscience most.' (x) Therefore, a Mahometan should be sworn on the Alcoran; (y) a Jew on the Pentateuch, with his head covered; (z) a Gentoo according to his peculiar forms. (a) So a witness professing Christianity, but declining to swear on the New Testament, was allowed to be sworn on the Old Testament, upon stating that he should consider such oath binding on his conscience. (b) By the law of Denmark an oath is taken in all judicial proceedings by holding up three fingers of the right hand, to indicate the three persons of the Holy Trinity, and promising to speak the truth. (c) But although

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(x) By Lord Mansfield in *Atcheson v. Everitt*, Cowp. 389. And see *Miller v. Salomons*, 7 Exch. R. 475.

(y) *Morgan's case*, 1 Leach, 54.

(z) *Omichund v. Barker*, Willes, 543.

1 Phill. Ev. 9.

(a) 1 Phill. Ev. 9. 1 Chit. Crim. L. 591.

(b) *Edmonds v. Rowe*, R. & M. N.P.R. 77, Bosanquet, Serjt.

(c) *Boelen v. Melladew*, 10 C. & B. 898. There is no doubt that this is the most ancient form of taking an oath, and it is equally clear that it originated from the fact that the sacred name of Jehovah was never uttered by any Jew, except the High Priest, and by him only once in the year. Lee's *Hebr. Gram.* 28. Lee there says, 'This is a mere Jewish superstition, derived from a considerable antiquity.' It is, however, as old as the 3rd Chapter of Genesis: for there throughout the conversation between Eve and the serpent the word Jehovah is omitted, and Elohim alone used in the Hebrew, although immediately before and immediately after that conversation Jehovah Elohim are used, and that, too, in the same narrative; and the only assignable reason for the omission of Jehovah in the conversation itself is, that that sacred name was then never uttered in speaking. The first instance in which an oath is mentioned in the Bible is Gen. 14, v. 22, which ought to be translated, 'I have lifted up my hand to Jehovah;' but the like expression occurs frequently afterwards in the original, though sometimes it is otherwise translated in our version. In Moore's *Lost Tribes of the Saxons of the East and West*, p. 234, it is stated that the High Priest of the Jews, in order to signify the name of Jehovah, was accustomed to hold his hand aloft with three fingers extended in a manner, of which he gives a figure, in which the thumb is represented as holding down the little finger, whilst the other three fingers are extended. A more appropriate emblem of the Holy Trinity could not have been devised, and when the hand was held up on high in this position, a more significant mode of appealing to the Holy Trinity could not have been adopted, even though the person so holding up his hand uttered no name. Nor can it be doubted that this is the form

of swearing so frequently mentioned in the Old Testament, under the significant expression of holding up the hand to Jehovah. A very remarkable distinction exists between the manner in which English and South Welsh witnesses now-a-days take the book at the time when they are sworn. An English witness always places his fingers under, and his thumb at the top of the book. A Welsh witness, on the contrary, places his three fingers at the top, and his thumb under the book, whilst his little finger does not touch the book at all. And I have often observed witnesses in the box let the book remain on the top of the box with their three fingers upon the book until the time to kiss it arrived, when they raised it from the box to their lips. Now no doubt this practice originated from the ancient form of taking the oath with the hand raised in the manner above described, and which, in process of time, was changed first to laying the three fingers upon the book, and so taking the oath, and afterwards to raising the book and kissing it. There is no doubt that originally an oath was taken without touching anything; and Selden, vol. 2, p. 1467, plainly shows that such was the custom among the early Christians, but he also shows that the custom of touching the book was derived from the Pagans. *Inolevit vero tandem, ut quemadmodum Pagani sacris ac mysteriis aliquo suis aut tactis aut præsentibus jurari solebant, ita solenniora Christianorum juramenta fierent, aut tactis sacrosanctis evangelii, aut inspectis, aut in eorum præsentia manu ad pectus admotâ, sublatâ aut protensâ; atque id corporaliter seu personaliter juramentum præstari dictum est, ut ab juramentis per epistolam, aut in scriptis solummodo præstitis distingueretur, inde in vulgi passim ore 'upon my corporal oath.'* Here we clearly see the origin of the laying the hand upon the book, and how it came to pass that it was and still is considered an essential part of the English oath. See 3 Inst. 165. Jacob's *Law D. (Oath)*. 2 Hale, P. C. 279. In 1657 Dr. Owen (a name that savours of Wales), vice-chancellor of Oxford, being a witness for the plaintiff in a cause, refused to be sworn in the usual manner, by laying his right hand upon the book, and by kissing it afterwards, but he caused the book to



it is highly desirable that a witness should be sworn according to the form which he considers *most* binding on himself, yet, if he has taken the oath in the usual form administered in our courts of law, without objecting to it, and upon being questioned whether he considers the oath he has taken as binding on his conscience, he answers in the affirmative, he cannot then be further asked whether there be any other mode of swearing more binding on his conscience than that he has already used. (*d*) For if the witness says he considers the oath as binding on his conscience, he does, in effect, affirm that in taking that oath he has called his God to witness that what he shall say will be the truth, and that he has imprecated the Divine vengeance on his head if what he shall afterwards say is false, and, having done that, it is perfectly unnecessary and irrelevant to ask any further questions. (*e*) And so where a negro, who was called as a witness, stated before he was sworn that he was a Christian and had been baptized, it was held that he ought to be sworn without any other question being asked. (*f*)

Judicial oaths are governed by the law of nations, oaths of office or of qualification by the municipal law.

The intercourse of nations must frequently give rise to the necessity of the sanction of an oath in matters that concern both; sometimes with reference to treaties into which they may enter, sometimes with reference to the administration of criminal or civil justice: the sanction of an oath, if valid at the place where taken, ought to be considered valid everywhere; just as marriage valid at the place where celebrated is (generally speaking) valid everywhere else; and as an oath is the personal act of the party taking it, if a witness be in a foreign land, his oath ought to be received as it would be received in his own country. In fact, a judicial oath (for justice is of all countries and climes) is governed by the law of nations; but an oath of office or of qualification is governed by

be held open before him, and he raised his right hand; whereon the jury prayed the direction of the court whether they ought to weigh such evidence as strongly as the evidence of another witness; Glyn, C. J., answered that, in his opinion, he had taken as strong an oath as any other of the witnesses; but he added that if he himself were to be sworn, he would lay his right hand upon the book itself (*il voilt deponer sa maine dexter sur le livre m  me*), *Colt v. Dutton*, 2 Sid. R. 6. Indeed, the invariable practice of requiring a witness to take off his glove shows that touching the book with the hand is considered the essential thing. I have not met with an instance where any notice is taken of the manner of holding up the hand in England, but the three fingers only may have been holden up, and the fact not noticed, just as the manner in which the Welsh take the book was (as far as I am aware) unnoticed till I drew attention to it. A clergyman, who is a native of Wales, informed me that the laying of the three fingers upon the book is intended to indicate the Holy Trinity, and that he was so taught at school; and this is fortified by the Danish oath, and leaves no reasonable doubt how the Welsh custom arose, viz. that originally the three fingers were held up,

and afterwards the practice was altered to laying them on the book, and lastly to raising the book with the fingers so placed upon it. More information on the subject of oaths may be found in *Notes and Queries*, vol. 8, p. 364, 471, 605; vol. 9, p. 45, 61, 403; vol. 10, p. 271; vol. 11, p. 232 (1st Ser.); and vol. 2, p. 293 (3rd Ser.). The Arabic version accurately renders the Hebrew word for word as to holding up the hand, but I have been unable to discover whether that be a mere verbal translation like our own, or whether it represents the mode in which the Arabs have at any time taken an oath.

(*d*) *The Queen's case*, 2 B. & B. 285.

(*e*) *Ibid.* See also *Sells v. Hoare*, 3 B. & B. 232, where, on an application for a new trial, it appeared that a witness who had been sworn as a Christian, on the Gospels, was a Jew; and the court refused to grant a rule, being unanimously of opinion that the oath as taken was binding on the witness both as a moral and religious obligation: and *Richardson, J.*, observed, that if the witness had sworn falsely, he might be convicted of perjury under the oath he had taken.

(*f*) *Reg. v. Serva*, 2 C. & K. 53. *Platt, B.*

the municipal laws of the state which requires it to be taken, and by those laws alone. (*g*) And in the case of oaths of office or of qualification, where the very form of the oath as well as the oath itself is prescribed by the legislature, there the directions of the legislature must be literally followed, and the oath must, and can only lawfully, be taken in the prescribed form, until that form be altered by the same authority which appointed it. (*h*)

The 1 & 2 Viet. c. 105, enacts, that 'in all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered: provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.'

1 & 2 Viet. c. 105. All persons bound by the oath taken.

The proper method of examining a witness, if the examination tends merely to try his *competency* in respect to religious principle, is not to question him as to his particular opinions (as whether he believes in Jesus Christ), but to inquire whether he believes in the existence of a God, the obligation of an oath, and a future state of rewards and punishments: (*i*) but if the examination be previous to swearing the witness, for the purpose of ascertaining what form of administering the oath will be most proper, as most binding on the witness's conscience, it is said to be not irregular to examine him as to his opinions; as whether he believes in the Gospels on which he is about to be sworn. (*j*) If a material witness, who is an adult, and of sufficient intellect, has no idea of a future state of rewards and punishments, it is not proper to discharge the jury, and postpone the trial, in order that the witness may have an opportunity of being instructed upon that subject before the next assizes, as may be done in the case of a child. (*k*)

Proper mode of examination as to opinions.

Trial cannot be postponed until an adult is instructed. [972]

Quakers were formerly excluded from giving evidence, not indeed from defect of religious principle, but owing to their refusal, upon religious scruples, to take any oath at all. (*l*) But this disability is now entirely removed.

Quakers.

The 9 Geo. 4, c. 32, s. 1, reciting that 'it is expedient that Quakers and Moravians should be allowed to give evidence upon

9 Geo. 4, c. 32, s. 1.

(*g*) Per Pollock, C. B. *Miller v. Salomons*, 7 Exch. R. 475.

(*h*) Per Alderson, B. *Ibid*.

(*i*) *Rex v. Taylor, Peake*, N. P. C. 11, by Buller, J., 1 Phill. Ev. 11; and according to the judgment of Willes, C. J., in *Omichund v. Barker*, Willes, 541, *ante*, p. 615, it seems sufficient if the witness believes in such a state either in this world or the next.

(*j*) 1 Phill. Ev. 11.

(*k*) *Rex v. Wade, R. & M. C. C. R.* 86.

(*l*) Their solemn affirmation, by the 7 & 8 Will. 3, c. 34, 8 Geo. 1, c. 6, and 26 Geo. 2, c. 46, s. 36, was admitted in

courts of justice to have the same effect as an oath in all civil, but not in criminal cases. It was, however, receivable in cases which are only technically criminal, as in penal actions, *Atcheson v. Everett, Cowp.* 382, but excluded in all proceedings substantially criminal, as on a motion for an information for a misdemeanor. *Rex v. Wych*, 2 Str. 872. *Rex v. Gardner*, 2 Burr. 1117. But where the application to the court was against a Quaker, his affirmation might be received in his own defence, though the proceedings were of a criminal nature. *Rex v. Gardner, supra*.



Quakers and  
Moravians.

their solemn affirmation in all cases, criminal as well as civil,' enacts, that 'every Quaker or Moravian, who shall be required to give evidence in any case whatsoever, criminal or civil, shall, instead of taking an oath in the usual form, be permitted to make his or her solemn affirmation or declaration in the words following, that is to say: "I, A. B., do solemnly, sincerely, and truly declare and affirm;" which said affirmation or declaration shall be of the same force and effect in all courts of justice, and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form.' (*m*)

3 & 4 Will. 4,  
c. 49.  
Quakers and  
Moravians.

The 3 & 4 Will. 4, c. 49, s. 1, enacts, that 'every person of the persuasion of the people called Quakers, and every Moravian, be permitted to make his or her solemn affirmation or declaration, instead of taking an oath, in all places and for all purposes whatsoever, where an oath is or shall be required either by the common law, or by any Act of Parliament already made, or hereafter to be made.' (*n*)

3 & 4 Will. 4,  
c. 82.  
Separatists.

The 3 & 4 Will. 4, c. 82, reciting, that 'there are in various places in Ireland, and in some parts of England and elsewhere, certain dissenters from the United Church of England and Ireland, and from the Church of Scotland, commonly called Separatists,' enacts, that 'every person for the time being belonging to the said sect called Separatists, who shall be required upon any lawful occasion to take an oath in any case where by law an oath is or may be required, shall, instead of the usual form, be permitted to make his or her solemn affirmation or declaration. (*o*) Which said solemn affirmation or declaration shall be adjudged and taken, and is hereby enacted and declared to be of the same force and effect, to all intents and purposes, in all courts of justice and other places whatsoever, where by law an oath is or may be required, as if such Separatists had taken an oath in the usual form.'

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1 & 2 Vict.  
c. 77.  
Persons who  
have been  
Quakers and  
Moravians.

The 1 & 2 Vict. c. 77, enacts, that 'it shall be lawful for any person who shall have been a Quaker or a Moravian to make solemn affirmation and declaration in lieu of taking an oath, as fully as it would be lawful for any such person to do if he still remained a member of either of such religious denominations of Christians.' (*p*)

(*m*) In *Rex v. Channens, R. & M.* C. C. R. 374, it was held that a Quaker, notwithstanding this statute, was not a good jurymen upon his affirmation. But an indictment stated to be found upon the oath of A., B., and C., then and there sworn, and charged as jurors, without saying who were sworn and who affirmed, would now be valid under the 6 & 7 Vict. c. 85, s. 2. *Rex v. Dunn, R. & M.* C. C. R. 424, is now no authority.

(*n*) The form of affirmation given by this statute is, 'I, A. B., being one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be], do solemnly, sincerely, and truly declare and affirm.'

(*o*) The form of affirmation given by this statute is, 'I, A. B., do, in the presence of Almighty God, solemnly, sin-

cerely, and truly affirm and declare that I am a member of the religious sect called Separatists, and that the taking of any oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner affirm and declare.'

(*p*) The form of affirmation given by this statute is, 'I, A. B., having been one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be], and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm.' This statute was passed in consequence of *Reg. v. Doran*, 2 Moo. C. C. R. 37, where it was held that a person, formerly a Quaker, who had seceded from that sect on some



Where a witness had made the affirmation directed by the statute to be made by members of the Society of Friends, but for some time back she had left the Society, and was no longer one of its members; the court, after looking into the 1 & 2 Vict. c. 77, and the other Acts on the subject, considered that the length of time since the person affirming had left the Society was of no importance, and that it was sufficient if she had once been a member of the Society, and entertained conscientious scruples to being sworn on the New Testament. (*g*)

It is immaterial how long a person has ceased to be a Quaker.

By the 24 & 25 Vict. c. 66, s. 1, 'if any person called as a witness in any court of criminal jurisdiction in England or Ireland, or required or desiring to make an affidavit or deposition in the course of any criminal proceeding, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court, or judge, or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration, (*r*) which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.' (*s*)

Persons refusing, from conscientious motives, to be sworn, may affirm or declare.

By the 14 & 15 Vict. c. 99, s. 16, 'every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.'

Court, &c., may administer oaths.

By the 13 & 14 Vict. c. 21, s. 4, in all Acts of Parliament 'the words "oath," "swear," and "affidavit," shall include affirmation, declaration, affirming and declaring, in the case of persons by law allowed to affirm instead of swearing.'

Oath includes affirmation.

Where an oath is administered before a court, judge, or magistrate, by a crier, clerk, or other person, the oath is in point of law administered by the court, judge, or magistrate: for the person who actually administers the oath is the agent of the court, judge, or magistrate, and when he administers the oath, the court, judge, or magistrate administers it. (*t*)

Oath administered in the presence of the court.

A witness who is subpœnaed cannot object to be sworn on the ground that any questions which may be put to him would tend to criminate himself; but he must be sworn, and must either answer the questions, or object to answer them, if he insists on any privilege in that respect. (*u*)

A witness cannot refuse to be sworn, because any questions may criminate him.

Previous to the 53 Geo. 3, c. 127, there was great doubt

Excommunicated persons.

points of doctrine, retaining their opinions on the unlawfulness of swearing, but refusing to affirm under the 3 & 4 Will. 4, c. 49, and the 3 & 4 Will. 4, c. 82, was not admissible in criminal cases upon making the affirmation according to the 9 Geo. 4, c. 32.

(*g*) Reg. v. Mooney, 5 Cox, C. C. 319. Pigot, C. B., and Moore, J. A.D. 1851.

(*r*) The affirmation is to be in the words following: 'I, A. B., do solemnly, sincerely, and truly affirm and declare that the taking of any oath is, according to my religious belief, unlawful; and I do also solemnly, sincerely, and truly affirm and declare,' &c.

(*s*) This section was framed from the Common Law Procedure Act, 17 & 18 Vict. c. 125, s. 20.

(*t*) Reg. v. Tew, Dears. C. C. 429, where an objection that the oath was administered to the witnesses going before the grand jury by the crier in open court, whereas it ought to have been administered by the Clerk of the Peace, was held to be unfounded, frivolous, and discreditable. See the 19 & 20 Vict. c. 54, as to the grand jury swearing the witnesses.

(*u*) Boyle v. Wiseman, 10 Exch. R. 647.

whether persons excommunicated by the ecclesiastical courts were competent witnesses; (*v*) but by that statute excommunication is not to be pronounced except in certain cases; and by sec. 3, in those cases, parties excommunicated shall incur no civil disabilities.

Infamy.

What offences  
created in-  
competency.

There were certain offences, of which if a person had been convicted, he formerly became incompetent to give evidence. Such are treason, felony, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, and other offences of the same description, which involve the charge of falsehood, and affect the public administration of justice. (*w*) So a conviction for bribing a witness to absent himself, and not give evidence, (*x*) barratry (*y*) or præmunire, (*z*) and so also an attaind of conspiracy at the suit of the King; (*z*) that is, of a conspiracy to accuse another of a capital offence; (*a*) but it was otherwise of an attaind of conspiracy at the suit of the party; (*b*) and a conviction for a conspiracy to raise the price of the funds by spreading false rumours was once held not to render the affidavit of the party convicted inadmissible; (*c*) but a conviction to bribe a witness not to appear on an information against the revenue laws before justices rendered the convict incompetent. (*d*) But a conviction for keeping a public gaming house did not. (*e*) Outlawry in a personal action did not create incompetency; (*f*) but it was otherwise of treason or felony; for a judgment of outlawry for treason or felony, appearing on the sheriff's return of the exigent, has the same effect as judgment after verdict or confession, (*g*) and consequently such an outlaw was incompetent. (*h*)

The nature of  
the punish-  
ment.

It was formerly thought that incompetency on the ground of infamy might also arise from the infliction of certain infamous punishments, as the pillory, (*i*) but it was afterwards clearly settled that it was the nature of the crime which rendered the party incompetent. (*j*) Therefore a person convicted of barratry and merely fined was incompetent, (*k*) while a person who had been in the pillory for a libel on the government was competent. (*l*)

Proof of the  
judgment was  
necessary.

In order to exclude a witness on the ground of his being infamous, it was necessary to produce the record, (*m*) not only of his conviction, but of the judgment thereon; (*n*) and even the admission of the witness himself that he had been convicted of felony, and was under sentence upon such conviction, was not sufficient to

(*v*) Gilb. Ev. 130.

(*w*) 2 Hale, 277. Com. Dig. Testm. A. 3, 4. Co. Lit. 6 b.

(*x*) Clancey's case, Fort. 208. Bushell v. Barrett, R. & M. N. P. R. 434.

(*y*) Rex v. Ford, 2 Salk. 690.

(*z*) Co. Lit. 6 b. Com. Dig. Testm.

A. 5.

(*a*) 2 Hale, 277.

(*b*) Ibid. Saville v. Roberts, Carth. 416.

(*c*) Case of the Ville de Varsovie, 2 Dods. 174; but see the remarks of Abbott, C. J., on this case in Crowther v. Hopwood, 3 Stark. R. 22.

(*d*) Bushell v. Barrett, R. & M. N. P. R. 434.

(*e*) Rex v. Grant, R. & M. N. P. R.

270.

(*f*) Co. Lit. 6 b. Com. Dig. Testm.

A. 5.

(*g*) 3 Inst. 212. Hawk. P. C. b. 2, c. 48, s. 22.

(*h*) Celier's case, Sir T. Raym. 369.

(*i*) Gilb. 127. 2 Hale, 277.

(*j*) Gilb. 127. Bull. N. P. 292. 2 Hawk. C. c. 46, s. 102.

(*k*) Rex v. Ford, 2 Salk. 690. Pen-  
dock v. Mackender, 2 Wils. 18. Bull.  
N. P. 292. 2 Hawk. P. C. b. 46, s. 102.

(*l*) Gilb. 127.

(*m*) Rex v. Castell Carcinion, 8 East,  
77. Com. Dig. Testm. A. 5. Bull. N. P.  
292.

(*n*) Gilb. 128, 129. Com. Dig. Testm.  
A. 5. Reg. v. Meek, 9 C. & P. 513.

avoid the necessity of producing the record. (*o*) The incompetency arising from infamy might be removed by enduring the punishment awarded for the offence. The 9 Geo. 4, c. 32, s. 3, provided that where any offender should be convicted of any felony not punishable with death, and should endure the punishment adjudged for the same, the punishment so endured should have the same effect as a pardon under the great seal for that particular felony; and sec. 4 contained a similar provision as to misdemeanors, but perjury and subornation of perjury were excepted. (*p*)

Infamy removed by suffering the punishment.

A pardon, whether by the King or by Act of Parliament, removed not only the punishment, but all the legal disabilities consequent on the crime. (*q*) This effect was produced by a pardon in misdemeanors as well as felonies wherever the disability was a consequence of the judgment; but where it was declared by a statute to be part of the punishment, as in the case of perjury, or subornation of perjury, on the 5 Eliz. c. 9, (*r*) the King's pardon did not make the witness competent. (*s*) If the pardon were conditional, the performance of the condition must have been shown. (*t*)

By pardon.

The incompetency might also be removed by the reversal of the judgment or outlawry, which must be proved by the production of the record. (*u*)

Reversal of the judgment.

3. Of incompetency from interest.—All witnesses interested in the event of a suit were formerly excluded from being witnesses in favour of that party to which their interest inclined them. They were excluded from a supposed want of integrity, and not, as some have supposed, that they might be saved from the temptation to commit perjury. (*v*) The rule on this subject at last completely established (though at variance with several old decisions) was, that the interest to disqualify must be some *legal, certain, and immediate* interest in the event of the suit, or in the record as an instrument of evidence available on future occasions in support of the witness's own interest. (*w*) But it was no objection to the competency of a witness that he might have wishes or a strong bias on the subject-matter of the proceeding, or that he might expect some benefit from the result of the trial. (*x*) Thus no tie of relationship except that of husband and wife created a disqualifying interest. But, with the exceptions hereafter pointed out, husband and wife have always been incompetent to give any evidence for or against each other in criminal cases; and where an offence can only be committed by several joining in it, as conspiracy or riot, the husband or wife of one of those who are jointly indicted has

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Incompetency from interest.

What interest dis-qualified.

What interest did not dis-qualify.

(*o*) *Rex v. Castell Careinion, supra.*

(*p*) See *Rex v. Badcock, R. & R.* 248, as to what is a sufficient endurance of the punishment.

(*q*) *Cuddington v. Wilkins, Hob.* 67, 81. 2 Hale, 278. *Crosby's case, Salk.* 689, S. C. 1 Lord Raym. 39. *Rookwood's case, 4 St. Tr.* 681, S. C. *Cases Temp. Holt, 683.* By Treby, C. J., in *Lord Warwick's case, 5 St. Tr.* 171. *Rex v. Ford, 2 Salk.* 690. *Bentley v. Bishop of Ely, Fitz.* 107.

(*r*) *Ante, p.* 24.

(*s*) *Rex v. Gripe, 1 Lord Raym.* 256. *Rex v. Ford, 2 Salk.* 690. *Gilb.* 128. *Bull. N. P.* 292. *Dover v. Mestaer, 5 Esp.*

94. And see 2 Hargrave's Juridical Arguments, p. 221.

(*t*) *Hawk. P. C. b. 2, c. 37, s. 45.* *Rex v. Burridge, 3 P. Wms.* 439. As to the proof of a pardon, see the 7 & 8 Geo. 4, c. 28, s. 13; Appendix, p. v. and *Reg. v. Harrod, 2 C. & K.* 294; and see *Reg. v. Boyes, 1 B. & S.* 311, *ante, p.* 608, as to the effect of a pardon.

(*u*) *Lord Lovat's case, 9 St. Tr.* 652, 665.

(*v*) 1 Phill. Ev. 45, 7th ed.

(*w*) 1 Phill. Ev. 81, 86. 1 Stark. Ev. 103. *Smith v. Prager, 7 T. R.* 60.

(*x*) 1 Phill. Ev. 47, 7th ed.



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always been an incompetent witness for or against any of the others; for the acquittal or conviction of such other would directly tend to the acquittal or conviction of the wife or husband, as the case might be. Thus on a prosecution against several persons for a conspiracy, the wife of one of the defendants was held not to be a competent witness for the others, a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for her husband. (y) And wherever the acquittal of the principal would ensure to the accessory's discharge, it may well be doubted whether the wife or husband of the accessory would have been a competent witness for the principal.

6 & 7 Vict.  
c. 85. Wit-  
nesses not to  
be excluded  
from giving  
evidence by  
incapacity  
from crime or  
interest.

The 6 & 7 Vict. c. 85, s. 1, reciting that 'the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony,' enacts 'that no person offered as a witness shall hereafter be excluded *by reason of incapacity from crime or interest* from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law or by consent of parties authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, (z) or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence.' (a)

14 & 15 Vict.  
c. 99, s. 2.  
Parties to be  
admissible  
witnesses.

The 14 & 15 Vict. c. 99, s. 2, enacts that 'on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, *the parties thereto, and the persons in whose behalf any such suit, action, or*

(y) *Ante*, p. 161. But where a woman was called to give evidence for the Crown, whose husband lay under sentence of death, and she said she supposed and hoped that the conviction of the prisoner would be the means of procuring her husband's pardon, she was admitted as a witness, and the objection held to go to her credit and not to her competency. *Rudd's case*, 1 Leach, 127.

(z) *Sic*—plainly a mistake for 'inquiry.'

(a) The clause then proceeded, 'Provided that this Act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in

ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively.' But the whole of this proviso, except so much as relates to husbands and wives, was repealed by the 14 & 15 Vict. c. 99, s. 1, and the remainder by the 16 & 17 Vict. c. 83, s. 4. The section also contains a proviso that it shall not repeal any provision in the Wills Act, 7 Will. 4 & 1 Vict. c. 26, and a proviso as to the examination of defendants in courts of equity.

other proceeding may be brought or defended, shall, except as herein-after excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.' (b)

Sec. 3. 'But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband.' (c)

The 16 & 17 Vict. c. 83, s. 1, enacts that 'on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.'

Sec. 2. 'Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery.'

Sec. 3. 'No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during marriage.' (d)

There are several points, which are likely to arise upon the construction of these statutes, and therefore require to be considered in this place.

A doubt seems to arise upon the words, in the 14 & 15 Vict. c. 99, s. 3, 'any person, who in any criminal proceeding is charged with the commission of any indictable offence,' whether these words

Nothing herein to render a person charged with any indictable offence, &c., competent or compellable to give evidence for or against himself, &c.

Husbands and wives of parties to be admissible witnesses.

Except in criminal cases and in cases of adultery.

Husbands and wives not compelled to disclose communications.

Points on these statutes.

Does the proviso in the 14 & 15 Vict. c. 99, s. 3,

(b) The 17 & 18 Vict. c. 122, s. 15, and 18 & 19 Vict. c. 96, s. 36, enact that this section 'shall not be deemed to apply to any prosecution, suit, or other proceeding in respect of any offence, or for the recovery of any penalty or forfeiture, under any law now in force, or hereafter to be made relating to the customs or inland revenue.' The 20 & 21 Vict. c. 62, s. 14, enacts that 'the several acts which declare, make competent and compellable a defendant to give evidence in any suit or proceeding to which he may be a party, shall not be deemed to extend or apply to

defendants in any suit or proceeding instituted under any Act relating to the customs.'

(c) Sec. 4 provides that nothing in this Act shall apply to proceedings in consequence of adultery, or breach of promise of marriage; and sec. 5, that the Act shall not repeal any provision in the Wills Act, 7 Will. 4 & 1 Vict. c. 26.

(d) Sec. 4 repeals so much of sec. 1 of the 6 & 7 Vict. c. 85, as provides that the Act shall not render competent the husbands and wives of the parties therein enumerated.



apply to  
criminal  
omissions?

[980]  
Rated in-  
habitants.

3 & 4 Vict. c.  
26, s. 1.  
Persons not  
disqualified  
from giving  
evidence on  
account of  
being assessed  
to parochial  
rates.

Nominal  
parties on any  
trial not dis-  
abled from  
giving evi-  
dence.

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include offences arising from mere nonfeasance, such as the non-repair of highways, bridges, and the like. As the question seems open to considerable doubt, it is thought better to retain the statutes applicable to such cases. (e)

In order to provide against the inconvenience of excluding the evidence of the inhabitants at large upon questions affecting the interests of parishes and other districts, the 54 Geo. 3, c. 170, s. 9, provided that no inhabitant rated or liable to be rated to any rates of any parish, &c., or executing or holding any office therein, should be incompetent for or against such parish, &c., in any matter relating to such rates, or to the boundary of such parish, &c. &c. So much difficulty, however, arose in the construction of this Act, that it was considered expedient to pass the following statute. (f)

The 3 & 4 Vict. c. 26, s. 1, reciting that 'it is expedient to remove all doubt whether persons are by law competent to give evidence in cases where they have been formerly held to be disqualified by the liability to pay parochial rates,' enacts 'that from and after the passing of this Act, no person called as a witness on any trial in any court whatever, may and shall be disabled or prevented from giving evidence by reason only of such person being, as the inhabitant of any parish or township, rated or assessed or liable to be rated or assessed to the relief of the poor, or for and towards the maintenance of church, chapel, or highways, or for any other purpose whatever.'

Sec. 2. 'No churchwarden, overseer, or other officer in and for any parish, township, or union, or any person rated or assessed or liable to be rated or assessed as aforesaid, shall be disabled or prevented from giving evidence on any trial, appeal, or other proceeding by reason only of his being a party to such trial, appeal, or other proceeding, or of his being liable to costs in respect thereof, when he shall be only a nominal party to such trial, appeal, or other proceeding, and shall be only liable to contribute to such costs in common with other the ratepayers of such parish, township, or union.'

(e) Should this question ever be argued, it must be remembered that many serious crimes arise from omissions—murder, for instance; and it can hardly have been intended that the evidence of a defendant should be admissible or not according as the crime charged happens to result from the omitting to do or doing certain things, as that would make a defendant competent in one case of murder, and not in another. On the other hand, if the clause extends to every indictable offence, the words, 'the commission of,' are wholly superfluous, and a striking anomaly is left unprovided for. By the statutes subsequently noticed, wherever the inhabitants of a county, parish, or place are indicted for the non-repair of a bridge or highway, they are rendered competent witnesses for the defence; but if an individual is charged *ratione tenuræ*, there is no clause that renders him competent; and yet if he preferred an indictment against the inhabitants, he would clearly be admissible

against them.

(f) The cases upon the construction of the 54 Geo. 3, c. 170, s. 9, are collected, 1 Phill. Ev. 141, *et seq.* In *Rex v. Hayman*, M. & Malk. 401, Tindal, C. J., held on an indictment for the non-repair of a bridge or road, on a liability *ratione tenuræ*, that rated inhabitants of the parish wherein the bridge or road was situated were rendered competent by the 54 Geo. 3, c. 170. But in *Rex v. Bishop Auckland*, 1 A. & E. 744, 1 M. & Rob. 286, it was held that inhabitants of a district indicted for the non-repair of a highway, were not rendered by that statute competent witnesses for the defence. This decision, however, seems to be overruled by *Doe d. Boulthée v. Adderley*, 8 A. & E. 502. It was held that the 54 Geo. 3, c. 170, did not render churchwardens and overseers competent when they were parties to an appeal. *Reg. v. Recorder of Bath*, 9 A. & E. 714; but this decision caused the 3 & 4 Vict. c. 26, s. 2 to be passed.



It has been held that the clause in this statute relating to inhabitants ought to receive the largest construction, and must be extended to owners. Therefore an owner of lands within a parish is competent to give evidence for the defendants on a prosecution against such parish for non-repair of a highway, though he be not a rated inhabitant, the lands being occupied by tenants who are rated for them. (*g*)

The effect of the 3 & 4 Vict. c. 26, is to make the persons mentioned in it competent witnesses, but it seems that where they are defendants they are not compellable by it to give evidence against themselves. (*h*)

It is manifest that the provisos in the 14 & 15 Vict. c. 99, s. 3, and 16 & 17 Vict. c. 83, s. 2, apply to every proceeding relating to any indictable offence, and therefore it is unnecessary in this work, which is confined to indictable offences, to refer to the cases which have been decided as to other criminal matters.

We will now consider the cases where prisoners are jointly indicted and tried together.

There seems no reason to doubt that where an offence can only be committed by several joining in it, as conspiracy or riot, the decisions before the late Acts will be equally applicable under them, and that in such cases one prisoner will not be a competent witness for another, inasmuch as his evidence will directly tend to the acquittal of that other and indirectly to his own, (*i*) and consequently he will in effect be giving evidence for himself.

Then with regard to those cases where the acquittal of one prisoner can in no way affect the acquittal or conviction of another, the first point to be noticed is how the matter stood before these Acts passed. Now at that time, in order to render a prisoner incompetent on the ground of infamy, he must not only have either pleaded or been found guilty, but must have had judgment passed upon him thereon, (*j*) and therefore a prisoner was in point of law a competent witness until he was actually sentenced.

Where, therefore, George and Ford were jointly indicted for housebreaking, and George pleaded guilty, but was not sentenced; Coltman, J., held that he might be called as a witness for Ford. (*k*) So where King and Braddon were jointly indicted for sheep-stealing, and King pleaded guilty, but was not sentenced; it was held that King was a competent witness for Braddon; and it was stated that it was the unanimous opinion of the judges that one prisoner may be called as a witness either for or against another charged in the same indictment with a joint offence, and this upon the common law, and in accordance with the preceding case, and independently of the 6 & 7 Vict. c. 85. (*l*)

(*g*) Reg. v. Doddington, 1 Q. B. 411.

(*h*) Reg. v. Adderbury, East. 5 Q. B. 187.

(*i*) See *ante*, pp. 161, 621.

(*j*) Gilb. 128. Com. Dig. Testm. A. 5.

(*k*) Reg. v. George, C. & M. 111.

(*l*) Reg. v. King, 1 Cox, C. C. 232, Platt, B., after consulting Erle, J. In Reg. v. Arundel, 4 Cox, C. C. 260, Patteson,

J., held that a prisoner, who had pleaded guilty, but was not sentenced, might be a witness for another prisoner jointly indicted with himself for robbery; but whether Patteson, J., held that he was competent at common law or not does not appear. The prisoner applied to have him examined; the prosecution objected that he was named in the record, and

The Act does not compel ratepayers to give evidence against themselves.

All proceedings in indictable offences are within the 14 & 15 Vict. c. 99, s. 3.

Prisoners jointly indicted.

Where the acquittal of one tends to the acquittal of another.

Where the acquittal of one has no effect on another.

A prisoner who has pleaded guilty but is not sentenced, is a competent witness for another prisoner.

Or against another prisoner.

So where Hinks and Waywood were jointly indicted for larceny, and Waywood pleaded guilty, but judgment was respited in his case, and the trial proceeded against Hinks, and Waywood was admitted as a witness for the prosecution; it was held, upon a case reserved upon the question whether he was a competent witness under the 6 & 7 Vict. c. 85, s. 1, that he was admissible at common law. (*m*)

The result of the cases.

The result of the cases therefore is that a prisoner is competent at common law as a witness at any time before he has been sentenced; in other words, it is by the sentence that he is rendered infamous: and consequently the statutes, which remove incompetency arising from infamy, have no application to any case where the prisoner has not been sentenced.

Can a prisoner whilst on his trial be a witness for another tried with him?

It would seem to be a reasonable conclusion, from these premises, that where several prisoners are on their trial, one of them would be a competent witness for the others at common law. There is, however, no decision to that effect; and although Lord Hale seems to have thought it possible that indicting an accomplice jointly with his companion might not wholly take away his testimony, (*n*) yet there is not only the uniform practice of never calling a prisoner jointly indicted with another as a witness, but also weighty authorities the other way. (*o*) And these authorities are confirmed by the practice, wherever it has been intended to call a prisoner as a witness against those jointly indicted with him, which has regularly been to obtain the leave of the court to offer no evidence against the particular prisoner, and to take an acquittal of him before examining him as a witness. (*p*)

It does not appear upon what ground a prisoner tried with another was considered to be incompetent. It could not be on the ground of infamy, because, until judgment, he would not be infamous; but it may perhaps have been on the ground of interest, or because the prisoner was a party to the record. If it

therefore came within the words of the proviso in the 6 & 7 Vict. c. 85, s. 1—the Act ‘shall not render competent any party to any suit, action, or proceeding individually named in the record;’ but Patteson, J., held that this proviso related only to civil proceedings. It is now repealed.

(*m*) Reg. v. Hinks, 1 Den. C. C. 84. 2 C. & K. 462. S. C. as Reg. v. Williams, 1 Cox, C. C. 289. The only observation as to the 6 & 7 Vict. c. 85, was made by Alderson, B., in answer to the statement that Waywood was a party individually named in the record, who said that he was not a party to the issue. Hawkesworth v. Showler, 12 M. & W. 45.

(*n*) 1 Hale, 305, where, speaking of an accomplice in a robbery, that great judge says, ‘But in these and the like cases, the party that is the witness is never indicted, because that doth weaken and disparage his testimony, but possibly not wholly take away his testimony.’ And yet, though such a party be admissible as a witness in law, yet the credibility of his testimony is to be left to the jury.’

(*o*) Mr. Starkie, 2 Stark. Evid. 11, says that ‘an accomplice, as it seems, is a com-

petent witness, and may be examined, if he be willing, although he is indicted along with others, *provided he be not on his trial at the same time with the others.*’ To which he adds a qu., and refers to 1 Hale, 305; and Rex v. Ellis, Macnall. 53. In a case in the Star Chamber, between the King and several defendants, it was ruled that if one of them does not accuse himself, but accuses another defendant, he shall not be received as a competent testimony to condemn his companion, but if he had accused himself, then he should have been received as a competent testimony to condemn his companion. Sir Percy Cresby’s case, Noy 154, cited 2 Hale, 234. And in a late case, Erskine, J., expressed a strong opinion that a principal could not be examined as a witness against an accessory before the fact with whom he was jointly indicted. Reg. v. Lyons, 9 C. & P. 555. Ultimately the principal pleaded guilty, and the point became immaterial.

(*p*) Rex v. Rowland, R. & M. N. P. R. 401. Reg. v. Owen, 9 C. & P. 83; *ante*, p. 599.



were on the ground of interest, that objection seems to be wholly removed by the 6 & 7 Vict. c. 85, s. 1, since the proviso in that section was repealed. If it were on the ground that the prisoner was a party to the record, then the question turns on the 14 & 15 Vict. c. 99. Now it seems clear that if sec. 1 of that Act had stood alone, without any exception, it would have rendered any party to any proceeding a competent witness both for himself and any other party to the proceeding; as the words are 'on behalf of either or any of the parties' to any proceeding; and so it has been uniformly acted upon in civil proceedings. Then sec. 2, which excludes 'any person who in any criminal proceeding is charged with the commission of any indictable offence' from sec. 1, is not general, but only renders such person not 'competent or compellable to give evidence for or against himself or herself.' It seems, therefore, to be the natural inference that such persons are competent and compellable to give evidence in every other case except for or against themselves, and consequently that a prisoner is competent and compellable to give evidence for or against any other prisoner who is tried with him; and a prisoner so circumstanced is reported to have been so examined in Ireland; (q) but the report of this case is so meagre, that little reliance can be placed upon it, especially as it does not even appear to have been argued.

We now come to the cases to which the 6 & 7 Vict. c. 83 applies; these are where a person proposed to be called as a witness has been convicted and sentenced for some offence by which he would have been rendered incompetent at common law. This may occur where several prisoners are jointly indicted, and one of them is convicted, either on his own confession or by verdict, and sentenced before the trial of the other is concluded, and in every such case the prisoner so sentenced is rendered competent by the statutes either for or against the other. Thus where Jackson and Cracknell were jointly indicted for forgery, and Jackson, who was also charged with having been previously convicted of felony, pleaded guilty to the charge of forgery, but denied his previous conviction, and the jury found that he had been previously convicted; Erle, J., was of opinion that the proper course was to pass sentence upon him, and so put an end to the whole matter as regarded him, before he allowed him to give evidence for the other prisoner; and this course was adopted; so that it is clear that that very learned judge was of opinion that a prisoner who had been convicted and sentenced was a competent witness for another with whom he was jointly indicted. (r)

But the more common case will be where a witness has been previously convicted on a separate indictment of some offence, which would have rendered him infamous at common law, and in this case the witness is clearly rendered competent by the statute.

Where prisoners have been rendered infamous by a judgment.

A prisoner sentenced on one indictment is competent on the

(q) In 2 Tayl. Evid. 1155, it is said that 'if several persons be jointly indicted, any one of them may, under the 14 & 15 Vict. c. 99, s. 3, be called as a witness either for or against his co-defendants;' and to this passage there is the following note:—'Reg. v. Stevenson and Coulter, tried before Ball, J., at Armagh, on March 4, 1851. The

indictment was for an aggravated assault, and Coulter was examined as a witness for Stevenson, MS. But see Reg. v. Jackson, 6 Cox, 525, where, however, no reference was made to Lord Brougham's Act, or to the case above cited.'

(r) Reg. v. Jackson, 6 Cox, C. C. 525.



trial of  
another in-  
dictment to  
which he has  
pleaded guilty.

Thus where upon an indictment for felony two prisoners, who had pleaded guilty to the same indictment, were called as witnesses on the part of the Crown, and they had been previously convicted and sentenced for another and different offence; it was urged that they were incompetent, as they were incapable, as attainted felons, of being witnesses at common law, and as they were 'individually named upon the record' their competency was not restored by Lord Denman's Act (6 & 7 Vict. c. 85); but Rolfe, B., held that they were admissible. They could not be either gainers or losers by the event of the trial then proceeding, and they could not be considered as parties to the proceeding then before the court. (*s*)

A prisoner  
who is ac-  
quitted is  
competent.

Husband and  
wife;

for each other.

Where one of several prisoners jointly indicted is acquitted, he is a competent witness against the others; (*t*) and it is equally clear that he is a competent witness for the others.

It has been already observed, that no tie of relationship will create an interest disqualifying as a witness, except that of husband and wife. They cannot be admitted to be witnesses either for or against each other; for, since their interests are absolutely the same, they cannot swear for the benefit of each other, any more than a man can attest for himself; (*u*) therefore the wife of a prisoner cannot give evidence for him, nor for any one of several others indicted with him, where a joint offence, as a conspiracy, is charged, and an acquittal of all the others would be a ground of discharge for her husband. (*v*) So also on an indictment against several prisoners, the wife of one of them has been held inadmissible as a witness for the others, if her evidence has a tendency to procure the acquittal of her husband. One of several prisoners, jointly indicted for burglary, proposed to call the wife of another in order to prove an alibi; but Littledale, J., rejected her; for though she only came to speak as to that prisoner being at one place, which had nothing to do with her husband being concerned in the offence, yet her evidence would go to show that the witness for the prosecution was mistaken as to the prisoner, for whom she was called, and then, if she was mistaken as to one, it would weaken her evidence altogether, and by that means she might benefit her husband; and, upon a case reserved, all the judges (except Graham, B., and Littledale, J.), thought the wife was not competent. (*w*)

(*s*) Reg. v. Drury, 3 C. & K. 190. It will be observed that it was not even contended in this case that the prisoners were incompetent, excepting by reason of the proviso, and that proviso is now repealed.

(*t*) Reg. v. O'Donnell, 7 Cox, C. C. 337. Five judges on a case reserved in Ireland.

(*u*) Gilb. Ev. 119. 2 Hawk. P. C. c. 46, s. 70.

(*v*) *Ante*, p. 161. So in the case of an assault, where the cases of the co-defendants cannot be separated. Rex v. Frederick, 2 Stra. 1095.

(*w*) Rex v. Smith, R. & M. C. C. R. 289. Mr. Phillpotts, vol. 1, p. 75, observes on this case that it 'must be understood as having been decided on its own particular circumstances, and not as warranting the conclusion that where prisoners

set up a separate and distinct defence the wife of one prisoner cannot in any case be a witness for another prisoner.' It seems that in this case there was only one witness who identified the prisoners: see note, 1 Phill. Ev. 75; but in Rex v. Hood, R. & M. C. C. R. 281, there were six persons at least present at the transaction, and yet the wife of one of the prisoners was held incompetent for the other prisoners. The authority of these cases seems open to some doubt, as they infringe the rule that it is only where there is a *certain* interest in the result that the witness is incompetent, and the utmost that can be said is, that in such cases the evidence has a *tendency* to produce such a result. It is also a great anomaly that a witness should be competent for a prisoner if tried sepa-

But where Sills, Fellows, and Johnson were jointly indicted for burglary, and it was proposed to call the wife of Sills as a witness for Fellows, to prove that she brought to Fellows' house part of the stolen property that was found there; Tindal, C. J., held that she was a competent witness for that purpose, and she was examined accordingly. (*x*) So where two prisoners were jointly indicted for burglary, and it was proposed to call the wife of one of them to prove an alibi for the other, and this was objected to on the part of the prosecution on the authority of *Rex v. Smith*; (*y*) Maule, J., held that, though she could not be examined for her husband, she certainly might for the other prisoner. (*z*) So where two prisoners were jointly indicted for stealing potatoes, and some potatoes were found in the apartment of each, and one of them called the wife of the other to prove that the potatoes found in his apartment were not the property of the prosecutor; Wightman, J., after consulting Cresswell, J., said, 'The point is a very nice one, but I am inclined, though with considerable doubt, to admit the evidence, and upon these grounds; although the prisoners are jointly indicted, the offence is distinct and severable. It differs from *Smith's case*; (*a*) for here evidence that one prisoner did honestly obtain the potatoes found in his apartment does not necessarily benefit the other prisoner. The defence of each is distinct, and it would be hard to say that one should be precluded from his defence because it might, by some remote possibility, benefit the other. I shall receive the evidence, but with considerable doubt.' (*b*) But where on an indictment for horse-stealing against two prisoners, the wife of one was called to prove that the other was not present at the time of the stealing, and *Reg. v. Bartlett* (*c*) was cited in support of her competency; Wightman, J., after consulting Cresswell, J., held that she was incompetent. *Reg. v. Bartlett* differed from this case, as there the evidence did not necessarily benefit the husband. Here it must do so by impeaching the credit of the prosecutor, and the facts of *Smith's case* (*d*) were so similar to those of the present case that, whether that case were good law or not, it was binding in this case. (*e*)

And they cannot be witnesses against each other, by reason of the dissensions and distrusts that it would occasion, inconsistent with the happiness of married life and the peace of families; (*f*) and therefore, on an indictment for bigamy, the first and true wife cannot be admitted to give evidence against her husband; (*g*)

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Against each  
other.

rately, but incompetent for him, if tried jointly with the witness's husband. C. S. G.

(*x*) *Reg. v. Sills*, 1 C. & K. 494, July 1844. This and the following cases occurred after the publication of the preceding note in the last edition of this work.

(*y*) *Supra*.

(*z*) *Reg. v. Moore*, 1 Cox, C. C. 59, August 1843. In *Hawkesworth v. Showler*, 12 M. & W. 45, it was held that in trespass against two defendants for taking the plaintiff's goods, the wife of one of them, against whom the case is clearly proved, is not a competent witness for the other to prove that he did not authorize

the taking of the goods. It is clear that in such a case the direct and necessary effect of the evidence of the wife for the other defendant would be to fix her husband with the whole damages and costs.

(*a*) *Supra*.

(*b*) *Reg. v. Bartlett*, 1 Cox, C. C. 105, April 1844.

(*c*) *Supra*.

(*d*) *Supra*.

(*e*) *Reg. v. Denslow*, 2 Cox, C. C. 230, A.D. 1847.

(*f*) *Gilb. Ev.* 119. 2 *Hawk. P. C.* c. 46, s. 70. *Barker v. Dixie*, Cas. temp. Hardw. 264.

(*g*) *Ante*, vol. 1, p. 319.



Wife of one prisoner incompetent against another prisoner.

but, after proof of the first marriage, the second wife may be a witness. (*h*) And where upon an indictment against Webb and three other prisoners for sheep-stealing, the counsel for the prosecution proposed to call the wife of Webb to prove facts against the other prisoners, and urged that it was only in cases where the acquittal or conviction of one prisoner had a direct tendency to cause the acquittal or conviction of the other prisoners that the wife of one prisoner was incompetent to give evidence for or against the other prisoners; but Bolland, B., held that the witness was incompetent. (*i*)

Wife not bound to state where her husband is.

On an indictment for conspiracy against Hamp and others, Mrs. Broome was examined for the prosecution, and it appeared that her husband had been bound by recognizances to appear and take his trial for cheating at play at a previous assize, but that he did not appear, and had not returned home since, and the wife being asked whether she had not seen her husband in Birmingham a few days before, said, 'I decline to answer the question, because my husband did not appear to his recognizance;' Lord Campbell, C. J., 'I think on that the question ought not to be proposed.' (*j*)

Not competent, even by consent.

And so strictly is this rule preserved, that in a civil case Lord Hardwicke would not suffer a wife to give evidence for her husband, even by consent of the other party. (*k*) And even after a divorce by Act of Parliament, the wife is not competent in an action against her husband to give evidence of anything that happened during coverture, (*l*) on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation. (*m*) The rule, however, must be understood as applying to cases where the husband or wife are directly accused of a crime, and not as extending in the same degree to collateral suits or proceedings between third persons. It was, indeed, once held, in *Rex v. Cliviger*, (*n*) that husband and wife in collateral cases are not to be permitted to give any evidence that might even tend to criminate each other; for though the evidence of the one could not be used against the other on a subsequent trial for the offence, yet it might lead to a criminal charge, and cause the other to be apprehended. And the principle of that decision would extend to prevent the one from being called to contradict the other; for the tendency of the evidence of the latter witness would be to prove the former guilty of perjury. (*o*) But the rule laid down in the case of *Rex v. Cliviger* was much discussed in the case of *Rex v. All Saints, Worcester*, (*p*) in which the Court of King's Bench was of opinion that it had been expressed in terms too large and general; and held, that where the evidence of the wife did not directly crimi-

Collateral cases.

*Rex v. All Saints, Worcester*.

(*h*) Ibid. *Wells v. Fisher*, 1 M. & Rob. 99.

(*i*) *Rex v. Webb*, Bushell, J., and T. Croome, Gloucester Spr. Ass. 1830. MSS. C. S. G.; and see Dalt. c. 164, p. 540, cited 1 Hale, 301.

(*j*) *Reg. v. Hamp*, 6 Cox, C. C. 167.

(*k*) *Cas. temp. Hardw.* 264.

(*l*) *Monroe v. Twisleton*, Peake Ev. Appendix. So a widow cannot be called by the defendant to disclose conversations

between herself and her late husband, in an action by his executors. *Doker v. Hasler*, R. & M. N. P. R. 198, ruled by Best, C. J. But see *Beveridge v. Minter*, 1 Carr & P. 364.

(*m*) By Lord Ellenborough, in *Aveson v. Kinnaird*, 6 East, 192.

(*n*) 2 T. R. 263.

(*o*) 2 T. R. 263.

(*p*) 6 M. & S. 194.



nate the husband (as in a proceeding relating to other matters, and not to any criminal charge against him), and never could be used against him, nor could he ever be affected by the judgment of the court founded upon such evidence, she was a competent witness.

So where upon the trial of an appeal a pauper proved his marriage with E., and M. B. was then called by the other side to prove that she had previously been married to the pauper; it was held that she was competent for this purpose; as nothing that was said by her in this case, nor any decision of the Court of Sessions founded upon her testimony, could afterwards be received in evidence to support an indictment against her husband for bigamy. (q)

But where on an indictment for stealing wheat, Eliza Ellis was called on the part of the Crown to prove that her husband, who had absconded, had been present when the wheat was stolen, and that she saw him deliver it to the prisoner; Taunton, J., doubted whether she could be so examined, as her evidence might be used as a ground of convicting her husband by causing a charge to be made against him. The two preceding cases were then cited. Taunton, J., 'I am against breaking down the rules of law. My opinion is to adhere to the rule laid down by Lord Hale. (r) In *Rex v. All Saints, Worcester*, at the time when the witness was examined, there was nothing in her evidence to criminate her husband. Here it is sought to make the woman charge her husband, not obliquely, but directly and immediately.' Having consulted Littledale, J., the learned judge added, 'We both agree in opinion that the witness is incompetent. We think *Rex v. All Saints, Worcester*, very distinguishable. There at the time when the wife was examined there was nothing in her evidence to criminate her husband. Here the evidence would directly charge the husband with being a principal; and although there is no prosecution pending, her evidence cannot but facilitate an accusation against her husband. Now, the law does not allow the wife to give evidence against her husband, and it is quite consistent with that principle that this evidence should not be received.' (s)

But where the first count charged Halliday with obtaining money by falsely pretending that a document produced to a bank by Eliza, the wife of D. Thomas, had been filled up by his authority; the second count was similar as to another document; and the third count charged Halliday and Eliza Thomas with a conspiracy to cheat the bank; but she was not tried with Halliday. The evidence of D. Thomas was essential to prove that he had given no authority to fill up the documents; but it was objected, on the authority of the preceding case, that he was incompetent to prove his wife guilty of a conspiracy, or even to prove the counts for false pretences; but Byles, J., thought his evidence admissible

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*Rex v. Bathwick.*

A wife is not competent to prove that a prisoner committed a felony in company with her husband.

The evidence of a husband is admissible, although it tends to inculpate his wife in the same charge with the prisoner against whom the evidence is given.

(q) *Rex v. Bathwick*, 2 B. & Ad. 639. The court doubted whether the competency of a witness could depend upon the marshalling the evidence, or the stage of the cause at which the witness was called. See Peat's case, *ante*, vol. 1, p. 319.

(r) I am not aware of the passage referred to by the learned judge, but see 2 Hale, P. C. 279, 1 Hale, P. C. 301. C. S. G.

(s) *Rex v. George Glead*, Gloucester Lent Ass. 1832. MSS. C. S. G.

on all the counts; and the jury found the prisoner guilty on the first count only; and, on a case reserved, it was held that the evidence of the husband was admissible in support of the first count. His evidence no doubt tended to show that his wife had acted criminally, but that count contained no charge against her. (*t*)

Unless he has  
been convicted  
or acquitted  
of such felony.

Where, however, the husband has either been convicted or acquitted of the same felony, respecting which the wife is called as a witness, she is competent to be examined. Thus on an indictment for sheep-stealing, the wife of a person, who had been previously convicted of stealing the same sheep, was held a competent witness for the prosecution. (*u*) So where one prisoner pleaded guilty, it was held that his wife was a competent witness against the other prisoner jointly indicted with him, as on the issue to be tried her husband was no longer interested. (*v*) So where a wife and her paramour were jointly indicted for stealing the goods of the husband, it was held that the husband was a competent witness against the paramour; for the wife was entitled to be acquitted, as she could not be guilty of stealing her husband's goods. (*w*) And in *Thurtell's case* Mrs. Probert was examined as a witness against Thurtell after her husband was acquitted. (*x*) In the same manner if Probert had not been apprehended, and Thurtell only had been on trial at the time, the wife of Probert would have been capable of being examined; because the question would have been whether Thurtell was guilty, and not whether Thurtell and Probert were guilty. (*y*)

They may be  
called to con-  
tradict each  
other.

And the reasoning upon which the decision in *Rex v. All Saints, Worcester*, was founded is equally strong to show that one may be called as a witness to disprove what has been stated by the other, and that either the party who has called the one, or the opposing party, may call the other for the purpose of contradicting. (*z*) The declarations of the husband or wife are subject to the same rule as their evidence. (*a*)

Their decla-  
rations.

[984]  
Exceptions.

Upon an indictment for forcible abduction and marriage of a woman, she may be a witness for the Crown, (*b*) or the prisoner; (*c*) but this is rather a case which does not fall within the general rule than an exception to it; for she is not legally his wife, a contract obtained by force having no obligation in law. (*d*) Indeed, if the actual marriage is valid (as where the woman after abduction consents to the marriage voluntarily, and not induced by any precedent menace), or if the marriage has been ratified by subsequent voluntary cohabitation, it has been

Abduction.

(*t*) *Reg. v. Halliday*, Bell, C. C. 257. The court seem to have considered the wife competent on all the counts, as Pollock, C. B., added, 'Indeed, in this indictment she was not charged at all, although she was involved in the conspiracy charged in the third count; but that did not prevent the husband's evidence from being admissible.' This case was not argued, and no previous decision referred to when it was decided.

(*u*) *Reg. v. Williams*, 8 C. & P. 284. Alderson, B.

(*v*) *Reg. v. Thompson*, 3 F. & F. 824, Keating, J.

(*w*) *Reg. v. Glassie*, 7 Cox, C. C. 1. Lefroy, C. J., and Monahan, C. J.

(*x*) Per Alderson, B., *Reg. v. Williams*, *supra*.

(*y*) Per Alderson, B. *Hawkesworth v. Showler*, 12 M. & W. 45.

(*z*) 1 Phill. Ev. 60, 7th ed.

(*a*) 1 Phill. Ev. 76.

(*b*) Gilb. Ev. 120. 1 Hale, P. C. 301, 302. 2 Hawk. c. 46, s. 78.

(*c*) *Rex v. Perry*, at Bristol, 1794, cited by Abbott, C. J., in *Rex v. Serjeant, R. & M. N. P. C. 354*.

(*d*) Gilb. Ev. 120. 1 Hale, P. C. 302, Bull. N. P. 286.



said she is not competent for or against the prisoner. (e) But there are very considerable authorities to the contrary. (f) And in a late case, where the defendants were indicted for a misdemeanor, in conspiring to carry away a young lady under the age of sixteen, from the custody appointed by her father, and to cause her to marry one of the defendants; and, in another count, for conspiring to take her away by force, being an heiress, and to marry her to one of the defendants; Hullock, B., was of opinion that, even assuming the young lady to be at the time of the trial the lawful wife of one of the defendants, she was a competent witness for the prosecution, although there was no evidence to support that part of the indictment which charged force. (g)

Wakefield's case.

The wife is also admitted as a witness against her husband, *ex necessitate*, in a prosecution of him for offences against her person. (h) So her dying declarations are admissible against him in the case of murder. (i) In an indictment of William Whitehouse, (ii) at Stafford, upon Lord Ellenborough's Act, for shooting at his wife, she was admitted as a witness for the prosecution by Garrow, B., after consulting Holroyd, J., upon the ground of the necessity of the case; and Holroyd, J., sent Garrow, B., the case of *Rex v. Jagger*, Yorkshire Assizes, 1797, where the husband had attempted to poison his wife with a cake in which arsenic was introduced, and the wife was admitted to prove the fact of the cake having been given her by her husband; and Rooke, J., afterwards delivered the opinion of the twelve judges that the evidence had been rightly admitted. Holroyd, J., however, said he thought the wife could only be admitted to prove facts which could not be proved by any other witness. (j) So on an indictment against a man for beating his wife, she was held competent. (k) And the wife is always permitted to swear the peace against her husband. (l) And her affidavit has been permitted to be read on an application to the Court of King's Bench for an information against the husband for an attempt to take her away by force after articles of separation; and it would be strange to permit her to be a witness to ground a prosecution, and not afterwards to be a witness at the trial. (m) And it seems to be now settled, that in all cases of personal injuries committed by the husband and wife against each other, the injured party is an admissible witness against the other. (n)

Indictment for personal violence.

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But this rule seems to be confined to cases where the charge affects the liberty or the person of the wife. Thus it has been decided

Not competent in cases where there is

(e) 1 Hale, P. C. 302. 1 Phill. Ev. 84, 7th ed. 2 Stark. Ev. 553.

(f) 4 Blac. Com. 209. 1 East, P. C. c. 11, s. 5. *Ante*, vol. 1, p. 949.

(g) *Rex v. Wakefield*, see the trial, published by Murray, p. 257. 2 Lewin, 1 & 279.

(h) Lord Audley's case, 1 St. Tr. 393. This case has been denied to be law, but is now established by the highest authorities. 1 Hale, P. C. 301. 2 Hawk. P. C. c. 46, s. 77. Bull. N. P. 287. *Rex v. Serjeant, R. & M.* 354. *Reg. v. Jellyman*, 8 C. & P. 604, *ante*, vol. 1, p. 939.

(i) Woodcock's case, 1 Leach, 500.

John's case, *ibid.* 504, n. (a).

(ii) MSS. Russell, Serjt.

(j) See *Reg. v. Pearce*, 9 C. & P. 667. S. P.

(k) By Lord Raymond on the authority of Lord Audley's case, *Rex v. Azire*, 1 Stra. 633. Bull. N. P. 287.

(l) Bull. N. P. 287.

(m) Lady Lawley's case. *Ibid.*

(n) 1 East, P. C. c. 11, s. 5, p. 455. In the Wakefields' case, p. 257, Hullock, B., said, 'I take it, it is quite clear now that a wife is a competent witness against her husband in respect of any charge which affects her liberty and person.'



no personal  
injury.

that in an indictment for a conspiracy in procuring a lady, then a ward in chancery, to marry, the wife was not a good witness for one of the co-defendants, if her evidence might enure to the acquittal of her husband; (*o*) and since she could not be admitted in favour of her husband, it follows necessarily that she could not be a witness against him. (*p*) So on an indictment against the wife of W. S. and others, for a conspiracy in procuring W. S. to marry, Abbott, C. J., refused to admit W. S. as a witness in support of the prosecution. (*q*) So a wife is not admissible as a witness against her husband on a charge of deserting her and her children against the 5 Geo. 4, c. 83. (*r*)

High treason.

In the case of high treason it has been said that a wife shall be admitted against her husband, because the tie of allegiance is more obligatory than any other; (*s*) but there are high authorities to the contrary. (*t*)

Competency  
of a woman  
living as a  
wife.

Whether a woman who has cohabited with a man as his wife, but who is ready to swear she is not married to him, will be allowed to give evidence on the part of the man, has been considered a doubtful question. (*u*) On a trial for forgery, Lord Kenyon refused to admit a woman as witness for the prisoner, whom in the course of the trial he had frequently alluded to as his wife, but afterwards, on hearing an objection taken to her competency, denied that they were in fact married. (*v*) But it seems now to be settled that the rule relates to persons who have entered into the relation of husband and wife; and does not extend to those who, not being married, have lived together and cohabited as man and wife. (*w*) Thus where a woman had been married to a man whom she had not seen for thirty years, and then married again, but afterwards found that the man she had first married was alive; as the second marriage was a mere nullity, she was held competent to give evidence of statements made by her second husband during the time they cohabited. (*x*) So where the prisoner had married his deceased wife's sister, Erle, J., held that the wife was a competent witness against him, as the marriage was void, and that the wife might prove her relationship to the former wife on the *voire dire*. (*y*) So a kept mistress, who has passed by the name and appeared in the world as the wife of her protector, has been held to be a competent witness for him. (*z*)

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A wife com-  
petent against

In the case of *Rex v. Perry*, Gibbs, C. J., stated that he could see no distinction between admitting a wife for and against her

(*o*) *Rex v. Locker*, 5 Esp. 107.

(*p*) *Rex v. Serjeant*, R. & M. 354.

(*q*) *Rex v. Serjeant*, R. & M. N. P. R. 352. But it is not necessary, it should seem, that there should be force employed in order to make the husband or wife competent. In the case of the Wakefields before mentioned for abduction, Hullock, B., was of that opinion, and he mentioned that he had seen a report of the case of *Rex v. Perry*, tried before Gibbs, C. J., as Recorder of Bristol, where the wife was held competent, and that no force was used in the abduction in that case.

(*r*) *Reeve v. Wood*, 10 Cox, C. C. 58.

(*s*) Bull. N. P. 286. Gilb. Ev. 120.

(*t*) 1 Hale, P. C. 301. 1 Brown, 47.

(*u*) *Campbell v. Twemlow*, 1 Price, 81.

(*v*) *Per Richards*, B., 1 Price, 83.

(*w*) 1 Phill. Ev. 69.

(*x*) *Wells v. Fletcher*, 5 C. & P. 12. S. C. as *Wells v. Fisher*, 1 M. & Rob. 99.

(*y*) *Reg. v. Young*, 5 Cox, C. C. 296. See *Reg. v. Chadwick*, 11 Q. B. 173, *ante*, vol. 1, p. 274. In *Reg. v. Blackburn*, 6 Cox, C. C. 333, a woman examined on the *voire dire* stated that she was the wife of one of the prisoners, and it was doubted whether evidence was admissible to prove that she had previously stated that she was a single woman, and also whether the question was to be decided by the judge or jury; the witness was, however, withdrawn. There is, however, no doubt the question is for the judge. See *post*, p. 637.

(*z*) *Batthews v. Galindo*, 4 Bingham, R. 610. *Reg. v. Young*, 2 Cox, C. C. 291. Erle, J. S. P.

husband. 'The *King v. Perry*,' said Abbott, C. J., in *Rex v. Serjeant*, (a) 'was much talked about at the time, and C. J. Gibbs expressed his surprise that any doubt should have been entertained that a wife was in all cases a competent witness for her husband when admissible against him.'

is so for her husband.

Anciently the rule was, that if there were any objection to the competency of a witness, he should be examined on the *voire dire*, (b) and it was too late after he was sworn in chief. (c) But for the convenience of the court, and the furtherance of justice (as the incompetency may not at first be suspected), the rule is now so far relaxed that if it is discovered during any part of the witness's examination, or even after his cross-examination, that he is incompetent, the objection may be taken, and his evidence will be struck out. (d) But it seems that the objection comes too late after the witness has left the box; (e) and it has been held that after a witness has been dismissed without any objection to his competency, it is not allowable to call a witness to prove his incompetency. (f) With respect, however, to the power of questioning a witness for the purpose of discovering his incompetency, there is still a material difference, which will presently be pointed out, between an examination on the *voire dire* and one after the witness has been sworn in chief.

Objections to competency, when to be taken;

The party against whom a witness is called may examine him respecting his interest on the *voire dire*, or may call another witness and produce other evidence in support of the objection. (g) The old rule is said to have been, (h) that if the witness were examined by the opposite party as to the fact of the objection, and denied it upon his oath, the party would not be at liberty to call afterwards another witness to prove it, in order to repel him from giving evidence, unless the other side acquiesced. But the modern and more convenient practice seems to be, that if the fact of incompetency is satisfactorily proved, the witness will be incompetent, although he may have ventured to deny it on the *voire dire*. (i) It has been said that if the opposite party raise the

how to be supported;

how repelled.

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(a) R. & M. N. P. R. 354.

(b) The *voire dire* is, when it is prayed upon a trial at law that a witness may (previously to his giving evidence in the cause) be sworn to *speaking the truth* (in old French, *voire dire*) whether he shall lose by the matter in controversy. Blount's Law Dictionary.

(c) *Turner v. Pearte*, 1 T. R. 719.

(d) *Jacobs v. Leybourn*, 11 M. & W. 685. 1 Phill. Ev. 153. *Turner v. Pearte*, 1 T. R. 720. *Howell v. Lock*, 2 Campb. 15. *Stone v. Blackburn*, 1 Esp. 37. *Perrigal v. Nicholson*, Wightw. 64. But where upon a trial for high treason it appeared, after a witness had been examined for the Crown, without objection on the part of the prisoner, that he had been misdescribed in the list of witnesses, which is required by the 7 Ann. c. 21, s. 14, to be given to the prisoner previous to his trial, the court would not permit the evidence of the witness to be struck out; but said, the objection ought to have been taken in the first instance; otherwise a party might take the chance of getting evidence which he liked, or, if he disliked the testimony,

he might then get rid of it on the ground of misdescription. *Rex v. Watson*, 2 Stark. N. P. C. 158. And upon this ground, Mr. Starkie expresses his opinion that a party who is cognizant of the interest of the witness at the time he is called, is bound to make his objection in the first instance. 1 Stark. Ev. 137; and see 1 Phill. Ev. 154, note (3), and *Hartshorne v. Watson*, 5 Bing. N. C. 477.

(e) 1 Phill. Ev. 153. *Beeching v. Gower*, Holt, N. P. R. 314.

(f) *Dewdney v. Palmer*, 4 M. & W. 664.

(g) *Per Hullock B.*, *Wakefield's case*, p. 157. 2 Lew. 279.

(h) By Lord Hardwicke in Lord Lovat's case, 9 St. Tr. 647. See also the observations of Parker, C. J., in *Rex v. Muscot*, 10 Mod. 193, in which case it was asserted, but overruled, that in criminal cases there could be no examination on the *voire dire*.

(i) 1 Phill. Ev. 154. In several cases it seems to have been considered that it is in the discretion of the judge whether other evidence should be called to support the objection before the witness is ex-



objection of interest by independent evidence, and without putting a question to the witness, then the party who has called him cannot be allowed to put a question to him in order to repel the objection; (*j*) but this seems to be incorrect. (*k*)

Where a question is raised as to the competency of a witness, all the evidence on both sides should be heard at once by the court.

It is now, however, clearly settled that, where a question arises as to the competency of a witness before he is sworn, the proper course is to receive all the evidence upon the question, both to impeach the competency of the witness and in support of it, before he is allowed to give any evidence. Thus in a case at York, where a witness was objected to by a prisoner as incompetent on the ground that he was insane, and the question arose as to the mode to be adopted under such circumstances; Parke, B., consulted the judges upon it before he went the circuit, and they were of opinion that it ought to be tried on the *voire dire*, and evidence admitted both on the part of the prisoner and on the part of the prosecution to impeach the competency of the witness, and in support of it; (*l*) and it has since been held that where an objection is raised to the competency of a witness on the ground that he is insane, it is for the court to decide whether such person has the sense of religion on his mind, and whether he understands the nature and sanction of an oath; and, in order to determine these questions, he may be examined and cross-examined, and witnesses on both sides may be examined, in order to found and to meet the objection to his competency before he himself is sworn. (*m*) If the court decides that he is a competent witness, 'then the jury are to decide on the credibility and weight of his evidence.' (*n*)

Where the question arises after a part examination of the witness.

In a late case, however, it has been intimated that in every case where any question is raised about the competency of a witness after he has been sworn and partly examined, there ought properly to be an inquiry made of the witness, who should be sworn 'to make true answer to all such questions as the court should demand of him;' in other words, that an examination on the *voire dire* may be instituted at any period of the examination. (*o*)

amined. And if the judge refuse to allow it to be then given, it seems that it may be given as part of the case of the party raising the objection, and if it support the objection, then the evidence of the witness objected to may be struck out of the notes. *Rex v. Wakefield*, note (*a*), M. & Malk. 197. *Jones v. Fort*, M. & Malk. 196. In this case the question was whether the defendant's examination taken under a commission of bankrupt was admissible, and Lord Tenterden, C. J., refused to allow evidence to be given tending to show that from the mode of taking it, and the state of the defendant's health, it was inadmissible before the examination was read, but held that it might be received in the defendant's case, and if the objection was supported, the evidence might be struck out. It certainly, however, is much the more convenient course, as well for the purpose of saving time, as to prevent the jury from being influenced by inadmissible evidence, to receive the evidence before the examination of the witness. C. S. G.

(*j*) 1 Phill. Ev. 123, 6th ed.

(*k*) See *Bunter v. Warre*, 1 B. & C. 689, per Bayley, J., and *Hartshorne v. Watson*, *supra*, note (*d*).

(*l*) Anonymous, stated by Parke, B., in *Attorney-General v. Hitchcock*, 1 Exch. R. 91, and also in *Bartlett v. Smith*, 11 M. & W. 483.

(*m*) *Reg. v. Hill*, 2 Den. C. C. 254.

(*n*) Per Lord Campbell, *ibid*.

(*o*) Per Lord Abinger, C. B., and Rolfe, B. *Jacobs v. Laybourn*, 11 M. & W. 685. In *Cleave v. Jones*, Hereford Sum. Ass. 1849, MSS. C. S. G., the plaintiff's counsel, in order to take the case out of the Statute of Limitations, tendered an account in the defendant's handwriting; and Rolfe, B., held that the defendant's counsel might at once put in two letters written by the plaintiff to the defendant, in order to show that the account was a confidential communication by the defendant to the plaintiff as her attorney. So on a subsequent trial of the same cause, when the same account was tendered in evidence, the



Every question respecting the competency of a witness is to be determined by the court and not by the jury. (*p*)

An examination on the *voire dire* is allowed to be conducted without strict regard to the general rule of evidence, which requires the best possible proof of a fact, and admits no other. Thus a witness may be examined as to the contents of a written document without a notice to produce; (*q*) for the party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection. (*r*) And the same relaxation is allowed in removing an objection of incompetency as in raising it. Thus where in an action brought by a chartered company, a witness for the plaintiffs admitted on the *voire dire* that he had been a freeman of the company, but added that he was then disfranchised; Lord Kenyon ruled that it was not necessary to prove the disfranchisement by the regular entry in the company's books, and that the witness was competent. (*s*) So where a witness was objected to as

The question is for the court.  
Mode of examination on *voire dire*.

counsel for the defendant claimed the right to interpose, and put in a letter of the plaintiff, and to call a witness to show that the account was written out and sent by the defendant to the plaintiff in consequence of such letter; and Erle, J., held that this might be done; and upon the defendant's counsel insisting that the witness ought to be sworn on the *voire dire*, Erle, J., held that that was the proper course, as the question whether the account was a privileged communication was to be determined by himself; and the letter and evidence of the witness were received, and the account rejected as a privileged communication. *Cleave v. Jones*, Hereford Sum. Ass. 1851; and the Court of Exchequer held that this ruling was correct. 7 Exch. R. 421. In an action by the payee against the maker of a promissory note, payable two months after date, with a plea that the defendant did not make the note, the defendant's signature to the note was proved; but the word 'two' was evidently written on an erasure. Erle, J., said that it was incumbent on the plaintiff to explain this, and a witness was called for the plaintiff to prove that the note was in the same state when it was signed by the defendant. Before the note was read, it was proposed, on the part of the defendant, to call witnesses to prove that, when the note was signed by the defendant, it was payable 'three' months after date; it was objected that this evidence should be given as part of the defendant's case; but Erle, J., at once received the evidence of two witnesses for the defendant, and upon their evidence decided that the alteration was not accounted for to his satisfaction. *Painter v. Hill*, 2 C. & K. 924, note. And where a witness for a plaintiff, being about to state the contents of a letter, a letter was put in his hands by the defendant's counsel, and he did not admit it to be the same; and the judge held that the defendant could not at that stage of the cause give evidence that it was the

original; the court held that this was erroneous, and that the judge was bound at once to hear the evidence on both sides, and decide whether the document was the original; and Parke, B., said, 'It is now well settled that all these preliminary questions, on which the reception of evidence depends, ought not to be submitted to the jury, but must be decided by the judge himself.' *Boyle v. Wiseman*, 11 Exch. R. 360; and see *Campbell's case*, ante, p. 266.

(*p*) *Reg. v. Hill*, 2 Den. C. C. 254, and see the preceding note.

(*q*) *Howell v. Locke*, 2 Campb. 15.

(*r*) But if the witness produces the instrument, on which the objection to his competency rests, it ought to be read. *By Abbott, C. J., Butler v. Carver*, 2 Stark. R. 434. On the passage in the text being cited in *Macdonnell v. Evans*, 11 C. B. 937, Maule, J., said, 'In many cases witnesses are called whom the opposite party has no reason to expect to see; the reason, therefore, given in that book is not a good one. An examination on the *voire dire* is for the purpose of establishing something of which the court is to be the judge and not the jury. It may well be, therefore, that the rule there is not so exclusive as in the case of an examination going to a jury.' Either the 'no' or 'not' in italics seems inserted by mistake in the report.

(*s*) *Butchers' Company v. Jones*, 1 Esp. 162. See also *Botham v. Swingle*, 1 Esp. 164. *S. C. Peake, N. P. C. 219*, where the witness was allowed to remove an objection of interest raised on the *voire dire* by his own statement that he had become a bankrupt, and his estate had been assigned. See also *Rex v. Gisburn*, 15 East, 57. So where a bankrupt, called as a witness, stated on the *voire dire* that he had obtained his certificate and released his assignees; *Park, J. A. J.*, held him competent, without production of the release. *Carlisle v. Eady*, 1 C. & P. 234. See also *Bunter v. Warre*, 1 B. & C. 689.

next of kin in an action by an administrator, but on re-examination answered that he had released all his interest, this was held by Lord Ellenborough to remove the objection. (*t*)

[988] But it is only on the *voire dire* that the general rules of evidence are thus relaxed; for although objections to the competency of a witness may now be made at any stage of the trial, yet they are not to be attended with the privileges of an examination upon the *voire dire*. Thus a witness cannot be cross-examined, for the purpose of showing him incompetent, as to what interest he takes under a will, for the will itself should be produced. (*u*) So where a party, who calls a witness, attempts to remove the objection by other independent proof, and not on the *voire dire*, he will then be subject to all the general rules of evidence. Thus where an objection, on the ground of interest, had been raised by the defendant to a witness of the plaintiff, who called another to prove that the former witness had been released, it was held that he could not be allowed to speak of the contents of the release, but the release itself, if not lost or destroyed, must be produced. (*v*) So where the objection is not raised on the *voire dire*, but appears in evidence in any other manner, the other party in answering it is bound by the usual rules of evidence. (*w*)

Judge or jury  
competent.

It is no exception against a person giving evidence for or against a prisoner, that he is one of the judges or jurors who is to try him. (*x*) And in the case of Hacker, two of the persons in the commission for the trial came off from the bench, and were sworn, and gave evidence, and did not go up to the bench again during his trial. (*y*)

(*t*) *Ingram v. Dade*, MS. 1 Phill. Ev. 155. *Lunniss v. Row*, 10 A. & E. 606, overruling *Goodhay v. Hendry*, M. & Malk. 319. and a case in a note, *ibid.* 321. See 1 Phill. Ev. 156.

(*u*) *Howell v. Lock*, 2 Campb. 14.

(*v*) *Corking v. Jarrard*, 1 Campb. 37.

(*w*) *Botham v. Swingler*, 1 Esp. N. P. C. 165, by Lord Kenyon; but see *Cleave v. Jones*, *supra*, note (*o*).

(*x*) 2 Hawk. P. C. c. 46, s. 83.

(*y*) *Ibid.*

# ADDENDA ET CORRIGENDA

TO

## VOLUME I.

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AN infant under the age of seven years cannot be guilty of felony; Page 7.  
and therefore a defendant cannot justify taking such an infant into  
custody and taking him before a magistrate upon the ground that he  
had been caught stealing a piece of wood. *Marsh v. Loader*, 14 C. B.  
(N. S.) 535.

The prisoner, a youth of eighteen, at first pleaded guilty to an indictment for murder; the judge warned him that this would not affect his fate; his counsel said he was insane, and desired to be hung; the prisoner, however, with apparently perfect intelligence, retracted his plea, and pleaded not guilty. The deceased, a boy, had been found with his throat cut, and the prisoner gave himself up, and admitted the act, recounting all the circumstances with perfect intelligence; and it did not appear that there was any ill-will to the boy, and the prisoner had said, 'I had no particular ill-feeling against the boy, only I had made up my mind to murder some one.' He added that he had wiped his hands and the knife. Afterwards he said that it was well for a Mr. Clark that he had left Chatham, for he had prosecuted him, and he had made up his mind to murder him when he came out of gaol. Evidence was given on behalf of the prisoner of strange conduct, and a surgeon proved that on two occasions he had sent the prisoner's mother to a lunatic asylum: she was low and desponding, and attempted suicide. The prisoner's brother was of weak intellect. On two occasions he had attended the prisoner, and said he believed he was labouring under what, in the profession, would be considered as moral insanity; that is, he knows perfectly well what he is doing, but has no control over himself. By the moral feelings he meant the propensities which may be diseased, while the intellectual faculties are sound; and that, having heard the evidence, in his opinion, it was reasonable to believe that there must in the prisoner's case be some derangement of the brain—some deviation from the normal condition of the brain. On cross-examination, he stated that he believed the prisoner knew what he was doing, but that an impulse came upon him, which he could not control; and he adopted an opinion of Dr. Winslow's, that no man could commit suicide in a state of sanity. He believed the prisoner had no proper control over his actions. He had a knowledge of right and wrong, but could not control his actions. Evidence on the part of the Crown was given to show that the prisoner was sane. Wightman, J., told the jury that 'In M'Naghten's case the judges had laid down the rule to be that there must, to raise the defence, be a defect of reason from disease of the mind, so as that the person did not know the nature and quality of the act he committed, or did not know whether it was right or wrong. Now to apply this

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rule to the present case would be the duty of the jury. It was not mere eccentricity of conduct which made a man irresponsible for his acts. The medical man called for the defence defined homicidal mania to be a propensity to kill, and described moral insanity as a state of mind under which a man, perfectly aware that it was wrong to do so, killed another under an uncontrollable impulse. This would appear to be a most dangerous doctrine, and fatal to the interests of society and security of life. The question is, whether such a theory is in accordance with law. The rule, as laid down by the judges, is quite inconsistent with such a view; for it was, that a man was responsible for his actions if he knew the difference between right and wrong. It was urged that the prisoner did the act in order to be hanged, and so was under an insane delusion; but what delusion was he under? So far from it, it showed that he was quite conscious of the nature of the act and its consequences. He was supposed to desire to be hanged, and in order to attain the object committed murder. That might show a morbid state of mind, but not delusion. Homicidal mania, again, as described by the witnesses for the defence, showed no delusion; it merely showed a morbid desire for blood. Delusion meant the belief in what did not exist. The question for the jury was, whether the prisoner at the time he committed the act was labouring under such a species of insanity as to be unaware of the nature, the character, or the consequences of the act he committed. In other words, whether he was incapable of knowing that what he did was wrong.' *Reg. v. Burton*, 3 F. & F. 772.

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On an indictment for murder, it appeared that the prisoner had been engaged to the deceased, but her friends disapproved, and the engagement was broken off, but renewed afterwards. However, the deceased formed an attachment for another, and wrote to the prisoner to break off the engagement; and he wrote three very sensible letters in reply to hers, that he would not stand in her way if she was resolved to part with him, but that he should prefer to have an interview with her, and to hear her determination from her own lips. Accordingly he went to the place where she lived, and they were seen together, and she was afterwards found with her throat cut in three places. The prisoner came up and assisted to carry her to the house, repeatedly stating that he had done it, and should be hanged for it. He said also, 'Poor Bessie! you should not have proved false to me.' He told her grandfather, who asked what was amiss, 'It is your granddaughter Betsy, murdered. She has deceived me, and the woman that deceives me must die.' The prisoner behaved throughout with apparent indifference, and, on the arrival of the police, said that he wished to give himself up for murdering the young lady; and added, 'I am far happier now I have done it than I was before, and I trust she is.' Evidence was given that there had been insanity in the family, and Dr. Winslow stated that he had seen the prisoner. 'I talked to him largely on the subject of the crime, and I am of opinion that at the present moment he is a man of deranged intellect. He told me he did not recognise he had committed any crime at all, neither did he feel any degree of pain, regret, contrition, or remorse for what he had done. I endeavoured to impress on his mind the serious nature of the crime he had committed. He repudiated the idea of its being a crime either against God or man, and attempted to justify the act, alleging that he considered Miss Goodwin as his own property; that she had been illegally wrested from him by an act of violence; that he viewed her in the light of his wife, who had committed an act of adultery; and that he had as perfect a right to deal with her life as he had with any other description of property—as the money in his pocket, &c. I endeavoured to prove to him the gross absurdity of his statement and the enormity of his offence: he replied, 'Nothing short of a miracle can alter my opinions.' The expression that Miss Goodwin was his pro-

perly, was frequently repeated. He killed her, he said, to recover property which had been stolen from him. I could not disturb this, as I thought, very insane idea. I said, "Suppose anyone robbed you of a picture, what course would you take to recover it?" He said he would demand its restitution, and, if it were not granted, he would take the person's life without compunction. I remarked that he had no right to take the law into his own hands; he should have recourse to legal measures to obtain restitution. He replied that he recognized the right of no man to sit in judgment upon him; he was a free agent; and as he did not bring himself into the world by any action of his own, he had perfect liberty to think and act as he pleased, irrespective of anyone else. I regard these expressions as evidence of a diseased intellect. He said he had been for some weeks under the influence of a conspiracy; there were six conspirators plotting against him, with a view to destroy him, with a chief conspirator at their head. This conspiracy was still going on while he was in prison, and he had no doubt that, if he were at liberty, they would continue their operations against him, and in order to escape their evil purposes he would have to leave the country. He became much excited, and assumed a wild demoniacal aspect. I am satisfied that aspect was not simulated.' On cross-examination he said, 'I have no doubt he knows that these opinions of his are contrary to those generally entertained, and that, if acted upon, they would subject him to punishment. I should think that he would know that killing a person was contrary to law, and wrong in that sense. I should think, from his saying he should be hanged, that he knew he had done wrong. His moral sense was more vitiated than I ever found that of any other human being. His opinions were pretty much those of atheists, but he was beyond atheism. He seemed incapable of reasoning correctly on any moral subject. He denied the existence of a God and of a future world. He said it was a matter of perfect indifference whether he was dead or alive.' Martin, B., told the jury, 'What the law meant by an insane man was, a man who acted under delusions, and supposed a state of things to exist which did not exist, and acted thereupon. A man who did so was under a delusion, and a person so labouring was insane. In one species of insanity the patient lost his mind altogether, and had nothing but instinct left. Such a person would destroy his fellow-creatures, as a tiger did his prey, by instinct only. A man in that state had no mind at all, and therefore was not criminally responsible. The law, however, went farther than that. If a man labouring under a delusion did something of which he did not know the real character—something of the effect and consequences of which he was ignorant—he was not responsible. An ordinary instance of such delusion was where a man fancied himself a king, and treated all around him as his subjects. If such a man were to kill another under the supposition that he was exercising his prerogative as a king, and that he was called upon to execute the other as a criminal, he would not be responsible. The result was, that if the jury believed that at the time the act was committed the prisoner was labouring under a delusion, and believed that he was doing an act that was not wrong, or of which he did not know the consequences, he would be excused. If, on the other hand, he well knew that his act would take away life—that that act was contrary to the law of God, and punishable by the law of the land—he was guilty of murder. In his opinion the law was best laid down by Le Blanc, J., in *Bowler's case* [*supra*], who told the jury that it was for them to determine whether the prisoner, when he committed the offence, was incapable of distinguishing right from wrong, or under the influence of any illusion which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the act he was capable of distinguishing



right from wrong, and not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to justice.' After noticing other cases, Martin, B., told the jury that 'they must judge of the act by the prisoner's statements and by what he did at the time. Unless they were satisfied—and it was for the prisoner to make it out—that he did not know the consequences of his act, or that it was against the law of God and man, and would subject him to punishment, he was guilty of murder. The prisoner's letters appeared to be as sensible letters as ever he had read. Again, the reason the prisoner gave for his act was, "She should not have proved false to me." Now, if his real motive was that he conceived himself to have been illused, and either from jealousy of the man who was preferred to him, or from a desire of revenge upon her, committed the act, that would be murder. Those were the very passions which the law required men to control; and if the deed was done under the influence of those passions, there was no doubt it was murder. The prisoner's expression, that he should be hanged for it, indicated that he knew the consequences of his act. Another reason he gave for what he had done was, "The woman who deceives me must die." If a young lady promised to marry a man, and then changed her mind, it might be truly said that she deceived him; but what would be the consequences to society if men were to say every woman who treated them in that way should die, and were to carry out those views by cutting their throats? The prisoner claimed to exercise the same power over a wife as he could lawfully exercise over a chattel; but that was not a delusion, nor like a delusion. It was the conclusion of a man, who had arrived at results different from those generally arrived at, and contrary to the laws of God and man; but it was not a delusion.' . . . 'It had been said by one of the witnesses that the prisoner did not know the difference between good and evil. If that was a test of insanity, many men were tried who did not know that difference. In truth, it was no test at all. The idea of a conspiracy was a delusion, but the mere setting himself up against the law of God and man was not a delusion at all. The question for the jury was, was the prisoner insane, and did he do the act under a delusion, believing it to be other than it was? If he knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he was guilty of murder.' *Reg. v. Townley*, 3 F. & F. 839.

Page 27. Add to note (d) S. P. Reg. v. Burton, 3 F. & F. 772.

Page 28. Note (g), read 1 Cox, C. C. 94.

Page 43. On an indictment for larceny it appeared that the prisoner was a servant of the prosecutor, and that he was seen to bring a box out of the house of his master on the 28th of July, and that on the night of that day the prisoner and the prosecutor's wife occupied the same bedroom at Bath, and that in that room a police constable found them together, and charged the prisoner with stealing spoons and a watch of the prosecutor. He said, 'I've not stolen anything; what I have taken away is with her consent' (nodding to the wife). She said, 'Yes; I told him to get a fly, and take the boxes.' The constable pointed out a box, and said, that is the prosecutor's. She said, 'Yes, that is the only thing which I have got of his.' The constable took the watch from the prisoner's person. The constable examined a box which the prisoner admitted to be his, and found on the top several articles of female apparel, and under these some silver spoons and sugar tongs of the prosecutor. The prisoner said, 'I did not know the silver was there; the watch is Mrs. F.'s; I got it from her.' The wife proved that she ordered the prisoner to get a fly and take away the boxes, and that the prisoner was not there when she was packing. He did not know of her



putting in the spoons or sugar tongs. It was objected that the charge against the prisoner could not be maintained, as he was acting under the control of his mistress, and that she could not be legally charged with stealing from her husband; the jury were directed that, if the prisoner and the wife went away with the intention of carrying on an adulterous intercourse, and if he, when so going away, was concerned in taking away the property of the prosecutor, he was guilty; and, on a case reserved upon the point so raised, Erle, C. J., after argument for the prisoner, said, 'Upon these facts the taking of the box *animo adulterii* was evidence of larceny. The prisoner took his master's property, and with it his master's wife, with the intention of committing adultery. The conviction must therefore be affirmed.' *Reg. v. Mutters*, 10 Cox, C. C. 50.

See the Year Book, 13 Ed. 4, p. 9, pl. 5, as to statutes binding aliens. Page 48.

Note (v), for 2 M. C. K. read 2 M. C. C. R. Page 71.

A person who has voluntarily taken upon himself the care of a lunatic brother in his own private house is a person 'having the care and charge' of a lunatic within the 16 & 17 Vict. c. 96, s. 9, and is indictable for ill-treating him. *Reg. v. Porter*, L. & C. 394. Page 83.

The Criminal Lunatic Asylum Act, 23 & 24 Vict. c. 75, s. 13, enacts, that 'any superintendent, officer, nurse, attendant, servant, or other person employed in any asylum for criminal lunatics, who strikes, wounds, ill-treats, or wilfully neglects any person confined therein, shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, and, on conviction under the indictment, to fine or imprisonment, with or without hard labour, or to both fine and imprisonment at the discretion of the court, or to forfeit for every such offence, on summary conviction thereof before two justices, any sum not exceeding twenty pounds nor less than two pounds.'

The prisoner was indicted for attempting to commit a certain felony, that is to say, he did put one of his hands into the pocket of a certain woman whose name was unknown, with intent the property of the said woman in the said pocket then being to steal, &c. It was proved that the prisoner put his hand into the pocket of a lady, who said that she had lost nothing, but she did not appear as a witness. It was contended that to put a hand into an empty pocket was not an attempt to commit a felony; and, on a case reserved, Cockburn, C. J., after argument, said, 'We are of opinion that this conviction cannot be supported, and in so holding it is necessary to observe that, from the case submitted to us, the question of whether there was anything in the pocket of the woman which might have been the subject of larceny, if the prisoner had not been interrupted, does not appear to have been left to the jury. The question we are asked seems to be whether an attempt at larceny can be committed by a person putting his hand into another's pocket for the purpose of committing a larceny, there being at the time nothing in the pocket. Now, we are far from saying that if the question, whether there was anything in the pocket, had been laid before the jury, there was not evidence upon which they might have found in the affirmative; but that question not having been put, we are of opinion that, assuming the fact to be that there was nothing in the pocket of the woman, the offence could not be committed. The question might have been submitted to the jury, and they might have found that there was something in the woman's pocket, but, that not having been done, the conviction cannot be sustained.' *Reg. v. Collins*, L. & C. 471. During the argument Crompton, J., said, 'It is important to notice how the indictment is framed. The prisoners are charged with putting their hands into the pocket "with intent the property of the said woman in the said gown pocket then being from the person of the said woman to steal."

As the putting a hand into a pocket with intent to steal is clearly an act accompanied by a criminal intent, though there be nothing in the pocket, it is a common law misdemeanor, and a count should in cases of this kind be framed to meet this view of the case.'

Page 92. In note (f), after Higgs add 10 C. B. (N. S.) 713.

Page 94. The 26 & 27 Vict. c. 74, s. 1, enables the Queen to declare gold coins issued from Her Majesty's Branch Mint at Sydney, New South Wales, a legal tender for payments within the United Kingdom.

Page 133. The prisoner was indicted on the 24 & 25 Vict. c. 99, s. 13, for uttering a medal resembling in size, figure, and colour a half sovereign. The medal was made of metal, and was of the same diameter as a half sovereign, and somewhat similar in colour. On the obverse there was the head of the Queen, similar to that on a half sovereign; but the legend was entirely different from that on the half sovereign, being 'Victoria, Queen of Great Britain,' instead of 'Victoria Dei Gratia.' The medal was guerled, but the guerling was round and not square. The medal was of less value than a half sovereign. It was objected that 'figure' in the indictment meant the impression on the medal, and that such impression must be similar to the impression on the genuine coin for which it was uttered, and that there was no evidence that the medal resembled the half sovereign in size, figure, and colour. It was answered that 'figure' meant the general shape and outline of the medal, and that there was evidence for the jury; and the jury having convicted, it was held, on a case reserved, that there was some evidence that the medal, in size, figure, and colour, resembled a half sovereign. *Reg. v. Robinson*, 12 Law T. 501. 10 Cox, C. C. 107.

Page 136. Where the defendants were indicted under the 59 Geo. 3, c. 69, for engaging and procuring at Liverpool men to enlist as sailors in the Confederate service; and it appeared that the men had been induced by the defendants to sign articles at Liverpool to serve in the Japan on a voyage to China, and they embarked on board her, and she sailed to the British Channel, and anchored off Brest, and the next day a captain of the Confederate navy enlisted the men in that service; Cockburn, C. J., held that the question was, whether the defendants procured the sailors to embark at Liverpool for the purpose of their being employed in the service of the Confederate States. If they procured the sailors to embark on board the Japan and sail to a foreign country, to be there enlisted in the Confederate service, they were guilty, and it was sufficient if that was the intention of the defendants, although the men themselves did not go with that intention. *Reg. v. Jones*, 4 F. & F. 25.

An indictment on the 59 Geo. 3, c. 69, contained counts for causing, &c., men to enlist in the Confederate service as sailors, &c., and for counselling men here to enlist in that service abroad, and for assisting the equipment of a vessel for that service. An old iron steam gunboat dismantled of all her guns and warlike equipments, and stripped of her armour-plates, masts, spars, and sails, and with only her engines and boilers in her, was sold by the government to a firm, who bought her with a view to her being engaged in the Confederate service. Leave was obtained from the Admiralty to have the vessel docked and repaired at Sheerness, and the defendant, who was one of the dockyard officials, had rendered every assistance. There were no warlike equipments done, but mere repairs or fittings as a mercantile vessel. The defendant had held himself out as engaging men on board the vessel for a trial trip previously to her going on a voyage to China, and had engaged men, or sent them on board to be engaged, as stokers, firemen, or engineers; but none of the men had any other idea than that the vessel was destined for China. The vessel went to Calais, and there the Confederate flag was hoisted, and officers came on board and took the

command of her as a Confederate vessel, and the men were invited to enlist in the Confederate service, but most of them declined. The defendant was on board whilst the Confederate flag was flying in company with the officers, and when he came back to Sheerness he continued to interest himself in sending men over for the service of the vessel, though only in connection with the locomotive power. The jury were directed—1st. That the main question was, whether the defendant was a party to the engagement of the men with a view to enlistment in the Confederate service. 2nd. That the acts of the defendant after he must have been aware of the destination of the vessel, though not the subject-matter of the indictment, might be taken into consideration as throwing light upon the intention with which he did the acts in the earlier part of the transaction, which were the subject-matter of the indictment. 3. That the trifling repairs done to the engines, &c., did not amount to an equipment. 4. That if the defendant procured the men to enter into engagements nominally for a trial trip, but with the ulterior purpose on his part of getting them into a position in which they might be induced to enlist in the Confederate service, the defendant was guilty; but if his object in engaging the men was simply that the vessel should go out on a trial trip and come back, he was not guilty. 5. That the term ‘sailors’ in the statute included persons engaged as stokers, firemen, and engineers, for the purpose of navigating the vessel. 6. That there must be a hiring or enlistment in the United Kingdom to bring the case within the statute. 7. That such an offence must have been committed in England, or the offence of counselling its commission was not proved. *Reg. v. Rumble*, 4 F. & F. 175.

The building in pursuance of a contract, with intention to sell and deliver to a belligerent power the hull of a vessel suitable for war, but unarmed and not equipped, furnished, or fitted out with anything which enables her to cruise or commit hostilities, or do any warlike act whatever, is not a violation of the 59 Geo. 3, c. 69. The equipment forbidden by that Act is an equipment of such warlike character as enables a ship on leaving a port of this kingdom to cruise or commit hostilities. Per Pollock, C.B., and Bramwell, B. If the character of equipment is doubtful, it may be explained by evidence of the intent of the parties. Per Channell, B. The Act includes a case where the equipment is such that, although the ship when it leaves a port in this kingdom is not in a condition at once to commit hostilities, is yet capable of being used for war, and the intent is clear that it is to be used for war. Per Channell, B. Any act of equipping, furnishing, or fitting out done to the hull or vessel, of whatever nature or character that act may be, if done with the prohibited intent, is within the statute. Per Pigott, B. On the trial of an information respecting the seizure of a vessel in a port at Liverpool for an alleged violation of the Act for equipping her for the service of a belligerent state, Bramwell, B., was of opinion that a right direction would be, that if the jury were satisfied that the parties concerned were equipping, or arming, or attempting so to do, the ship claimed, with intent that it should be employed in the service of a foreign power to cruise or commit hostilities against others as alleged, they should find for the Crown; but such equipment or attempted equipment must be of a warlike character, so that by means of it she is in a condition more or less effective to cruise or commit hostilities; otherwise find for the claimants. Channell, B., was of opinion that the questions left to the jury should have been—1. Was there an intent, on the part of anyone having a controlling power over the vessel, that she should be employed in the service of the Confederate States, to cruise or commit hostilities against the United States? 2. If so, was she equipped, fitted out, or furnished in a British port in order to be employed to cruise, &c.? 3. If not equipped, was there any attempt to equip her in a British port



in order that she should be so employed? 4. Or did anyone knowingly assist, &c., in such equipment in a British port? Pigott, B. The jury should have been directed to see—1, whether the equippers or the purchasers had the prohibited intent; and, 2, whether with such intent they had done any act towards equipping, furnishing, or fitting out the ship, beyond the mere work of building the hull of the vessel, or had attempted to do so. *Attorney-General v. Sillem*, 2 H. & C. 431.

Page 156. The 26 & 27 Vict. c. 125 repeals the 27 Hen. 8, c. 4.

Page 162. The prisoner was convicted of manslaughter committed on board the Gustav Adolph on the high seas, at a point about five days' sail from Pernambuco, and about 200 miles from the nearest land; the ship was built at Kiel, in the duchy of Holstein, and sailed thence to London, and thence on the voyage in which the offence was committed. All the officers and crew were foreigners; the prisoner was the second mate, and the deceased the master. The ship was sailing under the English flag when the offence was committed. The crew were told before sailing that Mr. Rehder was sole owner. He was not born an Englishman. A certified copy of the register of the Gustav Adolph under the 17 & 18 Vict. c. 104 was put in, and admitted as *prima facie* evidence that the ship was a British ship. Certain letters were put in, which, it was urged, showed a partnership between Rehder and Ehlers, and it was urged that under the 17 & 18 Vict. c. 104, ss. 18, 38, and 103, the owner of a beneficial interest in a British ship must be qualified in the same way as the owner of a legal interest; that, even admitting that the registration of the ship in the name of Rehder was *prima facie* evidence that he was owner, it could be no evidence of Ehler's qualification, and therefore the letters proving Ehler's interest in the ship rebutted the *prima facie* evidence that she was a British ship. And, on a case reserved, it was held that there was *prima facie* evidence that she was a British ship; as there was evidence of a certificate of registry in London, wherein Rehder was described as the owner at that time resident in London, and the ship was sailing under the British flag; but that the *prima facie* proof was rebutted by the proof that Rehder was alien born; and that there was no presumption that letters of denization or naturalisation had been granted to him, by reason that he, being alien born, would have become liable to penalties under the Act for registering the ship as belonging to a British owner. *Reg. v. Bjornsen*, 12 Law T. 473. 10 Cox, C. C. 74.

Page 181. Note (w), after Palmer read 1 M. & Rob.

Page 215. The 26 & 27 Vict. c. 125, repeals the last two sections of the 5 & 6 Edw. 6, c. 16, that is, secs. 6, 7—and therefore the passage from the words in the third line from the bottom of the page, 'and further,' to the end of the paragraph, is repealed.

Page 255. In the blank in note (f) insert Flight v.

Page 258. An agreement to be carried into effect in this country, which would be void on the ground of champerty if made here, is not the less void because it is made in a foreign country, where such a contract would be legal. Where, therefore, an attorney entered into an agreement in France with a French subject to sue for a debt due to the latter from a person residing here, whereby the attorney was to receive by way of recompense a moiety of the amount recovered; it was held that this agreement was void for champerty. *Grell v. Levy*, 16 C. B. (N.S.) 73. If any act were done under such an agreement in England, the party doing it would be indictable here. *Rev v. Brisac*, 4 East, R. 163.

Page 262. The 26 & 27 Vict. c. 125 repeals the 1 Rich. 2, c. 9.

Page 270. On an indictment for bigamy a witness proved the first marriage to

have taken place eleven years ago, and that the parties lived together some years, but could not say how long—it might be four years. Wightman, J., after referring to the 24 & 25 Vict. c. 100, s. 57, and the proviso, said, ‘How is it possible for any man to prove a negative? The prisoner cannot do that.’ ‘It seems to me that there is no evidence to take the case out of the statute. There is no evidence that the prisoner and his wife lived together within the seven years, or that he knew that she was alive.’ *Reg. v. Heaton*, 3 F. & F. 819.

Upon an indictment for bigamy it was proved that the first marriage was performed in an Independent chapel by a Wesleyan methodist minister, in the presence of the registrar of the district and two witnesses, and a certificate of the marriage was produced, and it was held that there was sufficient proof of the marriage without proving that the chapel had been duly registered. *Reg. v. Cradock*, 3 F. & F. 837, Willes, J., and Pollock, C.B. Page 307.

So where in an action for goods sold there was a plea of coverture, and the defendant stated that she was married to J. Lambert in 1844, at a Roman Catholic chapel in George Street, Portman Square; that she and Lambert were both Roman Catholics, and were married by a priest in the way in which Roman Catholic marriages are ordinarily celebrated, and that they lived together for some years, and she produced a certificate of the marriage from the priest who performed the ceremony, and a certificate showing that the civil contract of marriage had been performed before the French Consul; but there was no proof that the person who performed the ceremony was a priest, or that the chapel was a place licensed for marriages, or that the registrar was present at the time; the Court of Common Pleas held that it might be presumed that the chapel was licensed and the registrar present, as well because the 6 & 7 Will. 4, c. 85, s. 39, declares, any person who wilfully solemnises a marriage in any other place than a registered building or in the absence of the registrar, guilty of felony, as because the ordinary rule *omnia præsumuntur ritè esse acta* ought to prevail in such a case. *Sichel v. Lambert*, 15 C. B. (N. S.) 781.

*Reg. v. Orgill* was much doubted by Lord Wensleydale in *Yelverton v. Yelverton* in the House of Lords. Page 314.

As to privileged communications, see *Whiteley v. Adams*, 15 C. B. (N. S.) 392, *Fryer v. Kimmersley*, *ibid.* 422, and *Force v. Warren*, *ibid.* 806. Page 347.

See *Campbell v. Spottiswoode*, 3 B. & S. 769, as to a libel in the *Saturday Review*. Page 350.

The prisoner was indicted in various counts for publishing, or threatening to publish, or to abstain from publishing, a certain matter, or a false and scandalous libel with intent to extort money from one W. Gee, and in other counts for publishing a certain false and scandalous libel; every count set out *in hæc verba* the words published. One of the publications was, ‘W. Gee, Solicitor, Bishop Stortford. To be sold by auction, if not previously disposed of by private contract, a debt of the above, amounting to £3,197, due upon partnership and mortgage transactions.’ The other was similar, but stated the amount to be £3,900. Bramwell, B., was of opinion that these publications were not libellous, as each was a mere offer on the face of it to sell an alleged debt, which it did not necessarily imply an inability to pay, and did not, on the evidence, appear to be false. But he left the case to the jury, telling them what the law in his opinion was, and leaving them to apply it. Bramwell, B., also held that, assuming the intent to extort money were proved, it was not necessary that the matter threatened to be published should be libellous, as the 6 & 7 Vict. c. 96, s. 3, has the words Page 374.

'any matter.' On the evidence, Bramwell, B., was of opinion that there was no intent to extort money, but only to extort accounts. *Reg. v. Coghlan*, 4 F. & F. 316.

Page 435. As to private nuisances, see *Hodgkinson v. Ennor*, 4 B. & S. 229; *Tipping v. St. Helen's Smelting Company*, 4 B. & S. 608; *Roberts v. Yardley*, 3 H. & C. 162; *Bamford v. Turnley*, 3 B. & S. 62.

Page 438. An indictment alleged that the defendant near divers public highways and dwelling-houses did work certain quarries of stone, and did unlawfully send, throw, and discharge divers large pieces of rock and stones into and upon the said dwelling-houses, and in and upon the said highways, whereby the dwelling-houses were injured and the inhabitants put in fear and danger, and the highways were rendered unsafe for passengers, &c. Evidence was given of stones having fallen into two houses, and also of stones having fallen in the public highway, one of which hit a horse drawing a cart on the highway; and that these stones had been thrown from the prisoner's quarry by blasting the rock; and there was evidence that powder had been used in too large quantities. The jury were directed that, if they were of opinion that in working the quarry stones were thrown out upon the houses and roads, and that the use of the houses or the traffic of the roads was rendered unsafe to such a degree that persons inhabiting the houses or using the roads, of ordinary courage, might reasonably apprehend injury or danger, that was a nuisance, and that, if the defendant had committed the act by which the stones were thrown upon the houses and road, they might find him guilty; and they were directed to find whether, in the manner of working the quarry, the defendant had been guilty of negligence. The jury found the defendant guilty, and that he had worked the quarry negligently; and, on a case reserved on the question whether, upon the facts proved, the defendant was properly convicted on this indictment, the conviction was affirmed, as there was abundant evidence for the jury. *Reg. v. Mutters*, 10 Cox, C. C. 6. The summing up was too favourable for the defendant; for people have a right to travel on a public road without any impediment whatever; and in such a case it was perfectly immaterial whether the defendant had acted negligently or not, as no man can justify a nuisance on the ground that he acted without negligence. See *Scott v. Frith*, 4 F. & F. 349, an action for a nuisance caused by a rolling mill fitted up with steam hammers.

Page 448. See *Doggett v. Catterns*, 17 C. B. (N. S.) 669, as to the meaning of 'other place' in 16 & 17 Vict. c. 119, s. 1; and see the same case in error where the decision of the C. P. was reversed, 12 Law T. 355.

Page 449. To note (x) add S. C. L. & C. 263.

On an indictment for keeping a bawdy-house, it appeared that the house was inhabited entirely by women, who lived by prostitution openly carried on, and whose conduct was often riotous and grossly indecent, so as to be a scandal to the neighbourhood. The defendant owned the house, but occupied no part of it, did not keep the key, and had no right of entry. The apartments were let to weekly tenants, who occupied separately, under distinct takings, each lodger having her own room, her own key, and a door opening into the street, or into a passage communicating with the street. The defendant had nothing whatever to do with the management of the house (if indeed a house thus divided into separate holdings can be said to be managed as a house), or of any part of it. He received no share of the earnings of the women, nor did he derive any benefit therefrom, except so far as he may be said to have done so incidentally, from their ability to pay their rent being thereby increased. He had no control over the tenants, except such as might arise indirectly from his power as landlord to determine the tenancy



from one week to another. He only went to the house to collect the weekly rent from the different lodgers, or, when being pressed by the complaints of the neighbours (as sometimes happened), to endeavour to prevail on the inmates to be more orderly in their behaviour. But it was abundantly clear that he knew the use to which the apartments were applied by the several lodgers, and that he let the apartments with a full knowledge that they would be applied to the purpose of prostitution, and with a perfect assent on his part to their being so applied. Upon a case reserved upon the question whether, under the circumstances, the defendant could be considered as having 'kept' the house in the legal sense of that term, it was held that he could not. The house was not kept by him. He had no power to admit any one whom he desired to enter the house, or to exclude any one whom he wished not to enter. In fact, he was not the keeper of the house. *Reg. v. Stannard*, L. & C. 349. With all deference to the learned judges, it may well be doubted whether this decision, as well as *Reg. v. Barrett*, be not erroneous. The contract in each case was clearly illegal, as it is plain that the letting was for the purposes of prostitution. *Crisp v. Churchill*, 1 Selw. N. P. 68, 7th edit. *Girarday v. Richardson*, 1 Esp. N. P. C. 13, Lord Kenyon, C. J. That being so, the defendant was in point of law the occupier of the house, and the residents in the house merely his agents or servants in carrying on the purposes in question. But even if they were the occupiers, they were guilty of the offence, and the part he took would have made him an accessory before the fact, if the offence were felony, and it made him a principal, as it was only a misdemeanor, and he might have been convicted on an indictment charging him with keeping the house. See my note, p. 128 of Vol. I. Besides, the law is clear that, if a man lets a house with a nuisance upon it, he is indictable, and *à fortiori* if he lets a house for the very purpose that a nuisance may be created by its use. See *infra* at p. 454.

On an indictment for indecent exposure, it appeared that the prisoner, while several female servants of a club-house were going to bed, exposed himself on the roof of a house exactly opposite the window of the room where the females were. On the following night the prisoner again exposed himself in a most indecent manner, remaining on the roof about ten minutes. The head waiter and a policeman were sent for, both of whom saw the exposure, making, with five females, seven persons before whom on this occasion the exposure took place. The house out of which the prisoner came, as well as the club, were situate in public streets, but his acts could not be seen by persons passing along the streets, but they could be seen from the back windows of houses in these streets. Upon a case reserved, it was held that there was an abundant publicity in this case. *Reg. v. Thallman*, L. & C. 326. Page 449.

Where an indictment for indecent exposure alleged the offence to have been committed on a certain public and common highway, it was held, on a case reserved in Ireland, that evidence that it was committed on a piece of land near the highway did not support the indictment. And a count having been amended so as to state the offence to have been committed 'on a place in view of a public highway,' and there being no evidence that any one could have seen the prisoner except one female, it was held that no offence was proved; for an exposure seen by one person only, and being capable of being seen by one person only, is not an offence at common law; but if the prisoner had been seen by one person only, and there had been evidence that others might have seen him, the case would have been different. *Reg. v. Farrell*, 9 Cox, C. C. 446. No opinion was expressed as to the propriety of the amendment.

An indictment charged the prisoner with having, in a house situate in a public street, exposed divers filthy, offensive, and disgusting pictures Page 451.

in the windows of the house, in such a position as to attract the attention of persons passing along the street. The defendant was a herbalist, and had exhibited in his shop-window in the High Street at Chatham two large coloured pictures of the size of life, each of them representing the half length of a man naked to the waist, and one of them covered with sores. There was no indecency, but the effect was disgusting to the last degree. The other represented a cure. He had done this to exhibit the effect of a medicine he vended. Willes, J., held that there was no doubt that the exhibition of the picture in a highway was a nuisance. *Reg. v. Grey*, 4 F. & F. 73.

Page 453. As to lotteries within the 42 Geo. 3, c. 119, s. 2, see *Morris v. Blackman*, 2 H. & C. 912.

Page 454. Where a dangerous grating had existed over the area of a house for five years, and the rent for it had been paid quarterly, but there was no further evidence of the terms of the holding; it was held that the landlord was liable for an accident caused by the state of the grating, on the ground that his permitting the tenant to remain in occupation year after year, without taking steps for the termination of the tenancy, is equivalent to a new letting at the end of each year. *Gandy v. Jubber*, 5 B. & S. 78. Error is pending on this judgment, and, as it did not appear that the defendant had any knowledge of the nuisance, the decision seems very questionable.

Page 460. A custom for the freeman and citizens of a town on a particular day in the year to enter upon a close for the purpose of holding horse-races thereon, is a good custom. *Mounsey v. Ismay*, 1 H. & C. 729.

There are many towns in which the market-places are large, and the public have clearly the right of passing backwards and forwards over each and every part of them; and it should seem that an indictment alleging a right in the public to pass and repass in, over, and across each and every part of such a place would be valid.

Page 461. The public have only a right to use the land over which a public road passes for the purpose of passage, and therefore a person cannot justify using a highway for the purpose of racing upon it. *Sowerby v. Wadsworth*, 3 F. & F. 734.

To note (z) add *Smith v. Howden*, 14 C. B. (N. S.) 398. *Reg. v. The Strand Board of Works*, 4 B. & S. 526.

Page 470. To note (o) add See *Robbins v. Jones*, 15 C. B. (N. S.) 221, fully adopting *Fisher v. Prowse*.

Page 478. Note (s) S. C. as *Wright v. Frant*, 4 B. & S. 118.

Page 486. The mere fact that a part of a public highway has been used for twenty years by an innkeeper for the standing of the vehicles of his guests is no answer to a complaint for obstructing a 'highway' under the 5 & 6 Will. 4, c. 50, s. 72. If the innkeeper could have made out an immemorial right, it might be that the highway might have been dedicated subject to that right; but there was no proof that the highway was dedicated after this usage began. *Gerring v. Barfield*, 16 C. B. (N. S.) 597.

Page 489. If an excavation be made so near a highway as to cause danger to the public using the way, it is no defence to the party who made it that other parties were under a legal obligation created by statute to fence the highway, and that they had neglected to do so. *Wettor v. Dunk*, 4 F. & F. 298.

To note (o) add 9 Cox, C. C. 137, 174.

To note (g) add S. C. 2, E. & E. 651.

Page 496. See *Reg. v. Dukinfield*, 4 B. & S. 158, as to the steps necessary to be

taken under the 5 & 6 Will. 4, c. 50, s. 23, and the Public Health Act, 11 & 12 Vict. c. 63, s. 70, to render a road repairable by a parish.

See *Freeman v. Reed*, 4 B. & S. 174, as to the evidence of the separate liability of a township to repair its highways. Page 501.

The 95th section of the 5 & 6 Will. 4, c. 50, is in force still in South Wales, notwithstanding the 23 & 24 Vict. c. 68. *Reg. v. James*, 3 B. & S. 901. Page 509.

On the hearing of a summons under secs. 94, 95, the surveyor denied that the road was a highway, and said that consequently he denied the liability of the parish to repair it. The justices proceeded to hear evidence as to the road being a highway, but another justice came in, and the discussion was renewed before him. The justices made the order without hearing further evidence. The Court of Queen's Bench made a rule absolute to bring up the order in order that it might be quashed. In any view of the statute the justices were not justified in making the order; either the road must be admitted to be a highway, or there must be evidence to satisfy them that the road is a highway. *Reg. v. Askerton*, 11 Law T. 706. This case must not be taken as deciding that the justices have jurisdiction to try whether the road be a highway. See *Reg. v. Chedworth* and other cases, p. 526 of Vol. I., which were not cited, and show that the true construction of sec. 95 is that it only applies where the road is confessedly a highway, but there is a dispute as to the party liable to repair it.

On an indictment for continuing a nuisance upon a highway, the judgment on an indictment for the same nuisance, which was the erection of a wall, is conclusive evidence, and no evidence to the contrary is admissible. *Reg. v. Maybury*, 4 F. & F. 90. Martin, B., on the authority of *Reg. v. Haughton*, 1 E. & B. 501. Page 520.

To the end of note (s) add S. C. 2 E. & E. 613. Page 523.

Where an order was made to indict a 'highway called Quaker Lane,' and the indictment contained counts alleging it to be a way for carriages, and others a pack and prime way, and the jury found it was not a way for carriages, and the defendants admitted it was a pack and prime way; the Court of Queen's Bench held that the prosecutor was not entitled to costs; for the defendants really only denied that it was a highway for carriages. *Reg. v. Cleckheaton*, 11 Law T. 305. Page 526.

To note (l) add See also *Reg. v. Buckland*, 12 Law T. 380, that the same law prevails under the 25 & 26 Vict. c. 61, s. 19.

Add to note (p) S. C. 3 B. & S. 313.

Where the defendants plead guilty to an indictment for the non-repair of a highway, there is no power to grant costs under the 5 & 6 Will. 4, c. 50, s. 98, on the ground that the defence was frivolous or vexatious. *Reg. v. Denton*, 10 Cox, C. C. 61. Page 527.

The township of Wareham was included in a highway district under the 25 & 26 Vict. c. 61, and Heath having caused an obstruction in a street in the township, the Highway Board, at the instance of the waywarden of Wareham, indicted Heath for the same, who removed the indictment by certiorari, and was convicted, and paid the costs, but there were extra costs, which the Highway Board charged on Wareham, and it was held that the Highway Board were justified in incurring these costs to remove an obstruction in the highway, and that they were properly chargeable against the township; and per Cockburn, C. J., Crompton, J., and Blackburn, J., the same would have been the case under the 5 & 6 Will. 4, c. 50. *Reg. v. Heath*, 12 Law T. 492. Page 529.

Both the person who erects, and the person who keeps erected, on the shore of a navigable river between high and low water mark, a work for the more convenient use of his wharf adjoining, which work, either from Page 537.



its original defective construction, or from want of repair, presents a dangerous obstruction to the navigation, is guilty of a nuisance. *White v. Phillips*, 15 C. B. (N. S.) 245.

Page 551.

The justices in Quarter Sessions have a discretionary power under the 43 Geo. 3, c. 59, s. 2, to order a bridge to be widened, and are not bound to make such an order even if the bridge be narrow and incommensurable; and it seems that a presentment of the fact should first be made under the proviso in that section. *In re Newport Bridge*, 2 E. & E. 377.

Page 591.

When any person is convicted of 'any escape or rescue from lawful custody on a criminal charge,' the court may by the 14 & 15 Vict. c. 100, s. 29, sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment. See Appendix of Statutes, p. x.

Page 606.

See the preceding addendum.

By the 23 & 24 Vict. c. 75, s. 12, 'any person who rescues any person ordered to be conveyed to any asylum for criminal lunatics during the time of his conveyance thereto or of his confinement therein, and any officer or servant in any asylum for criminal lunatics who through wilful neglect or connivance permits any person confined therein to escape therefrom, or secretes, or abets or connives at the escape of any such person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for the term of five (27 & 28 Vict. c. 47) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, at the discretion of the court; and any such officer or servant who carelessly allows any such person to escape as aforesaid shall, on summary conviction before two justices of such offence, forfeit any sum not exceeding twenty pounds nor less than two pounds.'

Page 641.

An action lies against the owner of a dog, who, knowing the animal to have a propensity for destroying game, permits it to be at large, and the dog in consequence 'breaks and enters' the plaintiff's wood, and chases and destroys young pheasants, which had been hatched under hens, and when about eight weeks old had been removed into the wood, together with the coops and hens; the hens being kept in the coops, and the pheasants allowed to run in and out at pleasure, and the property damaged being game, is no answer to the action, because the law recognises in the proprietor of land a qualified right to game whilst it is upon the land. *Read v. Edwards*, 17 C. B. (N. S.) 245.

The defendant was convicted of having by night unlawfully entered certain open land, the property of Lord Sidmouth, with a net, for the purpose of taking game. The land in question had a hedge on either side of it, and a metalled road running through it; while between the road on both sides and the hedge is waste land varying in extent. The fields on each side belong to Lord Sidmouth, who is lord of the manor. The waste land, except where there are patches of grass, is covered with brambles and furze as high as five feet, and there is no sign of any traffic in or use of the said waste land. The net was found across the road, and fastened to one hedge, and reaching not quite to the hedge on the other side, the defendant standing between the end of the net and the hedge. Where the net was set, there was nine feet of waste on one side and three feet of waste on the other side of the road, which itself was eleven feet wide. At another point there were eighteen feet of waste on one side and twelve feet on the other side of the road, and at 403 feet distant from the net there were sixty-four feet waste on one side and eight feet on the other side. An accomplice of the defendant had been seen on the waste 163 feet from the net, and he ran along the waste land to the place where the net was set. The Court of Queen's

Bench held that this land was not open land within the 9 Geo. 4, c. 69, s. 1. *Reg. v. Harris*, 12 Law T. 303. This case seems to have been argued in anything rather than a satisfactory manner, and the decision can only be supported on the ground that the 7 & 8 Vict. c. 29, had the effect of taking such land out of the 9 Geo. 4, c. 69. The 7 & 8 Vict. c. 29 was a gross legislative blunder. If a road pass over land, no one has any right whatever to use that land for any other purpose than for the purpose of passing over it, and if he do use it for any other purpose, he is a trespasser just as much as if he had gone on a field where there was no road at all. In truth, as to every act done on land over which a road passes other than for the purpose of using it as a road, the land is in point of law just exactly in the same position as if the road did not exist. If in this case an action of trespass had been brought by Lord Sidmouth against the defendant for entering this land, and he had pleaded that he had entered to use the road, which is the only justification he could have set up, he would have been answered by alleging that he entered the land for other purposes, and by proving that he endeavoured to take game on the land. This proves that the defendant unlawfully entered. Then the words 'open or enclosed' in the 9 Geo. 4, c. 69, s. 1, are plainly used, not for the purpose of limiting the generality of the words 'any land,' but to prevent any doubt as to unenclosed land being within the clause. See the 57 Geo. 3, c. 90, in note (v), p. 659 of Vol. I.; and the case being clearly within the 9 Geo. 4, c. 69, s. 1, the manifest blunders of the 7 & 8 Vict. c. 29 ought not to have led to this decision. That Act recites that the provisions of the 9 Geo. 4, c. 69, 'have of late years been evaded and defeated, by the destruction, by armed persons at night, of game or rabbits, not upon open or enclosed lands, as described in the said Act, but upon public roads and highways, and other roads and paths leading through such lands, and also at the gates, outlets, and openings between such lands and roads, highways, and paths.' Now the first remark is that it exhibits gross ignorance of law to suppose that a person killing game on a highway that runs through an enclosed field is not within that Act; but it is still more absurd to suppose that any one killing game on a road other than a highway, i. e. on a private road, is not within that Act, and yet such is the recital of that Act. It adds but little to the absurdity of this Act that, being passed with the clear intention of extending the whole of the 9 Geo. 4, c. 69 to the places mentioned in it, it only extends it to the cases where game or rabbits are actually taken or destroyed, and does not include the cases where everything is done to take or destroy game or rabbits, but none is taken or destroyed; and this leads to the very remarkable absurdity that the Act does not hit the very case at which it was undoubtedly aimed, viz. the offence within sec. 9 of the 9 Geo. 4, c. 69, which makes three 'persons entering for the purpose of taking game,' &c., guilty of a misdemeanor; for it only extends the penalties imposed by the 9 Geo. 4, c. 69 upon persons 'taking or destroying' game—not upon persons entering for the purpose of taking or destroying game—to persons 'taking or destroying any game or rabbits' in the places mentioned in the 7 & 8 Vict. c. 29. In truth, that Act only empowers justices summarily to convict under sec. 1 of the 9 Geo. 4, c. 69, in cases where game or rabbits are actually taken or destroyed. A more thoroughly blundering piece of legislation cannot be found. It was clearly wholly unnecessary, as the 9 Geo. 4, c. 69, when properly construed, extends to every case, and the proper course is to treat the latter Act as wholly superfluous.

To note (g), after 834 add 13 C. B. (N.S.) 844, affirmed in error in Exch. Ch., and afterwards in the House of Lords, 12 Law T. 615. Page 641.

For 7 & 8 Vict. c. 39 read c. 29.

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If a constable sees game or rabbits upon a person, it is not necessary Page 644.



that there should be a search to authorize a proceeding under the 25 & 26 Vict. c. 114, s. 2, for it cannot be intended that if a man is seen coming out of a plantation with game or rabbits in his possession it should be necessary to go through the process of searching him. *Hall v. Knox*, 4 B. & S. 515.

On an indictment against two prisoners for unlawfully wounding a policeman, with intent to resist their lawful apprehension, it appeared that the policeman saw a horse and cart between one and two o'clock in the night approaching L. One man was leading the horse, and seven or eight more were in the cart. Suspecting that they had been in pursuit of game, the policeman laid hold of the horse's rein, and asked them their names and business. The men in the cart called out to the man who was leading the horse to pull out his stick and knock the policeman down. The man pulled out his stick, and put himself in a fighting attitude. The policeman drew his staff, and said, 'You are poachers; I shall search the cart.' The men tried to prevent him looking into the cart, and a scuffle ensued, in which the policeman was knocked down by a blow from behind, which struck out one of his eyes. The two prisoners were afterwards apprehended, as they were driving the cart into L.; they were then alone, and the cart contained nothing but a wooden peg, a pocket-knife, and dog-collar. Martin, B., held that the 25 & 26 Vict. c. 114 does not authorize the policeman to apprehend the persons whom he suspects of having been unlawfully in search of game; and therefore there was no intent in the prisoners to resist their lawful apprehension; and that the prisoners could only be found guilty of unlawfully wounding if the policeman was authorized to search the cart; and that it was not shown that the policeman had any cause of suspicion whatever. That it was not shown that either of the prisoners struck the blow, and there was no such common intent as would render the prisoners liable for the act of the man who did strike the blow. The only common intent proved was that of resisting the unlawful search, which, so far as appeared, the prisoners had a right to do. The man who struck the blow was alone guilty of the excess, and the prisoners must be acquitted. *Reg. v. Spencer*, 3 F. & F. 854. It deserves consideration whether the existence of a common intent is not in all cases a question for the jury, and whether in this case there was not abundant evidence in the declaration, 'Pull out your stick and knock him down,' and in the other facts, of a common purpose to inflict unnecessary violence.

On another indictment against the same prisoners for assaulting the policeman in the execution of his duty, in addition to the facts proved on the previous trial, it was proved that a Mr. Franks had sent word to the policeman, a few hours before the cart was stopped, that eight men, a cart and horse, and two dogs, were going from Leicester in the direction of a village three or four miles distant, and it was proposed to give evidence that the prisoners were habitual poachers, for the purpose of showing what was passing in the policeman's mind; but Martin, B., held that such evidence could not be given, and that the other evidence did not show sufficient cause of suspicion. Good cause to suspect means a reasonable ground of suspicion, upon which a reasonable man may act. It was obvious that eight men might reasonably go out of a town, with a horse and cart and two dogs, for a multitude of purposes besides that of unlawfully taking game; and the policeman had, from those circumstances alone, no more cause to suspect them of having committed the latter offence than of committing almost any other offence known to the law. There was no good cause of suspicion in these circumstances, and therefore the policeman was not in the execution of his duty. *Reg. v. Spencer*, 3 F. & F. 857. The decision that evidence is not admissible in such a case of the prisoners being habitual poachers, deserves reconsideration. The common law has always taken notice of habitual misconduct, and it has even been held that an indictment charging a man



that he, being of bad fame and dishonest conversation, *fruit nocte vagans* is good; for this is to be intended *communis nocte vagans*. *Willow's case*, Latch 173, and see note (o), p. 809 of Vol. I. No one can doubt that habitual conduct necessarily leads any reasonable mind to form a conclusion; and to exclude evidence of what must operate on the mind, is to exclude evidence of what may have been the chief cause of an action.

Note (s), after *Mayhew v. Wardley* add 14 C. B. (N.S.) 550.

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Where two persons drove along a highway in a trap, and one got out and entered a field with a gun and dog, and shot a hare, and then returned to the trap and gave the hare to the other in the trap, which had remained where the one had got out of it; it was held that the one who remained in the trap might be convicted of aiding and abetting the other in committing a trespass in pursuit of game in the daytime, against the 1 & 2 Will. 4, c. 32, s. 30. *Stacey v. Whitehurst*, 18 C. B. (N.S.) 344.

Where a person standing on land where he had a right to shoot shot a pheasant on the ground in an adjoining close, and then entered that close and picked up the dead pheasant, the Court of Common Pleas held that he was guilty of a trespass in pursuit of game, as the shooting the bird and going on the land to pick it up was one continuous transaction. *Osbond v. Meadows*, 12 C. B. (N.S.) 10.

But the preceding case was doubted in a case where the defendant, being on his own land, shot a pheasant, which rose on that land and fell dead on the land of another person, and the defendant went and fetched the bird, taking his dog and gun with him; and the Court of Queen's Bench held that the defendant was not guilty of a trespass in search of game against the 1 & 2 Will. 4, c. 32, s. 30; for that section only applies to living game. *Kenyon v. Hart*, 11 Law T. 733.

At the end of note (t) add S. C. 3 B. & S. 787.

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Parker and Smith were indicted for night poaching on the 26th of January, 1861, and a warrant dated the 5th of February, 1861, was proved to be under the hand of a magistrate, and this warrant recited that information had that day been given of the offence, but no information was given in evidence. Smith was apprehended under this warrant on the 27th November, 1862, and Parker on the 14th January, 1864; and, upon a case reserved, it was held that, in order to show that the prosecution was commenced in due time, the information ought to have been given in evidence. *Reg. v. Parker*, L. & C. 459. This case was only argued for the prisoners, and the decision is unsatisfactory. It was objected that it was not alleged in the warrant that the information was in writing, as required by sec. 8 of the 11 & 12 Vict. c. 42. It did not therefore appear that any legal information was ever laid. The answer is, that the form given by the statute for a warrant does not recite that the information was in writing, and as the warrant did recite an information, it was sufficient. See *Haylock v. Sparke*, 1 E. & B. 471. At all events, the warrant was evidence that the prosecution was pending at its date; under that warrant the prisoners had been apprehended, examined, and committed, and any objection as to the information was far too late at the trial.

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On an indictment for murder it appeared that the deceased died of a wound inflicted in her chest with a knife; there was no evidence of any dispute; the prisoner asserted that she had killed herself, and this was his defence. The jury found the prisoner guilty, 'but we believe it was done without premeditation.' Byles, J., refused to receive this verdict, and told the jury that 'to reduce the crime to manslaughter, it must be shown that there was provocation at the time, and provocation of a serious nature. The prosecutor is not bound to prove that the homicide was committed from malice

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prepenſe. If the homicide be proved, the law preſumes malice ; and although that may be rebutted by evidence, no ſuch attempt has been made here. The defence is that the woman took her own life. The queſtion for you is, did the priſoner take his wife's life or not? If he did, it was murder.' *Reg. v. Maloney*, 9 Cox, C. C. 6.

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The law is undisputed that if a perſon, having the care and cuſtody of another who is helpless, neglects to ſupply him with the neceſſaries of life, and thereby cauſes or accelerates his death, it is a criminal offence. But the law is alſo clear that if a perſon, having the exerciſe of free-will, chooſes to ſtay in a ſervice where bad food and lodging are provided, and death is thereby cauſed, the maſter is not criminally liable. Per Erle, C. J. Where, therefore, a ſervant maid of very weak intellect was kept on very inſufficient food, and ſlept in a damp room, and died in conſequence thereof; but it appeared that ſhe was not confined to the houſe, and might have left it if ſhe choſe; it was held that the miſtreſs was not guilty of manſlaughter. *Reg. v. Smith*, 12 Law T. 608. The facts of this caſe are voluminous, and would clearly have ſupported an indictment on the 24 & 25 Vict. c. 100, ſ. 26, p. 1015 of Vol. I. But that clause was not adverted to in the caſe; and yet it ſeems very well worthy of conſideration whether, where death reſults from the commiſſion of an offence within that ſection, the caſe is not one of manſlaughter. See Vol. I. p. 851. It is difficult alſo to ſee how the ſervant's remaining can affect the legal quality of the priſoner's acts, and render thoſe acts which are an indictable offence innocent as regards the death. The utmoſt effect that can reaſonably be given to the ſervant's remaining is to make her a partaker in cauſing her own death; but that is clearly no defence to the miſtreſs. Suppoſe the death had been from beating, the caſe would clearly have been manſlaughter, and yet the ſervant might have gone away and avoided the beating.

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On an indictment for manſlaughter it appeared that the deceased, a child about eight years old, was killed by a kick from the priſoner's horſe, which had been in his poſſeſſion about four years, and was a very vicious and dangerous animal, and had kicked and injured ſeveral perſons, and ſome of theſe inſtances had been brought to the priſoner's knowledge, and he otherwiſe knew of the propenſities of the horſe. There is a large common at C. where the ratepayers are accuſtomed to paſture their horſes, and through it there are defined public paths a yard wide or more. Two of them converge near a bridge over the river, and from the point where they meet form a broad path to the river, but the boundaries of this path are ill-defined. The paths are open to the reſt of the common. The public have a right to uſe theſe paths, but it was not proved that they had a right to traverse the other parts of the common, although they often did traverse it. The priſoner claimed a right as a ratepayer to turn out his horſes to paſture on this common, and this right was not diſputed. The deceased with ſome other children was on the common, and when on or very near the broad path, the vicious horſe of the priſoner, which had been turned on looſe by him, kicked at the deceased, ſtruck her on the head, and killed her. It was a queſtion whether the deceased was on the path at the time ſhe was kicked. The queſtion was left to the jury whether the death of the child was cauſed, by the culpable negligence of the priſoner, and they were told that they might find culpable negligence if the evidence ſatisfied them that the horſe was ſo vicious and accuſtomed to kick mankind as to be dangerous, and that the priſoner knew that it was ſo, and with that knowledge turned it out looſe on the common, through which there were to his knowledge open paths on which the public had a right to paſs. The jury found the priſoner guilty of having cauſed the death by his culpable negligence, but that the evidence did not ſatisfy them one

way or the other whether the child at the time she was kicked was on the path or beyond it. Upon a case reserved, after argument for the prisoner, Erle, C. J., said, 'I am of opinion that this conviction should be affirmed. The prisoner turned upon a common where there was a public footway a very dangerous animal, knowing what its propensities were, and it is found by the jury that the prisoner was guilty of culpable negligence in so doing, and that the death of the child was caused by the culpable negligence of the prisoner. That under ordinary circumstances would be sufficient to sustain a conviction for manslaughter; but the point contended for the prisoner is, that the child was not on the path at the time when she was kicked, and her death caused thereby; and the jury were unable to say whether she was on the footway or beyond at the time. For the purpose of the judgment I assume that the child was not on the footway, but very near it. In point of reason I think that the prisoner ought to be held responsible in this case, and that it is not a ground of acquittal that the child had strayed off the pathway.' (After citing *Barnes v. Ward*, 9 C. B. 414.) 'The principle of that case extends to a case like this, where a child walking on a public highway accidentally deviated into the neighbouring land, and met with her death from the kick of a vicious horse close to the public way.' . . . 'The public take a highway on the terms on which it is granted to them by the grantor, and, as between them and the grantor, must use the way subject to its risks; but the public are entitled to use the way without being subject to dangers like that in the present case. It was injurious to persons using the pathway in question to turn on the common a vicious animal of this kind. The judgment is confined to the fact of the child being near to the path at the time, and that, having accidentally strayed from the pathway, but being very near to it, her death was caused by the culpable negligence of the prisoner. I do not wish to sanction the notion that, because a person may not be civilly liable for an act of negligence, he is therefore not criminally liable. It is not necessary to discuss that proposition now; however, I do not accede to it.' *Reg. v. Dant*, 10 Cox, C. C. 102. L. & C. 567.

The prisoner was indicted for manslaughter, and was a herb doctor, and had found the deceased ill of a cold from standing in a market, and volunteered to prescribe for her, and put into a small bottle of pale brandy about an ounce of meadow saffron seeds, known medically as colchicum seeds, first bruising them, and directing the deceased's daughter to place the bottle before the fire for two hours, and then shake it up and give her mother a tablespoonful. The daughter gave her mother a tablespoonful on Monday, and she became ill and sick shortly after, and continued at short intervals vomiting and retching till she died exhausted on Wednesday. She died from gastritis, or inflammation of the stomach, which the medical men attributed to the over-dose of colchicum seeds. Two grains of colchicum seeds, in the form of tincture, was a dose; a teaspoonful of the mixture would contain eighteen grains, and a tablespoonful contained eighty grains. This was a highly poisonous and fatal dose. The heart of the deceased showed slight symptoms of fatty degeneration, and the administering colchicum to a person so diseased was malpractice, as it tended to depress and weaken the heart's action, and render it less able to keep up the circulation. Willes, J., 'Every person who dealt with the health of others was dealing with their lives, and every person who so dealt was bound to use reasonable care, and not to be grossly ignorant. Gross negligence might be of two kinds: in one sense, where a man, for instance, went hunting and neglected his patient, who died in consequence. Another sort of gross negligence consisted in rashness, where a person was not sufficiently skilled in dealing with dangerous medicines, which should be carefully used, of the properties of which he was ignorant, or how to administer a proper dose. A

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person who with ignorant rashness, and without skill in his profession, used such a dangerous medicine, acted with gross negligence. It was not, however, every slip that a man might make that rendered him liable to a criminal investigation. It must be a substantial thing. If a man knew that he was using medicines beyond his knowledge, and was meddling with things above his reach, that was culpable rashness. Negligence might consist in using medicines in the use of which care was required, and of the properties of which the person using them was ignorant. A person who so took a leap in the dark in the administration of medicines was guilty of gross negligence. If a man was wounded, and another applied to his wound something which was of a dangerous nature and ought not to be applied, and which led to fatal results, then the person who applied this remedy would be answerable, and not the person who inflicted the wound, because a new cause had supervened. But if the person who dressed the wound applied a proper remedy, then, if a fatal result ensued, he who inflicted the wound remained liable. He left it to the jury to say whether the deceased had died from natural causes, or from the supervening cause of the medicine prescribed for her by the prisoner, he being an irregular and apparently unskilled practitioner. If from the latter cause, had the prisoner prescribed this medicine, which was the cause of death, rashly in the sense he had explained?' *Reg. v. Markuss*, 4 F. & F. 356.

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Lee and Costen were indicted for the murder of S. J. Hill. Hill was at a public-house where the prisoners were, and showed some money, and left to go home; the prisoners followed him. Lee first came up to Hill and pushed him through a hedge, so that he fell down a bank five feet high. Lee jumped down after him, and tried to rob him, but he resisted, and Lee called out to Costen to come and help him; Costen then went and helped to force the purse out of Hill's hand. It was not clearly proved what was the precise degree of violence used, as Hill said that he was so shaken with his fall that he hardly knew; but they both used some violence to force the money from him. Pollock, C. B., told the jury 'that if two or more persons go out to commit a felony, with intent that personal violence shall be used in its committal, and such violence is used and causes death, then they are all guilty of murder, even although death was not intended.' . . . 'It is for you to consider whether there was any such joint design here, or, if not, whether Costen was party to such violence as tended in this case to cause death. If not you must acquit him, and I think there is no such evidence.' *Reg. v. Lee*, 4 F. & F. 63.

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On a trial for murder it appeared that a dispute had arisen between the deceased and Turner, who called the deceased a liar. The deceased then struck Turner, on which Staple took off his coat to fight, but the police prevented it, and the deceased left to go home; after a few minutes Turner and Staple followed him, and the police went after them, and just before they came up they heard a cry 'Get up,' and on coming up found the deceased lying on the road, one of the prisoners having hold of his head, the other of his feet. The deceased died the next day. The death was caused by an injury in the orbit of the eye, which had fractured the frontal bone, and which might have been caused by a blow from a blunt instrument or a kick from a heavy iron-shod boot, such as the prisoners wore. It was urged that as it was not proved which prisoner inflicted the blow, and there was no evidence of a common design to inflict felonious violence, or to do more than commit an assault, neither prisoner could be convicted even of manslaughter. *Reg. v. Luck*, 3 F. & F. 483. Channell, B., agreed with the law laid down in that case, and held that on a charge of murder there must be evidence of a common design to kill or inflict murderous violence; but

on a charge of manslaughter, if several were proved to have been parties to an unlawful act of violence, they are all guilty. *Reg. v. Turner*, 4 F. & F. 339.

The word 'indictment' in the 24 & 25 Vict. c. 100, s. 6, has been since held to include a coroner's inquisition. *Reg. v. Ingham*, 10 Law T. 456, B. R. 9 Cox, C. C. 508. Page 766.

Where on an indictment for endeavouring to conceal the birth of a child the evidence went to show that the woman had been delivered in the fourth or fifth month of her pregnancy, and that the fœtus was about the length of a man's finger, but had the shape of a child, and it was objected, on the authority of *Reg. v. Berriman*, 6 Cox, C. C. 388, that this fœtus was not within the statute; Martin, B., overruled the objection, stating that he saw nothing in the statute to limit the word 'child' to a child likely to live, but that as soon as the fœtus had the outward appearance of a child it was sufficient. *Reg. v. Colner*, 9 Cox, C. C. 506. Page 779.

Where on an indictment for endeavouring to conceal the birth of her child it was proved that, the prisoner appearing ill, her mistress sent for a doctor, who asked the prisoner if she had been confined, and she said she had been; and the doctor asked her what she had done with the child, and she said it was in a box in her bedroom, and he went to the room and found the child in an open box, having the cover lifted; Byles, J., told the jury that 'there must be a secret disposition for the purpose of concealing the birth. The concealment must be by a secret disposition of the body, and a disposition could only be secret by placing it where it was not likely to be found. Secrecy was the essence of the offence. Could they say that an open box in the prisoner's bedroom was a secret disposition? It was for them to say, but in his opinion it was not.' *Reg. v. Sleep*, 9 Cox, C. C. 559.

Major-General Hutchinson was commandant of the forces at the garrison of Plymouth. A target was placed in the Sound, under the general directions of the Horse Guards, and the artillerymen were accustomed to practise by firing at it with ball. One day while such practice was proceeding a ball missed the target, and, striking the waves, ricocheted and hit a boatman, who was taking a boat across the Sound in the lawful and proper exercise of his vocation, and in a place where he might lawfully be. Byles, J., after stating that the depositions were extremely long and vague, so that he hardly knew in what shape the charge would be presented, is said to have told the grand jury that 'manslaughter was when one man was killed by the culpable negligence of another. A slight act of negligence was not sufficient—all men and women were negligent at some time; it would depend on the degree of negligence. A slight deviation from proper care and skill was not sufficient. By way of illustration: suppose a man were to fire a gun in a field where he saw no one, and as he fired another man suddenly raised his head from a ditch; he could not say that that man would be guilty of manslaughter; it would be held not to be culpable negligence. [It is clear this would be no negligence at all. The case as put is of a man lawfully shooting in a lawful place, where he had no reason to suppose any other person was.] But supposing a man were to fire down the High Street of Exeter because he saw no one, and some one was suddenly to appear, and he was killed, that would be culpable negligence in the man who fired the gun. It would seem, and the results showed it, that the boat was within the range of fire; but that was no defence. If the man had not been killed, and had brought an action for damages, or if his wife and family had brought an action, if he had in any degree contributed to the result an action could not be maintained. But

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in a criminal case it was different. The Queen was the prosecutor, and could be guilty of no negligence; and if both the parties were negligent, the survivor was guilty; and therefore it was no defence that the boat was within danger. He could only speculate upon the negligence imputed in this case. First, he did not know that it would be said that it was an improper place whether to fire from or to fire over. The gun was fired from one of the batteries kept on purpose for practice. It was said that this battery was too low; but that was not the point of defence. Therefore, subject to their better judgment, nothing could be imputed to the defendant as to the place whence the gun was fired. Then as to the place over which it was fired. Had the defendant the selection of it? Then in using the place, although an improper one, was he obeying military orders? If so, he would not be guilty. [With all deference, this seems to be an error. The commission of a felony can never be excused by the order of any superior, except in cases where the circumstances are such as to warrant the act that is done, as in case of rebellion, &c. In other cases the law acknowledges no distinction between the soldier and the private individual. See the charge of Tindal, C. J., p. 402 of Vol. I. note (g). And the command of the master is no defence to the servant. See *Reg. v. James*, 8 C. & P. 131, Vol. II. p. 1020. If the Horse Guards gave an order to practise at a particular place, that order would only justify practising in a careful and proper manner.] Common danger did not make the place improper. He was a man performing a most important duty. Supposing, therefore, that the defendant had been personally engaged in the firing: if he thought that the place from which the gun was fired was not improper, and that the place to which the firing was directed was not improper, assisted by additional precautions, which might be used, he would not be responsible, because acting under the direction of superior authority. It seemed that complaints had been made by a great many persons residing in Plymouth and Devonport, and he must beg their attention to the orders the defendant had given. The major-general would impress upon the officers in command to see with the utmost diligence that the range was free before the firing. Then there was a second order. The major-general impresses upon the officers the necessity of seeing that all was free, as he should hold them personally responsible. He had hitherto presumed that the defendant had personally to do with the firing; and, if he had, he would not be guilty of manslaughter. But the next question was, did he personally superintend the firing or did he not? They would see whether he did or not. Was he guilty of a breach of duty in not personally superintending the firing? He could not see that he was. Again, it might be said, that if he issued orders it was his duty to see that proper persons were appointed to keep a proper look-out; and if proper persons were nominated by him, it did not appear whether they were properly disciplined, and it might be a question whether there was any negligence in them. There were persons with flags, but whether a proper look-out was kept might possibly be doubtful; whether means were taken for keeping a proper look-out they would have to determine. Under these circumstances it would be for them to say whether negligence was brought home to the defendant? *Reg. v. Hutchinson*, 9 Cox, C. C. 555. This report is manifestly imperfect, and, as counsel are never present when the grand jury are charged, cannot be the report of any barrister. The editor has inserted the parts between brackets.

On an indictment for manslaughter against an engine-driver and fireman of a railway, it appeared that by the general rules of the company the fireman was always to follow the directions of the engine-driver, but both of them had the duty of looking out, the engine-driver being directed to attend to and act upon signals, the fireman obeying



his directions. There was a regular system of signals, in which a red flag by day showed that the train must stop instantly. On Ascot race day special instructions were issued, which materially differed from the regular rules, and by them the red signal did not mean, as it usually did, 'Stop,' but only 'Danger,' and that meant that the engine should proceed with caution. The rules prohibited engines from running tender foremost; but there was no turn-table at Ascot, and the engines consequently returned with their tenders foremost. The return trains were started at irregular intervals of about five minutes by the station-master and traffic manager at Ascot. One of them stopped at Egham, and about five minutes afterwards another was started from Ascot. The prisoners, who had charge of it, did not know that the preceding train would stop at Egham; the stoppage delayed it two or three minutes; when the prisoners' train passed the two stations before Egham the signal was red. There was contradictory evidence as to the pace their train went; but, after passing the auxiliary signal before reaching Egham, the speed was slackened. The prisoners' train, not having to stop at Egham, went right through the station; a minute or two afterwards the engineer saw the preceding train, and tried to stop his train, but they did not succeed in stopping the train before it ran into the other train, and caused the death of several persons. Willes, J., held that in a criminal prosecution an inferior officer must be held justified in obeying the directions of a superior not obviously improper or contrary to law; that is, if an inferior officer acted honestly upon what he might not unreasonably deem to be the effect of the orders of his superior, he would not be guilty of culpable negligence, these orders not appearing to him, at the time, to be improper or contrary to law. It appeared that the prisoners had nothing to do with the general management or regulation of the traffic, and their duty was to obey the special instructions issued to them as well as they could, presuming there was no apparent illegality in them; and in that case, provided they put the best construction they could upon them, and acted honestly in the belief that they were carrying them out, they were not criminally responsible for the result. In a civil case they might be responsible, but not criminally. As to the fireman, as he was bound to follow the direction of the engineman, there was no case. The jury then interposed, and said that they were all of opinion that there was no case of culpable negligence against either of the prisoners. Willes, J., said he was quite of the same opinion, and thought that the prisoners ought not to be convicted on a criminal charge. They had instructions of an unusual kind, and were doing their best at the time to prevent an accident; that is, they were trying to put on the break so near to the time when, according to any view, they could be expected to have done so, that they can hardly be deemed guilty of culpable negligence. They only saw a red signal, and that, according to their special instructions, did not mean 'Stop.' There was no symptom of danger; they did not know that the other train had stopped at Egham, and they had no instructions to do so; and so they went right on, although a minute afterwards they did their best to stop the train. The arrangement was such as could not but cause imminent danger of the second train running into the first, which had passed only five or six minutes before, and had stopped three minutes at Egham. He therefore concurred in the verdict. In the course of the case, Willes, J., also held that a witness could not be asked to give an explanation as to his construction of the effect of the rules. The rules were in writing, and must speak for themselves, and the judge must declare their meaning. The special rules, if not consistent with the general rules, must override them, but their construction was for the judge. And that an officer of the Board of Trade could not be asked his opinion on the mode of conducting the traffic (which rather affected the company than the prisoners), nor whether in his judgment, as a man of experience, the

driver of the engine ought to be convicted of negligence, nor (it seems) whether, in his opinion, the driver had kept a sufficient look-out ahead; but that he might be asked whether, supposing the train was going about forty miles an hour, it could have been stopped. *Reg. v. Trainer*, 4 F. & F. 105.

Page 899.

In order to bring a case within the 24 & 25 Vict. c. 100, s. 59, it is not necessary that the intention of using the noxious substance should exist in the mind of any other person than the person supplying it. The prisoner was indicted for supplying savin, knowing that it was intended to be unlawfully used to procure a miscarriage, and it was contended that there was no case against him, because it was necessary that he should know that the savin was intended to be used with intent to procure the miscarriage, whereas it was not intended, except by the prisoner himself, to be so used; the jury found that the case was in other respects proved, but that the prosecutrix did not intend to take the savin, nor did any other person, except the prisoner, intend that she should take it; but, upon a case reserved, it was held that the intention of any other person than the prisoner was not necessary to the commission of the offence. The statute is directed against the supplying of any substance with the intention that it shall be employed in procuring abortion. The prisoner, in this case, supplied the substance, and intended that it should be employed to procure abortion. He knew of his own intention that it should be so employed, and is therefore within the words of the statute. He is also within the mischief of the statute, and was rightly convicted. *Reg. v. Hillman*, L. & C. 343.

Page 901.

The thing supplied with intent to procure abortion must be noxious in its nature. Where, therefore, an indictment charged the prisoner with supplying a certain noxious thing with intent to procure abortion, and a surgeon proved that the liquid was some vegetable decoction of a harmless character, and such as would not procure a miscarriage; but if taken with the belief that it would produce it, it might, by acting on the imagination, produce that effect; it was held that this liquid was not within the clause, although the woman proved that, after taking a wine-glassful, she felt dizzy in the head when she went to bed, and felt stupid in the head the next morning. *Reg. v. Isaacs*, L. & C. 220.

Page 934.

Where the jury convicted the defendant on a count, which alleged that he unlawfully and indecently did make an assault upon a girl, who appeared to be between ten and twelve years of age at the time, and the jury found that the girl consented to the acts with which the defendant was charged; it was held, on a case reserved, that the conviction could not be supported, as the having connection with a girl of that age was not an offence at common law; and *Reg. v. Martin*, &c., were considered as binding authorities. *Reg. v. Johnson*, 10 Cox, C. C. 114. L. & C. 632.

Page 955.

An indictment charged that F. Burrell fraudulently allured, took away, and detained Jane Burrell out of the possession of her mother and W. S. Hyder, he then having the lawful care and charge of her, she being under the age of twenty-one years, and having a present legal interest in real estates, with intent to marry, &c., and H. R. Burrell was charged with feloniously aiding, &c., to commit the felony. The prisoners were paternal uncles of Jane Burrell, who was sixteen years old, and entitled to real estates of the value of 50*l.* a year. Her mother had first married the brother of the prisoners, and after his death she had married W. S. Hyder. Jane lived with her mother and stepfather till she went to school in January, 1862, where she remained till August, 1862, when she returned to her mother's, and in October she went to another school, whence she returned to her mother's on December 20, in the afternoon; she stayed half an hour, and then left the house alone.

About nine o'clock that evening she returned, and stayed till ten, when she again left without her mother's knowledge or consent. She returned the next morning, and stayed with her mother about two hours, and then went away without her mother knowing whither. In fact, she went to the house of her uncle, H. R. Burrell, and she continued there till January 19, 1863. She continued to pay visits to her mother for an hour or two nearly every day till the 19th of January. In the interval between her coming home from the first and her going to the second school, it had been arranged, at her own desire, in consequence of her not living happily with her stepfather and mother, that she should live with her mother's mother and brother. When she came back for the Christmas holidays, she wished to remain with her mother, but the latter insisted on her abiding by her own choice to go to her grandmother's for the holidays, and would not consent to her staying with her at her stepfather's house. On this she went to the house of H. R. Burrell. Her mother, as soon as she discovered that her daughter was there, desired her to come to her house, and refused to let her have her clothes unless she did so. On the 19th of January F. Burrell and Jane Burrell left together by railway, and were married the next day at Plumstead. These occurrences took place under such circumstances as fully warranted the jury in finding that Jane Burrell was allured and taken away by F. Burrell, with intent to marry her, and that H. R. Burrell aided in the committing of this act. It was objected—1, that there was no evidence that F. Burrell had *fraudulently* allured away Jane Burrell; 2, that there was no evidence that she was taken out of the possession of her mother; 3, that the indictment charged that she was taken out of the possession of her mother and W. S. Hyder, he having then the lawful charge of her, and that it was necessary to prove that she was in his possession as thus alleged, as well as of her mother; but the only proof was that the guardianship of her person and copyhold estate had been granted to him when she was admitted as tenant of her copyhold estate. Upon a case reserved it was urged—1, that there was no fraudulent alluring away, and that the mere alluring away was not sufficient; 2, there was no evidence that she was taken out of the possession of her mother; 3, that the stepfather had not the lawful care of the girl; he had no general guardianship of her person. In *Ratcliff's case*, 3 Rep. 396, it was held that the consent of the stepfather was wholly immaterial; but here the indictment alleged the stepfather to have the lawful custody. [Pollock, C. B., 'We are all of opinion that the indictment would be supported by showing that the girl was taken out of the possession and against the will of the mother. The rest might be struck out as surplusage.'] For the Crown it was urged, 1, that in this case the statute did not require any evidence of fraud, but, if it did, there was sufficient evidence of fraud; 2, the girl was in the possession of the mother; she had never abandoned the possession, and the mere right of possession was sufficient. Pollock, C. B., 'The court is divided in opinion on the facts of the case. The opinion of the majority is that the facts do not bear out the prosecution, or, in other words, that the crime has not been established against the prisoners. There is no difference of opinion as to the law of the case.' *Reg. v. Burrell*, L. & C. 354.

On an indictment for taking A. Pollard, a girl under sixteen, out of the possession of her father, it appeared that the prisoner lived near them, and had known her a considerable time. Six months previously the father, hearing that the girl went to the prisoner's house, remonstrated with him for encouraging her to go there; the prisoner replied that he did not want girls for the purpose of intercourse, as he was old and under medical treatment. One Sunday she left her father's house to go, as she said, to the Sunday school, but did not return. In fact, she

Page 955.



went to the prisoner's house, and was found there a month afterwards. A youth proved that the prisoner had told him to bring that young girl if he could. He had told a policeman that he had the girl to do his work, as he had no servant. The girl stated that she had for two years been in the habit of going to his house occasionally, and that he had tried to persuade her to come and live with him, and had promised her a new dress if she came, and that when she came he promised to provide for her in his will, and persuaded her to sleep with him. Pollock, C. B., directed the jury that if they believed that the prisoner by promises or persuasion enticed the girl away from her father, and so got her out of his possession, and into his own, they should find him guilty, otherwise if she came without any such previous inducement or enticement. *Reg. v. Robb*, 4 F. & F. 59.

Page 969. The 32 Hen. 8, c. 16, s. 9, is repealed by the 26 & 27 Vict. c. 125. This repeal is extremely to be regretted, as no one can foresee how many points may be raised in consequence of it. There is no doubt that the clause was introduced to do away with questions which had previously arisen. See the Year Book, 13 Edw. 4, p. 9, pl. 5, as to some of such questions.

Page 973. An attempt to commit suicide is not an attempt to commit murder within the 24 & 25 Vict. c. 100, s. 15, and remains a common law misdemeanor triable at sessions. *Reg. v. Burgess*, L. & C. 258.

Page 1003. The prisoner was indicted for shooting at H. Lawton with intent to do him grievous bodily harm. The prisoner had been assaulted and annoyed by several persons, among whom was Lawton. These persons were standing together in a group of about fifteen, and the prisoner fired a pistol into the group, and Lawton received some severe shot wounds in the neck. The jury found that the prisoner did not aim at Lawton, or at anyone in particular, but that he fired into the group, intending generally to do grievous bodily harm, and so unlawfully wounded. Upon a case reserved it was held that he was rightly convicted of the felony. *Reg. v. Fretwell*, L. & C. 443.

Page 1035. Note (t), after Dutton add 3 B. & S. 821.

Page 1044. A constable has no authority to arrest, unless he reasonably believes that a breach of the peace will immediately take place; and if he endeavour to arrest and handcuff a person who is not about to commit a breach of the peace, such person and his companions may lawfully use so much violence as may be necessary to prevent such an illegal arrest; but if they used more violence than is necessary for that purpose, and thereby cause death, they are guilty of manslaughter. *Reg. v. Lockley*, 4 F. & F. 155.

Page 1057. See the 26 & 27 Vict. c. 112, 'An Act to regulate the Exercise of Powers under Special Acts for the Construction and Maintenance of Telegraphs,' for the general provisions as to such telegraphs.

## ADDENDA TO VOLUME II.

Where a prisoner has been acquitted on a trial for rape, he may nevertheless be convicted of an assault; for on the former trial he could only have been convicted of rape or of an attempt to commit it. *Reg. v. Dungey*, 4 F. & F. 99. Page 53.

The prisoner was indicted for stealing twenty-five pounds weight of copper from his masters, and acquitted; he was afterwards indicted for stealing a riddle and five shovels from his masters; there was no evidence in either case to show on what particular day or month either the copper, riddle, or shovels were stolen; and, on a case reserved, it was held that the acquittal on the first indictment was no bar to the second indictment. *Reg. v. Knight*, L. & C. 378.

Where an indictment has been removed by *certiorari*, and comes on for trial at Nisi Prius, a plea of *autrefois convict* cannot be pleaded at Nisi Prius. *Reg. v. Maybury*, 4 F. & F. 90. Martin, B. Page 61.

An indictment for attempting to steal goods in a dwelling-house described them simply as 'the goods and chattels of T. Roe;' and on a case reserved it was held good. Where an indictment charges an actual stealing, the goods must be specified; but where an attempt to steal only is charged, it is not necessary to specify the goods, for it cannot be said beforehand what the prisoner intended to steal. *Reg. v. Johnson*, 10 Cox, C. C. 13. L. & C. 489. Page 81.

Where on an indictment for robbery it appeared that the prosecutor owed the prisoner money, and had promised to pay him 5*l.*, and, being drinking at the prisoner's inn, the prisoner pressed him for payment, and, on refusal, induced him to go into a private room, and there, after repeating his demand for money, declared that he would have it, knocked him down, and tried to take it from him, and the prosecutor said if he would let him get up he would give him a cheque for 4*l.*, and did so. The prisoner, however, repeated his demand for money, declared he would have it, and knocked him down again, and his money dropped out of his pockets, but it was not known what became of it; Erle, C. J., said he thought the jury could hardly convict of a felonious robbery. The essence of the offence charged was the felonious intent, and that it was impossible to find on these facts. *Reg. v. Hemmings*, 4 F. & F. 50. Page 105.

Note (*j*), after Leach insert 287.

Page 109.

At the end of note (*i*) read p. 206.

Page 241.

On an indictment for larceny as a bailee it appeared that the prisoner borrowed a coat from the prosecutor, with whom he lodged, for a day, and returned it. Three days afterwards he took it without the prosecutor's permission, and was seen wearing it by him, and he again gave him permission to wear it for the day. Some few days afterwards he left the town, and was found wearing the coat on board a ship bound for Australia. Martin, B., stopped the case, stating that in his opinion there was no evidence of a conversion. There are many instances of conversion sufficient to maintain an action of trover, which would not be sufficient to support a conviction under this statute; the determination

of the bailment must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. As, for instance, in the case of a bailment of an article of silver for use, melting it would be evidence of conversion. So when money or a negotiable security is bailed to a person for safe keeping, if he spend the money or convert the security he is guilty of a conversion within this statute. The prosecution ought to find some definite time at which the offence was committed; the taking the coat on board ship was subsequent to the prisoner's going on board himself. *Reg. v. Jackson*, 9 Cox, C. C. 505. If this case is correctly reported, it deserves reconsideration. The words are 'take or convert the same to his own use, &c.' The clause therefore does not require a conversion, but was studiously framed to avoid the necessity of proving one. The evidence was sufficient to go to the jury that the prisoner took the coat on board for his own use with intent permanently to deprive the owner of it; and such a case seems clearly within the statute. Besides, the case ought to have been left to the jury to say whether he did not return the coat to the prosecutor's house after the end of the last bailment for a day. If so the case was simply one of larceny.

- Page 247. Where the prisoner was indicted for stealing sheep, and the prosecutor had delivered the sheep to the prisoner to keep, and he had afterwards sold them, and for some time concealed the sale; and the defence was that the prisoner had, or supposed he had, authority from the prosecutor to sell the sheep; Erle, C. J., told the jury that, 'if the prisoner sold the sheep without any authority and without any reason to suppose that he had authority to sell them, then he was guilty; otherwise, not so;' and left it to them to say whether he had any reason to suppose he had such authority. *Reg. v. Leppard*, 4 F. & F. 51.
- Page 249. Read Buckwell alias Bucknell, L. & C. 371.
- Page 280. Note, after Head insert *Reg. v. Cory*, 10 Cox, C. C. 23, S. P. Channell, B.
- Page 281. Where an indictment charged the stealing of 'ten fowls,' Pollock, C.B., doubted whether it was not bad for not stating them to be tame, and would have reserved the point if the prisoner had been convicted. *Reg. v. Lonsdale*, 4 F. & F. 56.
- Page 332. On the trial of an indictment for robbery at the Kent assizes, the offence appeared to have been committed in Surrey, at a distance of about 320 yards from the boundary of Kent and Surrey, as measured by a direct line, but at considerably more than 500 yards by the nearest road; and Parke, B., held that the distance must be measured in the direct line, and therefore the prisoner was triable in Kent. *Reg. v. Wood*, 5 Jurist, 225.
- Page 338. The prisoner was charged in one count with stealing a riddle on the 20th September, 1862, and in another with stealing five shovels on the 16th of January, 1863, the property of his masters. He had been in their employ some years; the riddle and shovels were found in his possession; the riddle in his back yard, one shovel in his coal-house, another in his garden covered with ashes, and three others in a distant pigsty of the prisoner's; and a witness proved that in the beginning of January the prisoner brought some tools to his yard where the pigsty was, and stated he had brought them to put at the top of the pigsty to be out of the way. The brand mark had been erased from some of the shovels, and the prisoner's initials substituted. The prosecutor's foreman stated that it was impossible to say when the articles were taken; but a witness had seen a riddle similar to the one in question on the prosecutor's premises in the summer of 1862. It was on the 21st January, 1863, that the riddle and shovels were found. It was objected that the riddle



not being proved to have been in the possession of the prosecutors for upwards of eighteen months, and the shovels for not less than eight months, there was no sufficiently recent possession by the prisoner proved; the objection was overruled, and, on a case reserved, it was held that it was rightly overruled. *Reg. v. Knight*, L. & C. 378. It is impossible to ascertain the correct dates in this report.

Recent possession of stolen property is evidence either that the person in possession stole the property, or that he received it knowing it to have been stolen. The prisoner had two sons, one aged eight, the other twelve, and his servant proved that in the week before Christmas his master and his sons went in a car to Sticklepath, and he went thither with them to open the gates. Another witness proved that she saw a flock of sheep driven through Sticklepath early in the morning, when it was bright moonlight, by two boys, and it was her impression that they were the prisoner's boys. Sticklepath is seventeen or eighteen miles from Exeter; the prosecutor's farm was twenty-two miles from Exeter, and the prisoner's farm was about a quarter of a mile from the prosecutor's. The servant of Smith, a cattle dealer, went on the 23rd of December to Little John's Cross Inn by his master's direction. This inn was a mile from Exeter; and seeing that no sheep had passed, he went half a mile on the road, and then met one of the prisoner's boys with twenty-one sheep, and returned with him and the sheep to the inn, where he saw the prisoner and his other boy. The sheep seemed weary with travelling, and it was about half-past eight when they were first met. The prisoner and the two boys went with the man to put the sheep in a field. The prisoner came to the inn at eight o'clock with his youngest boy in a car. He said he had sheep coming along the road, and he wished to stop them in the yard till he got keep for them. The cattle dealer proved that he had received a letter from the prisoner on the 22nd December, stating that he should have some sheep coming on, and that he would be early at Little John's Cross Inn, and that if the cattle dealer could not be there to deal for them, he was to send some person to show where to put the sheep in his field: and he accordingly sent his man, and in the evening, after a long bargaining, he bought the sheep of the prisoner. The sheep of the prosecutor were proved to have been among these sheep. The prisoner had said that he had bought a portion, or all of the sheep, but did not say from whom, or when. In his letter he said he had bought a small lot of sheep, and he would have them driven to Exeter on the 23rd. The jury found the prisoner guilty of receiving the sheep knowing them to have been stolen; it was then urged that there was no evidence to support that count, and that the jury ought to have been so directed; but, upon a case reserved upon the question whether, upon the whole case, the jury should have been directed that they could not lawfully find the prisoner guilty upon the second count, the conviction was affirmed. Pollock, C. B., 'If no other person is involved in the transaction, and the whole of the case against the prisoner is that he was found in possession of the stolen property, the evidence would no doubt point to a case of stealing rather than a case of receiving; but in every case, except indeed where the possession is so recent that it is impossible for any one else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it himself or received it from some one else. If there is no other evidence, the jury will probably consider, with reason, that the prisoner stole the property; but if there is other evidence, which is consistent either with his having stolen the property, or with his having received it from some one else, it will be for the jury to say which appears to them the more probable solution.' Byles, J., 'There are three ways in which the prisoner may have received these sheep with a guilty knowledge. First, the boys may have stolen them independently of their father, who may have received the sheep from them. Secondly, the father may have

sent the boys as innocent agents to receive the sheep from the actual thief, in which case the father would have been guilty of receiving as a principal, the boys being, as it were, merely the long arms with which he took the sheep. Thirdly, he may have sent the boys for the same purpose as guilty agents, in which case, although the boys would be the principals in the felony (of receiving), yet the father would be an accessory before the fact, and might be convicted as a principal.' Blackburn, J., 'When it has been shown that property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver, according to the circumstances. If he had been seen near the place where the property was kept before it was stolen, they may fairly infer that he was the thief. If other circumstances show that it is more probable that he was not the thief, the presumption would be that he was the receiver. The jury should not convict the prisoner of receiving unless they are satisfied that he is not the actual thief.' *Reg. v. Langmead*, L. & C. 427. A clearer case than this there never was: the sheep were proved to have been in the possession of the son on the road, and the prisoner received them at the inn, and there was abundant evidence of guilty knowledge, and it was perfectly immaterial whether the prisoner had previously stolen them; for a man may be a thief and a receiver as well. There was also evidence that he either stole, or was an accessory before the fact to the stealing, for the letter appointing the meeting with the cattle dealer proves the previous intention, and supports one or other of these views.

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The prisoner was indicted for stealing a cheque for 18*l.*, and also for forging an indorsement on it. Langley sent the prisoner's mistress a cheque for 18*l.* in a letter, and drawn to her order; she was then ill. Two days afterwards the prisoner cashed the cheque with an indorsement of her mistress's name on it, which her mistress's relations believed not to be hers. Two days afterwards the mistress died. Being asked whether she had received any letters for her mistress while she was ill, the prisoner said she had not. After cashing the cheque she had paid 14*l.* to a tradesman, to whom her mistress owed that sum, and who had pressed for and been promised payment of it. The prisoner being taxed with this, as proof that she must have received the cheque, still denied it, and had retained and never accounted for the surplus. Pollock, C. B., held that the prisoner could not be convicted of stealing the cheque; there was no sufficient evidence of the forgery of the indorsement. Perhaps, in the absence of any proof of the forgery, the prisoner was entitled to have it presumed that it was genuine. At all events, it could not be taken that it was not so; and if it were so, then that, coupled with the undoubted fact that the prisoner applied most of the proceeds to the payment of her mistress's debt, would negative any felony as to the cheque. The appropriation of the proceeds to what must be deemed to have been a purpose of the mistress, and may fairly be presumed to have been directed by her, tended strongly to show that the cheque was intrusted to the prisoner, and not feloniously taken. *Reg. v. Slingsby*, 4 F. & F. 61. The prisoner was tried only for the larceny of the cheque, and no charge made as to the 4*l.*

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Where an indictment contained a charge of stealing on the 13th of February, and another charge of stealing on the 15th of the same month, but did not aver that the larcenies were within six months; Pollock, C. B., put the prosecution to elect on which charge to proceed. *Reg. v. Lonsdale*, 4 F. & F. 59.

An indictment contained nine counts, in all of which the property was described as 600 lbs. of cotton woft, 400 lbs. of cotton twist, and 1000 lbs. of cotton. The first count charged J. Heywood with larceny as a

servant. The second count charged Heywood and four others with simple larceny. The third count charged all the prisoners with feloniously receiving. All these counts laid the offence on the 1st September, 1863. The fourth count charged Heywood with larceny as a servant. The fifth count charged all the prisoners with simple larceny. The sixth count charged all the prisoners with feloniously receiving. All these three counts laid the offence on the 2nd September in the year aforesaid. The seventh count charged Heywood with larceny as a servant. The eighth count charged all the prisoners with simple larceny. The ninth count charged all the prisoners with feloniously receiving. All these three counts laid the offence on the 24th September in the year aforesaid. Before pleading it was contended that the indictment ought to be quashed, as there was no allegation that the larcenies were committed within six months; but the sessions refused to quash the indictment; and, upon a case reserved after a verdict of guilty against some of the prisoners of stealing, and against others of receiving, it was held that the conviction was good, but that the proper course in such a case is either to quash the indictment, or to put the prosecutor to his election, if there is reason to apprehend that the prisoners will be embarrassed. *Reg. v. Heywood*, L. & C. 451.

Line 3 of the text read 11 for 10.

Page 349.

Line 2 of the last paragraph read 11 for 10.

Page 350.

Note (a), for Great Bolton read Great Bentley.

Page 365.

Note (f'), add S. C. 4 B. & S. 89.

Page 369.

Note (g), after 356 add S. C. 4 B. & S. 301, and at the end of the note add S. C. 4 B. & S. 585, as *Hudson v. MacRae*.

Page 376.

Note (o), add S. C. L. & C. 371.

Page 387.

The prisoner was indicted for embezzling the money of his master, the high bailiff of the Witney County Court, who had appointed the prisoner (by the allowance of the judge of the County Court, under the 9 & 10 Vict. c. 95, s. 31) to be one of the bailiffs to assist the high bailiff. The prisoner had received the monies, being the amounts of three levies under County Court processes, in his official capacity, and had embezzled them, and the prosecutor was in consequence held responsible for them to the County Court. Under sec. 30 the prosecutor had power to dismiss a bailiff at his pleasure, and he had dismissed the prisoner. By Rule 31 of the Rules of Practice, every bailiff receiving money is to pay it over to the registrar of the court. Upon a case reserved, it was held that the prisoner was not guilty of embezzlement, for the prisoner was the servant of the court, and the monies were the property of the registrar, and not of the high bailiff. *Reg. v. Glover*, L. & C. 466.

Page 417.

Note (h), add *Baines v. Swainson*, 4 B. & S. 270.

Page 475.

An indictment alleged that the prisoner was duly adjudged bankrupt by the Court of Bankruptcy for the Liverpool district, and that, having been so adjudged bankrupt, he, upon his examination in the said court, with intent to defeat the rights of his creditors, did not fully and truly discover, to the best of his knowledge and belief, all his property, to wit, all his personal property in money and in goods, and did not as part of his said property (not being part fully and *bonâ fide* sold, &c.) fully and truly discover, to the best of his knowledge and belief, how and to whom, and for what consideration, and when he had disposed of, assigned, or transferred such part thereof, to wit, 1000*l.* sterling, 1000 sacks of corn, 1000 sacks of flour, ten horses, &c., being part of his said property; and upon error it was objected, 1, that if the 24 & 25 Vict. c. 134, s. 221, No. (2) created two offences, the count was

Page 526.



bad for duplicity. If the count proceeded on the first part of the clause, it was bad for not describing the offence, with the certainties of number, time, and value. 2. The second part of the count was bad for not alleging that the prisoner disposed of any part of his property. Lastly, the indictment did not show that the examination of the prisoner had terminated, and until then the offence was not complete. But it was held that the indictment was good. Supposing the indictment charged two offences, this was no objection upon error; and supposing there was a want of certainty, the objection was cured after verdict by the 7 Geo. 4, c. 64, s. 21, as the offence was sufficiently described in the words of the statute. *Quære* whether the offence by a bankrupt in not discovering his property on examination is complete until the examination is ended; but whether that be so or not, this indictment is sufficient. *Nash v. Reg.* 4 B. & S. 935.

Page 528.

On an indictment on the 24 & 25 Vict. c. 134, s. 221, it appeared that the prisoner carried on business in London, in partnership with one Branders, and the firm had also a house in Paris, where Branders principally was. Branders was in the habit of buying large quantities of goods in Paris, and sending them to London, where they were immediately afterwards pawned or sold below the invoice price. Branders had no residence in this country. In the course of the case it was objected, that as the adjudication of bankruptcy was not upon the prisoner's own petition; it was necessary to prove the trading, petitioning creditor's debt, and act of bankruptcy, and that, as the adjudication was jointly against the prisoner and Branders, it was necessary to prove a joint trading, a joint debt, and an act of bankruptcy against both; and Channell, B., so held. The act of bankruptcy alleged against Branders was that, having come over to this country two days before the adjudication of bankruptcy, he had taken away the books of the business, and then gone away immediately, with intent to defeat his creditors; and it was objected that, as he had no place of residence in this country, this was not an absconding to delay creditors; but Channell, B., held that it would be for the jury with what intention Branders left London; and this question was left to them. A Frenchman domiciled in Paris, upon a declaration of insolvency filed by the prisoner, became petitioning creditor, and on his petition the prisoner and Branders were jointly adjudicated bankrupts. It was objected that a trader domiciled in Paris could not be a petitioning creditor in this country for a debt contracted there; but Channell, B., held that that would depend on whether the business in Paris was a distinct *bonâ fide* business, or merely auxiliary to that carried on in London; and this question was left to the jury, who found that the premises in Paris were not used for buying and selling purposes, but were used exclusively by Branders for the purpose of sending goods to England. As to an objection that goods obtained in Paris, and the credit for which was given in that city, were not matters which could be brought within the jurisdiction of the Central Criminal Court, although no offence could arise from merely obtaining goods within three months of a bankruptcy, and the offence could only be completed by disposing of them, there being an intent to defraud, yet it was an ingredient in such cases that the property should be obtained on credit. If by any contrivance the house in Paris succeeded in obtaining goods on credit, and sending them to London, and if on their arrival there they were sold and disposed of, and all this was done with intent to defraud, then there was an offence sufficient to bring the case within the jurisdiction of the court. *Reg. v. Raudnitz*, 4 F. & F. 165. The section by numbers 8 & 10, p. 522 of this volume, clearly creates distinct offences; viz. 8, the disposing of property, no matter how or when obtained, and, 10, the obtaining money on credit. The report, therefore, is probably erroneous in this part, as it is quite clear the disposal in London with

the intent charged was a complete offence wholly irrespective of where the goods came from, or how they were obtained.

On an indictment against a bankrupt for removing, concealing, and embezzling property, and omitting property from his schedule, it is for the jury to form their opinion on the whole evidence as to the intent of the defendant; and in judging of the intent, they must look at the general character of the transactions as indicated by the whole evidence, especially with a view to the object, scope, and design of all its different parts. *Reg. v. Manser*, 4 F. & F. 45. Page 532.

The London Gazette is, by the 12 & 13 Vict. c. 106, s. 233, conclusive evidence of the bankruptcy on an indictment under the 24 & 25 Vict. c. 134, s. 221, clause 3, if the bankrupt was within the United Kingdom at the time of the adjudication, and no step has been taken to annul the adjudication. *Reg. v. Levi*, 10 Cox, C. C. 110. L. & C. 597. Page 540.

See *Reg. v. Langmead*. Addenda to p. 338 of Vol. II. *ante*, p. 667. Page 555.

Note (f), read 280 for 80. Page 558.

An indictment alleged that Fisher had deserted his wife, and that the prisoner falsely pretended to the wife that she, the prisoner, then had the power to bring back Fisher to his wife, and that the prisoner then had power to bring back Fisher to his wife over hedges and ditches, and that a certain stuff which the prisoner then had in her possession was sufficient for the purpose of bringing back Fisher to his wife; by means whereof the prisoner unlawfully obtained from the wife a dress and two sixpences. The wife proved that her husband had left her, and that she had had a conversation with a woman, in consequence of which she went with her to the prisoner's house, and 'I asked the prisoner to tell me a few words by the cards to fetch my husband back. She asked me how much money I had. I told her sixpence. She said that would not be of any use at all. Then I gave her another sixpence. She said her price was high; it was five shillings. She asked me if I had anything on that I could leave. I said I had a petticoat on, but that was old, and she said that would be of no use. I had two frocks on. She told me to leave the under one. I left it with her. She said her price was so high, she could not do anything without the money; the stuff she had to work upon would cost her five shillings, or nearly that. She said *she could bring my husband back over hedges and ditches*. She said that about bringing my husband back after she got the frock. She said that she would bring my husband back before I gave her the money. She went upstairs, and came down again, and said I was not to be offended at what she was going to tell me; she said my husband was gone off with another woman. I told her I did not think so. She said the woman came from the same place as I did, but that did not matter; *she would bring my husband back; she could do it, and would do it*. She said she was what they called the cunning woman, and there was not another woman such as her about handy. She said she would bring my husband back with the stuff she had to work upon. She would bring him back on the Wednesday if she could, and if she did not bring him back on the Wednesday she would on the Thursday. She said if I brought four shillings I should have the frock again. I went to the prisoner's house again on the following Monday. She asked me if I had heard anything of my husband. I replied I had not. She asked me if I had any more money. I said I had not. She said she had worked very hard for me all the time during the week. I parted with the money and the dress on the faith of what passed between us on the first occasion.' Upon a case reserved, it was urged that the false pretence charged amounted merely to a promise that the prisoner would do the act. It might mean by moral influence, physical strength, or Page 643.

supernatural power. Secondly, there was no sufficient evidence to go to the jury. The false pretence was made after the property had been obtained. Lastly, there was no evidence that the prisoner knew that she had not the power to do what she promised. Erle, C. J., 'The first question is whether the indictment is good. I take it that the pretence that the prisoner had the power to bring back her husband to the prosecutrix is the material part of the indictment. Now, the pretence of power, whether moral, physical, or supernatural, made with intent to obtain money, is within the mischief of the law, and sufficient to constitute an offence within the language of the statute. The second point is, whether there was any evidence to support the indictment. I take the law to be that there must be a false pretence of a present or past fact, and that a promissory pretence to do some act is not within the statute. Then the question is, was there evidence of a false pretence of an existing fact that the prisoner had the power to bring the husband back when the money was obtained? It was contended that the prosecution ought not to succeed, because the evidence was that the prisoner said that she *would* bring the prosecutrix's husband back, and that thereupon the money was parted with by the prosecutrix, and that after the prisoner had got the property she said that she *could* bring the husband back, and that there was therefore a promissory pretence only. It is clear that an indictable pretence must precede the obtaining of the money, so that it can be alleged that the money was obtained by means of the pretence. The exact words of that part of the evidence favour the argument of the prisoner's counsel; but I have come to the conclusion that we ought not to sustain the objection, because the whole tenor of the evidence is to be regarded, and it may be upon the evidence that the prisoner intended to convey to the mind of the prosecutrix that she had not only the will but the power to bring her husband back. The whole of the evidence was to be regarded by the jury, and they were to consider whether the prisoner intended to pretend to the prosecutrix, and to induce her to believe, that she, at that time, had the power to bring her husband back, and that she did actually so pretend. Upon the whole evidence, I think there was enough for the jury from which they had a right to infer that she intended to induce the prosecutrix to believe that she had power, at the time when the money was parted with, to bring her husband back. It was next contended that the prisoner might have believed that she did possess such power; but upon the facts, I think there was evidence to go to the jury that the prisoner was a fraudulent impostor. I think, therefore, that the conviction ought to be affirmed.' *Reg. v. Giles*, 10 Cox, C. C. 44. The indictment was clearly bad on the face of it, as it laid the property in the wife, and alleged the intent to be to defraud her. 'It ought in both instances to have been the husband. S. C. L. & C. 502.

Page 657.

The first count stated that the prisoners did falsely pretend to one J. B. Thurman that two loads of soot, which the prisoners then delivered to him, did together weigh one ton and seventeen cwt., whereas in fact the said two loads of soot did not weigh one ton and seventeen cwt., but only weighed one ton and thirteen cwt., the prisoners well knowing the said pretence to be false. The second count stated that the prisoners did falsely pretend to one J. B. Thurman that three loads of soot, one of which loads the prisoners delivered to him on the 17th August, and the remaining two loads on the 20th August, did together weigh two tons eleven cwt. and two quarters, whereas in fact the said three loads did not weigh together two tons eleven cwt. and two quarters, but only weighed one ton nine cwt., the prisoners well knowing, &c. On the 17th August Lee delivered to Thurman, who had agreed to purchase soot at 17. 18s. a ton, a cartload of soot, and at the same time presented to Thurman a ticket of the alleged weight (fourteen cwt. and



two quarters). Thurman paid Lee 1*l.* 7*s.* 6*d.* for that soot, believing there was fourteen cwt. and two quarters, as stated on the ticket. On the 20th August both prisoners delivered to Thurman two loads of soot, and gave him two tickets for the alleged weight of the two loads. All three loads had been weighed, and the tickets obtained at a public machine some miles distant; and Lee stated that the weights mentioned in the tickets for the two last loads were the weights of those two loads. Thurman then paid the prisoners for those loads according to the weight stated in the tickets, believing them to be correct. In consequence of suspicion all the soot was weighed, and found to be one ton two cwt. and two quarters less than the weight represented by the prisoners. The loads had been weighed at the machine, and the tickets represented their weight at that time, but the prisoners had afterwards removed three bags full of broken bricks and wet coal slack, which were in the carts when they were weighed, and had had ample opportunity to remove soot before the delivery to Thurman. It was objected that the indictment ought to have set forth that the soot was weighed and the tickets given, and the contents of the tickets, and then alleged that the false pretence was the production of the tickets; and also that it was not a false pretence within the statute falsely to represent the weight of the soot. But, on a case reserved, it was held that the indictment was good, and that it was supported by the evidence, which clearly showed a false pretence within the Act. *Reg. v. Sherwood*, D. & B. 251, was precisely in point. *Reg. v. Lee*, L. & C. 418.

A count alleged that Henshaw and Clark did falsely pretend to H. Pond, who lived at one Madame Temple's, and acted as her representative, that Clark had come down from London to the residence of Henshaw, and that H. Pond was to give him 10*s.*, and that the said Madame Temple was going to allow Clark 10*s.* a week for the benefit of his health. By means, &c., the prisoners did attempt, &c. Madame Temple had a shop in London and another at Brighton, and the prisoners went to the shop at Brighton, and saw H. Pond, who kept the accounts of Madame Temple there, and who proved that Henshaw in the hearing of Clark said that Clark had come down from London, and had been in Brompton Hospital with a bad leg, and had seen Madame Temple in London, who had said that she (Pond) was to give Clark 10*s.* a week while he was in Brighton for the benefit of his health. She refused to do so. And, upon a case reserved, it was held that the indictment did not sufficiently allege any pretence of an existing fact. *Reg. v. Henshaw*, L. & C. 444. The court seem to have thought that, if the indictment had alleged that Pond was to give the money on account of Madame Temple, it would have been good. In these sort of cases there ought to be an averment that the prisoner was authorized by the party to ask for and to receive the money.

The indictment alleged that the prisoner falsely pretended that he was the servant of W. Hardman of Stickley (the said W. Hardman being well known to the prosecutor), and that he was sent by the said W. Hardman to buy a horse for him; by means, &c. The prisoner had gone up to Henderson, the prosecutor, who had a mare for sale, and asked him if she was for sale; he said 'Yes.' 'What price?'—'12*l.*' 'Where do you come from?'—'Denton Burn.' 'The same place,' said the prisoner, 'that my governor is from.' 'Who is he?'—'Mr. Hardman.' Henderson knew no person of the name of Hardman, but he had known very well one Harding of Benwell Lodge. Henderson and the prisoner then went to an inn, where Henderson's father joined them. Henderson said to his father, 'I am going to sell a horse to Mr. Harding of Benwell Lodge;' upon which the father said, 'He does not live there now.' 'No,' said the prisoner, 'he lives now at Stickley farm.' And the prisoner ultimately got the mare. Upon a case reserved it was held

that the indictment was not supported by the evidence; for the indictment alleged that the prisoner pretended he was the servant of Hardman, while the evidence showed that the prosecutor considered him the servant of Harding. But if the indictment had alleged that the prisoner pretended that he was the servant of Harding, it would have been supported. The prosecutor confounded Hardman with Harding, and then the prisoner availed himself of what was passing in the prosecutor's mind, and linked Hardman into Harding. It was further held that the proviso in the 24 & 25 Vict. c. 96, s. 88, did not prevent the prisoner from being acquitted; for that proviso does not authorize the proof of a larceny under any state of facts that may be alleged in the indictment; but provides that the prisoner shall not be acquitted of the misdemeanor by reason of its being merged in the felony, showing that the pretences alleged must still be proved. *Reg. v. Bulmer, L. & C. 476.* Quare whether the indictment might not have been amended by substituting the name of Harding for Hardman under the 14 & 15 Vict. c. 100, s. 1.

Page 693.

The indictment alleged that the prisoner falsely pretended that he was manager of the Surrey County Hospital, and that certain persons had required the prosecutors to supply for the use of the hospital certain large quantities of linen, and that he had authority to ask for and receive so many yards of linen for and on the account of the said persons; by means, &c. A hospital was building to be called the New Surrey County Hospital, and the prisoner was in the employ of the contractor, and as such had charge of the building stores, and there was a committee composed of the persons mentioned in the indictment. The prisoner sent the prosecutors, linen manufacturers, the following letter:—

‘New Surrey County Hospital, Guildford.

‘Please to forward samples of linen and your prices to the above hospital.

‘(Signed) for H. J. Franklin,

‘J. STENT.’

The prisoner sent a subsequent letter to the effect that he wished, on account of the hospital, to have the prices of bedding for sixty-eight beds, and afterwards the following:—‘I have to inform you that the committee at their last meeting decided not to have any linens at present. A special meeting will take place at an early day, and Mr. Franklin hopes to make a better order. At present forward the following to H. J. Franklin, Manager, Surrey County Hospital, Guildford.’

An order was enclosed for a quantity of linen. The members of the committee knew nothing of such order, and there was no manager of the hospital. On his apprehension the prisoner said he meant to pay for the goods, and it appeared that he was in a position to do so, as he had a good situation, and the amount of the goods was such as he might reasonably require and afford to pay for. Willes, J., told the jury that ‘the only question for you is, did he fraudulently endeavour to obtain the goods from the prosecutors by representing to them that he was ordering them on behalf of the Surrey County Hospital? In other words, did he order the goods on behalf of the hospital, or for himself? If the former, there was an intent to defraud; for a man to assume to order goods in the name of a person in better credit than himself is a fraud, and shows an intent to defraud.’ *Reg. v. Franklin*, 4 F. & F. 94. This case is probably misreported. It is perfectly clear that a man may order goods in the name of a person in better credit than himself with an honest intention of paying for them, and no doubt the learned judge left the question to them whether he did so, or whether he ordered them with the fraudulent intention of obtaining them and not paying for them.

Add to note (f) S. C. L. & C. 383.

Page 700.

Note (c) S. C. L. & C. 390.

On an indictment for forgery it appeared that the prisoner had in his service George Beard as foreman, and he got him to write his acceptance on a bill drawn by himself at three months for 32*l.* 11*s.* 8*d.*, and directed to 'Mr. George Beard,' without any address. He then, without, as far as appeared, G. Beard's knowledge or consent, filled in the address, 'Rottingdean, near Brighton.' The prisoner took this bill to a discount company, and said he (quære Beard or the prisoner) was 'good for the amount.' There was a George Humphrey Beard at Rottingdean, but he was a youth of seventeen, and knew nothing of the prisoner, and there was no other George Beard there. George Beard, the foreman, had lived near Brighton, and had accepted bills for a person who lived at Rottingdean, but he denied that he had led the prisoner to suppose that these bills were addressed to him at Rottingdean. He had written this acceptance in the prisoner's shop, and he did not observe that there was an address upon it, nor did he believe that there was; but he admitted that he never read the bill. *Reg. v. Blenkinsopp*, 1 Den. C. C. 282, was cited for the Crown; Willes, J., however, pointed out that in that case there was evidence that the prisoner intended to make the drawing to be on a different person, and here there was no evidence of that, and directed an acquittal. *Reg. v. Epps*, 4 F. & F. 81. The prisoner was then tried for another forgery. He had gone to one Woods, a bill discounter, and stated that he had business transactions with 'Mr. Beard, seedsman, Rottingdean,' and asked him whether, if he could get an acceptance of this Mr. Beard, he would discount it; and, after making inquiries, Woods said he would, and then discounted a bill, which, like the other, had been accepted by the prisoner's foreman, who lived then at Maidstone, and had never lived at Rottingdean, and was no further a seedsman than having been foreman for years in that business. In this case the acceptance had been written by George Beard on a blank stamp, which the prisoner afterwards filled up, and put the address 'Rottingdean,' without, so far as appeared, Beard's knowledge or consent. There was no George Beard at Rottingdean. The false address was not added to the acceptance but to the address. *Reg. v. Blenkinsopp* was cited for the prisoner to show that the address must be that of a different existing person. Willes, J., said that could not have been the ground of the decision, as it was clear law that there may be a forgery in the name of a non-existing person, and it is too plain for argument that if a person added an address to a bill, so as to make it appear that the acceptance, though really written by a person of the same name, was that of a different person, whether such person existed or not, he was guilty of forgery. Here the bill was so altered as to make it appear that the acceptor was a seedsman, whereas he was a servant. It was then urged that the indictment was for forging the acceptance, not the bill, and that the acceptance was not altered. Willes, J., held that that did not matter, for in point of law there was no acceptance until the bill was drawn. It was, therefore, really the effect of the acceptance that was altered, and that was a forgery. It was then urged that the body of the bill, including the prisoner's address, was all in the prisoner's handwriting, and therefore it could not be forgery to alter what purported to be his own handwriting; and *Rex v. Webb*, R. & R. 406, was cited; but Willes, J., said that that made no difference, and that the question for the jury was whether the bill was passed off to Woods as that of a seedsman and customer, instead of what it really was, that of a mere servant; and he told the jury that 'forgery consists in drawing an instrument in such a manner as to represent fraudulently that it is a true and genuine document, as it appears on the face of it, when in fact there is no such genuine document really in existence, as it appears on the face of it to be. Consequently, if the prisoner passed off this acceptance as that of one



Beard of Rottingdean, thereby meaning one Beard, a seedsman, then find him guilty.' *Reg. v. Epps*, 4 F. & F. 83.

Page 1002.

In order to obtain the appointment of agent of the British Prudential Assurance Company the prisoner delivered the following document, which was partly printed:—

'To the Directors of the British Prudential Assurance Company,  
35 Ludgate Hill, London, E.C.

'In consideration of your appointing Mr. Patrick Joyce, of 8 Rockly Street, Pendleton, as agent for your Company, I do hereby guarantee you against any loss, costs, charges, or expenses whatever which you may incur by reason of his culpable negligence or dishonesty in such situation; and I do hereby undertake that this guarantee shall be in force so long as the said Mr. P. Joyce is in your employment, and in whatever capacity he may be engaged; and you are quite at liberty to alter and vary his duties and emoluments from time to time without giving me notice.

'(Signature)

Christopher McConvill,

'(Address)

57 Lisadel Street, Pendleton,

'(Witness)

John Moonan.'

Upon a case reserved it was held that this was an undertaking for the payment of money within the 24 & 25 Vict. c. 98, s. 23, on the authority of *Reg. v. Reed*, 2 M. C. C. 62, and *Reg. v. Stone*, 2 C. & K. 364; for the undertaking was a promise to pay money on the contingency of the prisoner failing in his duty to his employer. *Reg. v. Joyce*, 12 Law T. 351. L. & C. 576.

Page 1016.

Add S. C. 4 B. & S. 715.

Page 1030.

The prisoners were indicted for setting fire to certain post letters in a dwelling-house, divers persons then being in the said house, against the 24 & 25 Vict. c. 97, s. 7; there were other counts framed in the 8th section of the Act. One prisoner was sixteen years of age, the other eighteen, and they were seen opposite a post-office, the letter-box of which is upon the floor under the shop-window ledge, and letters are dropped in from the slit outside. Both went close to the box, and the younger was about to drop in the remains of a paper he had lighted from his pipe, when the elder said, 'What the devil is the use of that? It is not half big enough.' He then lighted a larger piece, and dropped both pieces through into the box. Both ran away. The pieces of paper partly burnt twenty-nine letters. Williams, J., 'How can you support this indictment? From the evidence it appears that this act on the part of the prisoners was what is vulgarly called a lark, and that there was no intention to set fire to the house.' . . . 'No doubt, if they intended the fire to do its worst they would be guilty; but if they only set fire to the letters, and it was contrary to their intention to burn the house, even if the house had been burned, they would not have been guilty. I shall so leave the case to the jury.' *Reg. v. Batstone*, 10 Cox, C. C. 20.

Page 1032.

The present Naval Discipline Act, 27 & 28 Vict. c. 119, s. 30, is in terms the same as the 24 & 25 Vict. c. 115, s. 30.

Page 1052.

On an indictment for arson of a house with intent to defraud, it was suggested that the motive might have been the desire to realize the sum insured upon the furniture, &c.; and Pollock, C.B., held that evidence was admissible that the prisoner was in easy circumstances, and had a comfortable income. *Reg. v. Grant*, 4 F. & F. 322.

Page 1098.

A person who sets fire to letters in a pillar for receiving them may be convicted under the 24 & 25 Vict. c. 97 s. 52, although he was originally charged with the offence under sec. 10 of the Act, and remanded, and on the hearing that charge was abandoned, and although there was no information on oath and the offender was not found committing the offence. *Shepherd v. The Postmaster-General*, 10 Cox, C. C. 15.

## ADDENDA TO VOLUME III.

An indictment for perjury alleged that after the 18 & 19 Vict. c. 118, Page 6.  
 S. Kilshaw was a person licensed to sell beer by retail at Burtonwood, and that on the 11th December, 1864, he was duly summoned to appear before certain justices acting in and for the county of L. to answer an information for opening his house for the sale of beer after the hour of three in the afternoon and before the hour of five on a Sunday; that Kilshaw appeared at the petty sessions holden for the petty sessional division holden at N. in the said county of L., the same being the county, division, and place where the said offence was alleged to have been committed, before certain justices in and for the said county; and thereupon the said charge against Kilshaw was heard; and that the prisoner was duly sworn, and that it became a material question whether the prisoner was in the house of Kilshaw at all on the said Sunday, and whether he had been at Burtonwood on the said Sunday; and that the prisoner swore that he was never in Kilshaw's house on that Sunday, and was not in Burtonwood on that Sunday. Before plea it was objected that the indictment did not show that the justices had any jurisdiction within the petty sessional division, and that it did not show that the information against Kilshaw contained any offence over which they had jurisdiction. In the course of the trial it was proved that the justices had in fact acted as such in hearing the case within that division. The only proof of any information was that Todd, a policeman, who proved the charge against Kilshaw, had reported to the superintendent that he had seen the prisoner in Kilshaw's house between the hours mentioned in the indictment, and the circumstances thereof, and the superintendent submitted these facts to the magistrate's clerk, and he thereupon filled up a blank summons against Kilshaw, which the superintendent took to a magistrate, who signed it after reading it. It was then put into the officer's hands for service. This was stated to be the usual practice. The magistrate who signs the summons has always any explanation he may require made to him. In this case he made no inquiry, and no statement was made to him. The summons was not produced, and no evidence was given of its contents. It was objected that there was no information or complaint to justify the issuing of a summons, and therefore the whole proceeding was *coram non judice*. Todd proved that he saw the prisoner in Kilshaw's beerhouse at twenty minutes to five on the day in question; another witness swore that he had seen the prisoner in Burtonwood at two o'clock in the afternoon of the same day; and a third swore that she had seen the prisoner between three and four o'clock the same afternoon on the road leading to Kilshaw's house, and that when she last saw him he was close to Kilshaw's house. The direction the prisoner was taking led also to the house of the prisoner's brother, where, according to the prisoner's witnesses, he was at the time when, according to Todd's statement, he was drinking ale at Kilshaw's. It was contended that there was no corroboration of Todd. All the objections were overruled, and, on a case reserved, it was held that the conviction was right. The 18 & 19 Vict. c. 118, s. 5, says that every person who offends against that Act shall be liable to be convicted before any justice of the county, &c., and thus creates a different tribunal from

that created by the 1 Will. 4, c. 64, which gave the jurisdiction over these cases to the petty sessional division. Although no information warranting the issuing of the summons was proved, this was not fatal, for where a party appears before a justice charged with an offence within his jurisdiction, the justice has jurisdiction to dispose of the case without a summons or information being laid before him, unless the statute creating the offence imposes the obligation of these preliminaries. This might have afforded a ground for asking for an adjournment; but if the party chose to waive the information, and allow the hearing to proceed, the justice had jurisdiction. As to the corroboration, what degree of corroborative evidence is necessary must be matter for the opinion of the court that tries the case, and any attempt to define the degree of corroboration would be illusory. One of the charges of perjury was that the prisoner swore that he was not in Burtonwood on the Sunday, and two witnesses proved that they saw the prisoner there on that day, and one of them saw him near Kilshaw's house. That was some corroboration at least. *Reg. v. Shaw*, L. & C. 579. The court thought that the objection, that the allegation in the indictment that a summons had been duly issued was not proved, was not raised. As to petty sessions, see *Reg. v. Rawlins*, 8 C. & P. 439, p. 54 of Vol. III.

Page 12.

On an indictment for perjury it appeared that Robinson had sued in the county court a person named in the proceedings Bernard Edward Mullany for a debt. The plaintiff gave evidence in support of his case, and the defendant was sworn and gave evidence, and the judge came to the conclusion that the debt was due, and the plaintiff entitled to recover. A discussion took place as to the times at which instalments of payments were to be made, and the judge then asked the defendant what was his name, and he replied Edward. The plaintiff's attorney then asked him whether it was Edward only. The defendant answered 'Yes.' And the plaintiff's attorney then asked him whether it was not Bernard. The defendant answered 'Not Bernard, only Edward.' Application was then made to amend, but it was refused, and the judge struck out the cause. The defendant was indicted for perjury in answering the above questions, and it was clearly proved that he had wilfully and corruptly sworn falsely in the above answers; and, upon a case reserved, it was held that the false swearing was upon a matter material to the inquiry. The answers were given in the course of a judicial inquiry, and with the intention of misleading the judge. The effect of the defendant's answers was to cause the judge to strike out the case, and so virtually to nonsuit the plaintiff. *Reg. v. Mullany*, 12 Law T. 549. L. & C. 593.

Page 80.

See *Reg. v. Shaw*, *supra*.

Page 105.

On an indictment for perjury alleged to have been committed on the trial of A. Poole for an indecent assault, it appeared that the prisoner had sworn that Poole had assaulted her at a certain time and place, but on cross-examination she had admitted that certain liberties had been taken without resistance; whereon the judge directed an acquittal. Poole and others were called to prove that no such assault could have been committed at the time alleged; and it was held that the prisoner was entitled to prove what her conduct was immediately after the alleged assault; that she had made immediate complaint; and that all the evidence which was admissible on the trial of the assault was admissible for the purpose of showing that the prisoner was not guilty. *Reg. v. Harrison*, 9 Cox, C. C. 503.

Page 130.

A count alleged that the prisoners unlawfully conspired, &c., to solicit, persuade, and procure, and in pursuance of the said conspiracy did unlawfully solicit, incite, and endeavour to procure L. M., an unmarried girl, within the age of eighteen years, to become and be a common prostitute, and to commit whoredom and fornication for lucre and gain with men;



and it was urged, in arrest of judgment, that the count was bad, as it did not aver that the girl was chaste; the fact of a loose woman committing fornication was not punishable by law; but it was held that the count was good, as it charged a conspiracy to bring about an illegal condition of things. *Reg. v. Howell*, 4 F. & F. 160, Bramwell, B., and the Recorder.

Add to note (k) S. C. 4 B. & S. 376.

Page 143.

Where an indictment on the Naval Discipline Act, 24 & 25 Vict. c. 115, s. 57, charged that the defendant on his oath before a court-martial held on board Her Majesty's ship H., then being on the high seas, and within the jurisdiction of the Admiralty of England, wilfully and corruptly did give false evidence, contrary to the form of the statute, &c.; it was doubted whether this was an indictment for perjury within the 22 & 23 Vict. c. 17, s. 1, and also whether that enactment extends to offences committed on the high seas. It seems that the taking of a false oath before a court-martial is perjury at common law. *Reg. v. Heane*, 4 B. & S. 947.

Page 160.

The prisoner, a foreigner, was indicted for conspiring at Ramsgate with the owner, the master, and the mate of a ship, to cast away the ship, with intent to prejudice the underwriters. The ship was a Prussian merchant vessel, named the Alma, and arrived at Ramsgate, and afterwards sailed thence, and she was in six days' time scuttled and sunk by the prisoner and others. The prisoner was apprehended, and made statements implicating himself, the captain, and the mate. He said that the mate had said in Ramsgate that the ship would never reach her place of destination, and spoke of the making away of the ship in an unlawful manner; and when the prisoner said, 'Then we had better sink her here at once on the bar,' the mate replied that was too close to land to make away with the ship in an unlawful manner, or to sink her. Martin, B., told the jury, 'The ship was a foreign ship, and she was sunk by foreigners far from the English coast, and so out of the jurisdiction of our courts. But the conspiracy in this country to commit the offence is criminal by our law. And this case does not raise the point which arose in *Reg. v. Bernard*, 1 F. & F. 240, as to a conspiracy limited to a criminal offence to be committed abroad. For here, if the prisoner was party to the conspiracy at all, it was not so limited; for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate, which would be within the jurisdiction. The offence of conspiracy would be committed by any persons conspiring together to commit an unlawful act to the prejudice or injury of others, if the conspiracy was in this country, although the overt acts were abroad. . . . The question is, was it agreed by and between the prisoner and any other person at Ramsgate that the ship should be destroyed, whether at sea or in port?' *Reg. v. Kohn*, 4 F. & F. 68.

The prisoner was indicted for feloniously demanding, with menaces, five shillings from the prosecutor. The prisoner was a policeman on duty in his uniform, and the prosecutor proved that he was going home in the night, and had spoken to a woman, when the prisoner came up and said, 'You have been talking to a prostitute.' I said, 'I do not know who she is or what she is.' He said, 'You must go with me to Hotham Street Bridewell.' I said, 'I had the care of three horses, and if he would go with me to my master, and leave the keys, I would go anywhere with him.' He said I was under a penalty of 1*l.* and costs for talking to a prostitute in the streets, and that if I would give him 5*s.* I might go about my business. He pulled out a book to take my name. He asked my name, and said he would write it down. He did not write it down. He took the book out before he mentioned the 5*s.* I pulled out a half-crown and two-shilling piece, and he placed it in his right-hand pocket. The prisoner afterwards said, 'This is only a two-

Page 203.

shilling piece; I must have the other sixpence. It was objected, 1st, that as the money was obtained, the case was not within the clause of the statute; 2nd, that this was not a menace within the statute, as it was a threat to accuse of a non-existing offence; but, upon a case reserved, it was held, 1st, that the first objection was not correct, because part only of the 5s. demanded was obtained; and even if the whole had been obtained, *Reg. v. Norton*, 8 C. & P. 671, showed that that made no difference; 2nd, that there was no ground for the objection that this was not a menace, because it was a threat to accuse of a non-existing offence. If a policeman states that he is acting under authority, and that it is his intention to exercise the authority which he professes to have unless money is given to him, that is a menace within the statute. The threat was within the plain words of the statute. *Reg. v. Robertson*, 10 Cox, C. C. 9. *Reg. v. Walton*, L. & C. 288, had been relied on for the prisoner, and the court did not express any approval of the judgment in that case; and the decision in this case seems to bear against that judgment. On *Rex v. Knechtum* being cited, Channell, B., said, 'This is a statutory offence. The decision in that case was that the facts did not support an indictment for robbery at common law,' which is the correct distinction.

Page 204.

After Robertson in the note add 10 Cox, C. C. 9. L. & C. 483.

Page 211.

Where an indictment contained three counts, each charging the sending of a different threatening letter, Byles, J., held that the prosecutor must elect on which count he would proceed, though any letter leading up to or explaining the letter on which the trial proceeded would be admissible. *Reg. v. Ward*, 10 Cox, C. C. 42.

Page 215.

On a trial for murder, Pollock, C. B., said, 'There was no doubt that it had been said that there ought to be certainty. There ought to be the highest certainty that there was in human affairs; and the rule that Lord Tentenden laid down was this—and I pronounce it in his very words: 'The jury should be persuaded of the guilt of the prisoner before they find him guilty to the same extent, (as) they ought to have the same certainty that they would have in the transaction of their own most important concerns. They ought to have the highest practicable degree of certainty; demonstration was not required, nor was absolute certainty; for that was not attainable in any case whatever. Direct testimony might be always got rid of by the suggestion that the witnesses were perjured; and they never could have absolute positive certainty; it was idle to speculate as to what might be to one man the most important matter in his life; but there were occasions—with reference, for instance, to the deepest interests of those whom one loved most dearly; there were interests that might be called in question to require the highest consideration, and all the certainty that could be attained in human affairs. He did not think it necessary to say certainty as to this or that particular matter, but it was the certainty men would require in their own most important concerns in life; and he thought that to hold any other doctrine or to act on any other view would be to paralyse the law entirely in its criminal application, and to make it difficult, if not impossible, to have a satisfactory administration of justice.' *Reg. v. Kohl*, January 12, 1863. From the 'Times' report.

Page 226.

On an indictment for burglary it appeared that one of the articles stolen was a ring, which was particularly described by the prosecutor as made of bright Australian gold in the form of a broad band, with the representation of a buckle to it as a garter, and with an inscription inside it, made on the occasion of the loss of a sister, and in remembrance of her. Channell, B., held that it could not be asked what

the inscription was; for although the prosecutor could state that there was an inscription on the ring, and could otherwise describe it so as to identify it, he could not state the contents of the inscription. The prosecutor produced another ring, which had been made for a brother on the same occasion, and was, he said, exactly like the former. A witness proved that, soon after the burglary, the prisoner showed her a ring, which she described, and which had an inscription on it; and Channell, B., held, that as no notice had been given to produce it, the contents of the inscription could not be asked; Channell, B., however, allowed the fellow ring to be shown to the witness, and she said that the ring shown to her by the prisoner was exactly like it. *Reg. v. Farr*, 4 F. & F. 336. This decision is contrary to all the authorities as to the inscription, and cannot be supported. See p. 238 of this volume.

Where a governor of a workhouse took down a statement from the deceased, but at that time the deceased did not express any apprehension of death; and the next day the chairman of the Board of Guardians asked her whether she was aware of the state in which she was, and she said she felt she was dying, and satisfied him that she thought so. He then questioned her from the statement, sometimes putting the questions from it in a leading way, and sometimes taking her own words; and it was objected that the statement was inadmissible, because it was in answer to leading questions; but the objection was overruled; and, on a case reserved, the judges seem to have been of opinion that the statement was properly admitted; but the conviction was reversed on another ground. *Reg. v. Smith*, 12 Law T. 608. L. & C. 607. Page 263.

Where on an indictment for setting fire to a shed some evidence was given that the prisoner had been seen going away from the shed; Willes, J., held that it could not be proved that a few days previously, in consequence of the barking of a dog, the prosecutor's family had gone out, and seen another shed on fire, and the prisoner and his wife standing at their back door laughing, and looking on, and that, when a member of the prosecutor's family went to get a bucket of water to put the fire out, the prisoner came behind her and upset her, and prevented her doing so. *Reg. v. Harris*, 4 F. & F. 342. It seems very strange that it never occurred to anyone that this evidence was clearly admissible, as very cogent proof of malice against the prosecutor. Page 288.

The facts of *Reg. v. Garner*, 3 F. & F. 681, are much better stated in 4 F. & F. 346. The husband kept a general shop, in which he had a considerable quantity of arsenic, which he was in the habit of selling to farmers, and occasionally supplied milk to neighbouring families. He had a beershop near, kept by a woman named Shepherd. Jemima Garner, the husband's mother, had resided with him for a short time before her death, and quarrels arose between her and the husband and wife, and various expressions of ill-will borne by the wife to J. Garner were proved. A short time before J. Garner's death, the wife had expressed jealousy of Shepherd; and Shepherd's children were seized with violent sickness, followed by great thirst, after taking some milk sent by the wife. Shepherd gave the rest of the milk to Mrs. Mann, and all who partook of it were affected in the same way. The following day Shepherd's girl, who went for milk, was told by the wife to take a particular can out of two standing together. She took the other whilst the wife's back was turned, and on that day Shepherd's children were not affected; but several persons in Garner's house who had eaten rice pudding made with milk were seized with sickness, followed by violent thirst. J. Garner Page 291.



had eaten part of this pudding, and was taken ill like the others. She was attended during her illness by the wife, who prepared all her meals, and died. In the course of her illness she had shown constant symptoms of the presence of an irritant poison in her stomach. Two or three months after her death the horse of another person, against whom the wife was supposed to have a spite, and two other horses, were poisoned with arsenic in the prisoners' stables. In consequence of what then transpired the body of J. Garner was taken up, and found to contain arsenic enough to cause death. The body of the husband's first wife was then exhumed, and also found to contain arsenic. She had died in March, and J. Garner in the December following. All the food of the first wife was prepared for her by the second wife, then a servant in the house, and both the first wife and Shepherd, who attended her and occasionally tasted the food prepared for her, showed symptoms of poisoning by arsenic during the whole continuance of the illness, while the prisoners, who were the only other persons in the house, were not affected. All these facts were given in evidence for the purpose of showing that J. Garner died of poison wilfully administered to her by the prisoners. The case is said to have been privately argued before Willes, J., who held the evidence admissible.

- Page 202. After Rowton in the note add 10 Cox, C. C. 25. L. & C. 520.
- Page 304. After Tuberfield in the note add S. C. 10 Cox, C. C. 1, L. & C. 495, as Turberfield.
- Page 316. Although it is little likely that a question should arise in any criminal proceeding as to the *strict* legality of a change of name, it may be well to mention that on the great Roll of the Pipe, 26 Hen. 2, A.D. 1180, mem. 1, Essex and Hertford, under the heading 'De oblatis per Ranulphum de Glanvillâ,' is this entry: 'Ylgerus Luvel debet dimidiam marcâ quia vocavit se alio nomine quam proprio.' This shows that at that time a change of name was not in every case lawful. The roll was examined at my request. Quære was this Ranulphus de Glanvillâ, the great lawyer, or his father? See Baker's Chronicle, p. 92. Grose's Antiq. 'Butty Priory.'
- Page 386. On a trial for murder it appeared that the prisoner, on her arrival in the gaol, was sent into a room alone with Edwards to be searched. Edwards was the wife of a sergeant of police, but was not employed in any capacity at the gaol except as a searcher of female prisoners, for the performance of which duty she received regular wages. Soon after entering the room, and during the search, the prisoner said, 'I shall be hung; I shall be sure to be hung;' and, after a pause, 'If I tell the truth shall I be hung?' Edwards, who saw that the prisoner was much agitated, and wished to soothe her, answered, 'No, nonsense, you will not be hung. Who told you so?' and thereupon the prisoner made a statement. *Rex v. Enoch*, 5 C. & P. 539, was cited; and Channell, B., after consulting Crompton, J., held the statement inadmissible. *Reg. v. Windsor*, 4 F. & F. 360.
- Page 483. Where on an indictment for endeavouring to conceal the birth of a child, of which E. Fox had been delivered, it was proposed to read the deposition made by the prisoner at the inquest held on the body of E. Fox, the coroner having proved that he had cautioned the prisoner previously to his making the deposition, and this was objected to; Martin, B., held that it might be read, but would have reserved the point if the prisoner had been convicted. *Reg. v. Colmer*, 9 Cox, C. C. 506.
- Page 608. It is no confirmation of a thief that the stolen property is found

on the premises of the person charged as receiver, as the thief may have placed the goods there himself. *Reg. v. Pratt*, 4 F. & F. 315. Pollock, C. B.

It may be well to add that, if the 14 & 15 Vict. c. 99, s. 2, stood alone, it would render every defendant in a criminal case a competent witness, and if sec. 3 is confined to crimes of *commission*, defendants charged with crimes of *omission* are competent. The words used are very inaccurate; but it is not probable that the clause would be held to be confined to crimes of commission only, and consequently no defendant in a criminal case seems to be rendered competent by this Act; and the statutes inserted in p. 624 must be resorted to for the cases in which such defendants are rendered competent; and it seems clear that these statutes are in no way affected by the subsequent statutes, which were passed to render persons competent, and not to render any persons incompetent.

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## POSTSCRIPT.

SINCE the Addenda went to press the following alterations have been made:—Vol. 1, pp. 481, 595, 604, the 4 Geo. 4, c. 64, is repealed by the 28 & 29 Vict. c. 126, and by sec. 37, ‘every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress, or other disguise, or any letter, or any other article or thing, shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding two years.’

Assisting prisoners to escape.

Sec. 38. ‘Every person who, contrary to the regulations of the prison, brings or attempts by any means whatever to introduce into any prison any spirituous or fermented liquor or tobacco, and every officer of a prison who suffers any spirituous or fermented liquor or tobacco to be sold or used therein, contrary to the prison regulations, on conviction shall be sentenced to imprisonment for a term not exceeding six months, or to a penalty not exceeding twenty pounds, or both, in the discretion of the court, and every officer of a prison convicted under this section shall, in addition to any other punishment, forfeit his office and all arrears of salary due to him.’

Punishment for carrying spirituous liquors or tobacco into prisons.

Sec. 39. ‘Every person who, contrary to the regulations of a prison, conveys or attempts to convey any letter or other document, or any article whatever not allowed by such regulations, into or out of any prison, shall on conviction incur a penalty not exceeding ten pounds, and if an officer of the prison, shall forfeit his office and all arrears of salary due to him, but this section shall not apply in cases where the offender is liable to a more severe punishment under any other provision of this Act.’

Punishment for carrying letters into and out of prisons.

Vol. 2, pp. 917, 918, 919, 1012, the 11 Geo. 4, c. 20, is repealed by the 28 & 29 Vict. c. 112, except sec. 80; and by the 28 & 29 Vict. c. 124, s. 6, ‘if any person, in order to sustain any claim to any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half pay, pension, or allowance from the compassionate fund of the navy, or other money payable by the admiralty, or to any effects or money in charge of the admiralty,—or in order to procure any person to be admitted a pensioner as the widow of an officer of the navy,—does any of the following things, namely,—offers or utters to any person in the service of the crown or of the admiralty any false

Punishment for uttering false petitions, certificates &c.

affidavit, knowing the same to be false, or makes or subscribes or offers or utters as aforesaid any false written petition, application, statement, answer, certificate, or voucher, or other false writing, knowing the same to be false,—every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, or on summary conviction before a justice, sheriff, or magistrate shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.’

Parts of  
24 & 25 Vict.  
c. 98. incor-  
porated.

Sec. 7. ‘The following sections of the Act of the session of the twenty-fourth and twenty-fifth years of Her Majesty’s reign (chapter ninety-eight), “to consolidate and amend the statute law of England and Ireland relating to indictable offences by forgery,” shall be incorporated with this Act, and shall be read as if they were here re-enacted, namely, —sections forty to forty-two and fifty to fifty-three (all inclusive); and for this purpose the expression “this Act” used in the said incorporated sections shall be construed to include the present Act, and expressions therein used relating to forgery or forged writings shall be construed to apply to any Act being a misdemeanor under the last foregoing provision of this Act, and to writings made, subscribed, offered, or uttered in contravention of that provision.

Punishment  
for personation  
of sea-  
men, &c.

Sec. 8. ‘If any person in order to receive any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half pay, pension, or allowance from the compassionate fund of the navy, payable or supposed to be payable by the admiralty, or any other money so payable or supposed to be payable, or any effects or money in charge or supposed to be in charge of the admiralty, falsely and deceitfully personates any person entitled or supposed to be entitled to receive the same, every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, or on summary conviction before a justice, sheriff, or magistrate shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.

Vol. 2, p. 1055, the 28 & 29 Vict. c. 90, repeals the 14 Geo. 3, c. 78; except sec. 83 and 86.



## APPENDIX OF STATUTES.

3 GEO. 4, c. 114.

*An Act to provide for the more effectual Punishment of certain Offences by Imprisonment with Hard Labour.*

[5th August, 1822.]

AFTER reciting the 53 Geo. 3, c. 162, it is enacted, that ‘whenever any person shall be convicted of any of the offences hereafter specified and set forth, that is to say, [any assault with intent to commit felony;] any attempt to commit felony; any riot; [any misdemeanor for having received stolen goods, knowing them to have been stolen; any assault upon a peace officer, or upon an officer of the customs or excise, or upon any other officer of the revenue, in the due discharge and execution of his or their respective duty or duties, or upon any person or persons acting in aid of any such officer or officers in the due discharge and execution of his or their respective duty or duties, any assault committed in pursuance of any conspiracy to raise the rate of wages; being an utterer of counterfeit money, knowing the same to be counterfeit; knowingly and designedly obtaining money, goods, wares, or merchandises, bills, bonds, or other securities for money, by false pretences, with intent to cheat any person of the same] keeping a common gaming-house, a common bawdy-house, or a common ill-governed and disorderly house; wilful and corrupt perjury, or of subornation of perjury; having entered any open or inclosed ground with intent there illegally to destroy, take, or kill game or rabbits, or with intent to aid, abet, and assist any person or persons illegally to destroy, take, or kill game or rabbits, and having been there found at night armed with any offensive weapon; in each and every of the above cases, and whenever any person shall be convicted of any or either of the aforesaid offences, it shall and may be lawful for the court before which any such offender shall be convicted, or which by law is authorised to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this Act; and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such court shall think fit to direct.’

Persons convicted of the offences herein mentioned may be sentenced to hard labour.

The parts of this statute between brackets are repealed by the 9 Geo. 4, c. 31, s. 1, 9 Geo. 4, c. 53, s. 1, 9 Geo. 4, c. 74, s. 125, 7 & 8 Geo. 4, c. 27, and 2 Will. 4, c. 34, s. 1.

4 GEO. 4, c. 48.

*An Act for enabling Courts to abstain from pronouncing Sentence of Death in certain Capital Felonies.*

[4th July, 1823.]

‘Whereas it is expedient that in all cases of felony not within the benefit of clergy, except murder, the court before which the offender or offenders shall be convicted shall be authorized to abstain from pronouncing

Court may abstain from pronouncing sentence of death on persons convicted of any felonies, except murder.

Record of judgment to have same effect as if pronounced.  
Act not to extend to Scotland

Indictment not to abate by dilatory plea of misnomer, &c.

What defects shall not vitiate an indictment after verdict or otherwise.

judgment of death, whenever such court shall be of opinion that, under the particular circumstances of any case, the offender or offenders is or are a fit and proper subject or fit and proper subjects to be recommended for the royal mercy:’ enacts, that by the King’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, whenever any persons shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy in respect thereof, and the court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer then being present in court to require and ask, whereupon such officer shall require and ask if such offender hath or knoweth anything to say, why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may and is hereby authorized to abstain from pronouncing judgment of death upon such offender; and, instead of pronouncing such judgment, to order the same to be entered of record, and thereupon such proper officer as aforesaid shall and may and is hereby authorized to enter judgment of death on record against such offender, in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender, by the court before which such offender shall have been convicted.

By sec. 2. A record of every such judgment, so entered as aforesaid, shall have the like effect to all intents and purposes, and be followed by all the same consequences, as if such judgment had actually been pronounced in open court, and the offender had been reprieved by the court.

By sec. 3. Nothing herein contained shall extend to that part of the United Kingdom called Scotland.

#### 7 GEO. 4, c. 64.

19. ‘For preventing abuses from dilatory pleas,’ enacts, that no indictment or information shall be abated by reason of any dilatory plea of misnomer or of want of addition, or of wrong addition of the party offering such plea; if the court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded.

20. ‘And that the punishment of offenders may be less frequently intercepted in consequence of technical niceties;’ be it enacted, that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or toherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words ‘as appears by the record,’ or of the words ‘with force and arms,’ or of the words ‘against the peace,’ nor for the insertion of the words ‘against the form of the statute,’ instead of the words ‘against the form of the statutes,’ or *vice versâ*, nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation, instead of his, her, or their proper name or names, nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that

never happened, nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence.

7 & 8 GEO. 4, c. 28.

*An Act for further improving the Administration of Justice in Criminal Cases in England.*

[21st June, 1827.]

‘Whereas trials for criminal offences in that part of the United Kingdom called England are attended with some forms which frequently impede the due administration of justice, and it is therefore expedient to abolish such forms, and also to abolish the benefit of clergy, and to make better provision for the punishment of offenders in certain cases:’ be it therefore enacted by the King’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that if any person, not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of ‘Not guilty,’ he shall by such plea, without any further form, be deemed to have put himself upon the country for trial; and the court shall, in the usual manner, order a jury for the trial of such person accordingly.

2. If any person, being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of ‘Not guilty’ on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

3. If any person, indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge in any of the said cases, every peremptory challenge beyond the number allowed by law in any of the said cases shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made.

4. No plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment.

5. Where any person shall be indicted for treason or felony, the jury empanelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.

6. Benefit of clergy, with respect to persons convicted of felony, shall be abolished; but that nothing herein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of this Act.

7. No person convicted of felony shall suffer death unless it be for some felony which was excluded from the benefit of clergy before or on the first day of the present session of Parliament, or which hath been or shall be made punishable with death by some statute passed after that day.

8. Every person convicted of any felony, not punishable with death, shall be punished in the manner prescribed by the statute or statutes specially relating to such felony; and that every person convicted of any felony, for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this Act, and shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or

A plea of ‘Not guilty,’ without more, shall put the prisoner on his trial by jury.

If he refuses to plead, court may order a plea of ‘Not guilty’ to be entered.

Every challenge beyond the legal number shall be void.

Attainder of another crime not pleadable.

Jury shall not inquire of prisoner’s lands, &c., nor whether he fled.

Benefit of clergy abolished.

What felonies only shall be capital.

Felonies not capital punishable under the Acts, if any relating thereto; otherwise under this Act.



privately whipped (if the court shall so think fit), in addition to such imprisonment.

The court may order hard labour or solitary confinement as part of the sentence of imprisonment.

9. And with regard to the place and mode of imprisonment for all offences punishable under this Act, be it enacted, that where any person shall be convicted of any offence punishable under this Act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour as to the court in its discretion shall seem meet.

If a person under sentence for another crime is convicted of felony, the court may pass a second sentence, to commence after the expiration of the first.

10. Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence either of imprisonment or of transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded.

Punishment for a subsequent felony.

11. And whereas it is expedient to provide for the more exemplary punishment of offenders who commit felony after a previous conviction for felony, whether such conviction shall have taken place before or after the commencement of this Act; be it therefore enacted, that if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; and in an indictment for any such felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy shall utter a false certificate of any indictment and conviction for a previous felony, or if any person other than such clerk, officer, or deputy shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony, and, being lawfully convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

Form of indictment for the subsequent felony.  
What shall be sufficient proof of the first conviction.

Uttering false certificate of conviction.

Admiralty offences.

12. All offences prosecuted in the High Court of Admiralty of England shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon the land.

13. Where the King's Majesty shall be pleased to extend his royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under his royal sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or a conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the Great Seal for such offender, as to the felony for which such pardon shall be so granted: provided always, that no free pardon, nor any such discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of any such pardon.

Effect of a free or conditional pardon to a convict.

Proviso.

14. Wherever this or any other statute relating to any offence, whether punishable upon indictment or summary conviction, in describing or referring to the offence or the subject-matter on or with respect to which it shall be committed, or the offender or the party affected or intended to be affected by the offence, hath used or shall use words importing the singular number or the masculine gender only, yet the statute shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and wherever any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where such body shall be the party aggrieved.

Rule for the interpretation of all criminal statutes.

16. Nothing herein contained shall extend to Scotland or Ireland.

Not to extend to Scotland or Ireland.

The 11 Geo. 4 & 1 Will. 4, c. 70, s. 9, enacts, that upon all trials for felonies or misdemeanors upon any record of the Court of King's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default or confession, upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in court, excepting only where the prosecution shall be by information filed by leave of the Court of King's Bench, or such cases of informations filed by his Majesty's attorney-general, wherein the attorney-general shall pray that the judgment may be postponed; and the judgment so pronounced shall be indorsed upon the record of Nisi Prius, and afterwards entered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had or the judgment amended; and it shall be lawful for the judge before whom the trial shall be had either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term; and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison.

11 Geo. 4 & 1 Will. 4, c. 70, s. 9. Judgments to be pronounced in trials for felonies upon record during the sittings and assizes.

The 1 Vict. c. 84, s. 1, recites the 2 & 3 Will. 4, c. 59, s. 19 [see vol. 2, p. 934], the 2 & 3 Will. 4, c. 125, s. 64 [see vol. 2, p. 912], the 5 & 6 Will. 4, c. 45, s. 12 [see vol. 2, p. 922], and the 5 & 6 Will. 4, c. 51, s. 5 [see vol. 2, p. 912]; and enacts, that if any person shall after the commencement of this Act be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for

Persons convicted of any of the offences hereinbefore mentioned to be liable to be transported.

any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years.

The Acts recited in sec. 2 are repealed by the 8 & 9 Vict. c. 84 and 24 & 25 Vict. c. 95.

Persons convicted of offences punishable by imprisonment may be kept to hard labour and to solitary confinement.

3. And be it enacted, that when any person shall be convicted of any offence punishable under this Act for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

5 & 6 VICT. C. 38.

*An Act to define the Jurisdiction of Justices in General and Quarter Sessions of the Peace.*

[30th June, 1842.]

Justices in sessions restrained from trying certain offences.

‘Whereas it is expedient that the powers of justices in general and quarter sessions of the peace with respect to the trial of offences be better defined;’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that after the passing of this Act neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall, at any session of the peace, or at any adjournment thereof, try any person or persons for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas for life, or for any of the following offences (that is to say):—

1. Misprision of treason :
2. Offences against the Queen’s title, prerogative, person, or government, or against either House of Parliament :
3. Offences subject to the penalties of præmunire :
4. Blasphemy, and offences against religion :
5. Administering or taking unlawful oaths :
6. Perjury and subornation of perjury :
7. Making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor :
8. Forgery :
9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern :
10. Bigamy, and offences against the laws relating to marriage :
11. Abduction of women and girls :
12. Endeavouring to conceal the birth of a child :
13. Offences against any provision of the laws relating to bankrupts and insolvents :
14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels :
15. Bribery :
16. Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person :
17. Stealing or fraudulently taking, or injuring or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein :
18. Stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being



or containing evidence of the title to any real estate or any interest in lands, tenements, or hereditaments :

Provided always, that nothing herein contained shall be construed to give authority to the justices of the peace acting in and for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Middlesex, Essex, Kent, and Surrey, to try any person or persons for any offence committed or alleged to be committed within the jurisdiction of the Central Criminal Court, which such justices are restrained from trying under the provisions of an Act passed in the fifth year of the reign of his late Majesty, intituled, 'An Act for establishing a new court for the trial of offences committed in the metropolis and parts adjoining.'

Proviso as to justices acting in London and the environs.

4 & 5 Will. 4, c. 36.

6 & 7 VICT. c. 12.

*An Act for the more convenient Holding of Coroners' Inquests.*

[11th April, 1843.]

'Whereas it often happens that it is unknown where persons lying dead have come by their deaths, and also that such persons may die in other places than those in which the cause of death happened: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that the coroner only within whose jurisdiction the body of any person upon whose death an inquest ought to be holden shall be lying dead shall hold the inquest, notwithstanding that the cause of death did not arise within the jurisdiction of such coroner; and in the case of any body found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea, where there shall be no deputy coroner for the jurisdiction of the Admiralty of England, the inquest shall be holden only by the coroner having jurisdiction in the place where the body shall be first brought to land.

Coroner only within whose jurisdiction the body is lying dead shall hold the inquest.

2. For the purpose of holding coroners' inquests every detached part of a county, riding, or division shall be deemed to be within that county, riding, or division by which it is wholly surrounded, or where it is partly surrounded by two or more counties, ridings, or divisions, within that one with which it has the longest common boundary.

Provision for detached parts of counties.

3. If a verdict of murder or manslaughter, or as accessory before the fact to any murder, shall be found by the jury at any such inquest, against any person or persons, the coroner holding the said inquest and the justices of oyer and terminer and gaol delivery for the county, city, district, or place in which such inquest shall be holden, and all other persons, shall have the same powers respectively for the commitment, trial, and execution of the sentence of the person or persons so charged as they now by law possess with regard to the commitment, trial, and execution of the sentence upon any person or persons committed and tried within the jurisdiction where the death happened.

Parties may be tried on verdicts of murder or manslaughter.

The 7 & 8 Vict. c. 2, recites the 28 Hen. 8, c. 15, and enacts, that Her Majesty's justices of assize or others Her Majesty's commissioners by whom any court shall be holden under any of Her Majesty's commissions of oyer and terminer or general gaol delivery, shall have severally and jointly all the powers which by any Act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the jurisdiction of the Admiralty of England, and that it shall be lawful for the first-mentioned justices and commissioners, or any one or more of them, to inquire of, hear, and determine all offences alleged to have been committed on the high seas and other places within the jurisdiction of the Admiralty of England, and to deliver the gaol in every county and franchise within the limits of their

Justices of oyer and terminer may try offences committed on the high seas.

several commissions of any person committed to or imprisoned therein for any offence alleged to have been committed upon the high seas and other places within the jurisdiction of the Admiralty of England; and all indictments found, and trials and other proceedings had, by and before the said justices and commissioners, shall be valid; and it shall be lawful for the court to order the payment of the costs and expenses of the prosecution of such offences, in the manner prescribed by an Act of the seventh year of King George the Fourth, intituled, 'An Act for improving the administration of criminal justice in England,' in the case of felonies tried in the High Court of Admiralty.

7 Geo. 4, c. 64.

Venue in indictments.

2. In all indictments preferred before the said justices and commissioners under this Act, the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had; and all material facts which in other indictments would be averred to have taken place in the county where the trial is had shall in indictments prepared and tried under this Act be averred to have taken place 'on the high seas.'

Where offenders shall be tried.

7 Geo. 4, c. 38.

3. The justice or justices by whom any information shall be taken touching any offence committed within the jurisdiction of the Admiralty of England under the provisions of an Act passed in the seventh year of the reign of King George the Fourth, intituled, 'An Act to enable commissioners for trying offences upon the sea, and justices of the peace, to take examinations touching such offences, and to commit to safe custody persons charged therewith,' if he or they shall see cause thereupon to commit such person to take his trial for such offence, shall commit him to the same prison to which he would have been committed to take his trial at the next court of oyer and terminer and general gaol delivery if the offence had been committed on land within the jurisdiction of the same justice or justices, and shall have authority to bind by recognizance all persons who shall know or declare any thing material touching the said offence to appear at the said next court of oyer and terminer and general gaol delivery, then and there to prosecute or give evidence against the party accused, and shall return all such informations and recognizances to the proper officer of the court in which the trial is to be, at or before the opening of the court; and every such offender shall be arraigned, tried, and sentenced, as if the offence had been committed within the county, riding, or division for which such court shall be holden.

Not to affect Central Criminal Court, or prevent the issue of special commissions.

4. Nothing herein contained shall affect the jurisdiction belonging to the Central Criminal Court for the trial of persons charged with offences committed on the high seas and other places within the jurisdiction of the Admiralty of England, or to restrain the issue of any special commission under the first-recited Act for the trial of such offenders, if need shall be.

11 & 12 VICT. c. 78.

*An Act for the further Amendment of the Administration of the Criminal Law.*

[31st August, 1848.]

Questions of law may be reserved at sessions of the peace for consideration of judges.

1. When any person shall have been convicted of any treason, felony, or misdemeanor before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner or justices of the peace before whom the case shall have been tried may, in his or their discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one

or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be.

2. The judge or commissioner or court of quarter sessions shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons, and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order, if any, of the said justices and barons, shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or to the clerk of the peace or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge him, and also the next court of oyer and terminer and gaol delivery or sessions of the peace shall vacate the recognizance of bail, if any; and if the court of oyer and terminer and gaol delivery or court of quarter sessions shall be directed to give judgment, the said court shall proceed to give judgment at the next session.

3. The jurisdiction and authorities by this Act given to the said justices of either bench and barons of the exchequer shall and may be exercised by the said justices and barons, or five of them at the least, of whom the lord chief justice of the Court of Queen's Bench, the lord chief justice of the Court of Common Pleas, and the lord chief baron of the Court of Exchequer, or one of such chiefs at least, shall be part, being met in the exchequer chamber or other convenient place; and the judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior courts of common law at Westminster or Dublin, as the case may be, are now delivered.

4. The said justices and barons, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended.

5. Whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition, in any

Questions reserved to be certified to the judges.

Quorum of judges; their judgments to be delivered in open court.

Case or certificate may be sent back for amendment.

When judgment is re-



versed on writ of error, record may be remitted to court below for judgment.

Penalty for forgery.

criminal case, and the court of error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition.

6. Every person who shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any certificate of or copy certified by a chief justice, or any certificate of or copy certified by a clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, with intent to cause any person to be discharged from custody, or otherwise prevent the due course of justice, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding ten years, or be imprisoned for any term not exceeding three years, with or without hard labour and solitary confinement, both or either, at the discretion of the court before which he shall be tried.

#### SCHEDULE.

Whereas at the session of the peace for the county of \_\_\_\_\_ held on \_\_\_\_\_ before \_\_\_\_\_ and others their fellows [or at the session of oyer and terminer and gaol delivery held for the county of \_\_\_\_\_ on \_\_\_\_\_ before, among others, Sir *A.B.*, Knight, one of the justices of the court of \_\_\_\_\_ and \_\_\_\_\_ *here name the quorum commissioners*, justices of oyer and terminer and gaol delivery], *A.B.*, late of \_\_\_\_\_ *labourer*, having been found guilty of felony, and judgment thereupon given, that [state the substance] the court before whom he was tried reserved a certain question of law for the consideration of the justices of either bench and the barons of the exchequer, and execution was thereupon respited in the meantime :

This is to certify, that the said justices and barons having met in the exchequer chamber at Westminster [or Dublin, as the case may be] on the \_\_\_\_\_ day of \_\_\_\_\_ it was considered by the said justices and barons there that the judgment aforesaid should be annulled, and an entry made on the record that the said *A.B.* ought not, in the judgment of the said justices and barons, to have been convicted of the felony aforesaid ; and you are therefore hereby required forthwith to discharge the said *A.B.* from your custody.

To the Gaoler of \_\_\_\_\_ and the Sheriff of \_\_\_\_\_ and all others whom it may concern.

(Signed) *E.F.*

Clerk of the Peace for the County of \_\_\_\_\_  
[or Clerk of Assize for  
as the case may be.]

14 & 15 VICT. c. 100.

Provision as to traversing indictments.

27. No person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose.

Punishment

29. Whenever any person shall be convicted of any one of the

offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; any indecent assault, or any assault occasioning actual bodily harm; any attempt to have carnal knowledge of a girl under twelve years of age; any public selling, or exposing for public sale or to public view of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

for certain  
indictable mis-  
deemeanors.

16 & 17 VICT. c. 99.

Secs. 1, 2, 3, and 4 are repealed by the 20 & 21 Vict. c. 3.

5. Whenever Her Majesty or the lord lieutenant, or other chief governor or governors of Ireland for the time being shall be pleased to extend mercy to any offender convicted of any offence for which he may be liable to the punishment of death, upon condition of his being kept to penal servitude for any term of years or for life, such intention of mercy shall have the same effect, and may be signified in the same manner, and all courts, justices, and others shall give effect thereto and to the condition of the pardon in like manner, as in the cases where Her Majesty, or the lord lieutenant, or other chief governor or governors of Ireland for the time is or are now pleased to extend mercy upon condition of transportation beyond seas, the order for the execution of such punishment as Her Majesty, or the lord lieutenant, or other chief governor or governors of Ireland for the time being may have made the condition of her, his, or their mercy being substituted for the order for transportation.

Conditional  
pardons to be  
allowed with  
reference to  
the substituted  
punishment,  
as in cases of  
pardons on  
condition of  
transporta-  
tion.

6. Every person who under this Act shall be sentenced or ordered to be kept in penal servitude may, during the term of the sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, port, or harbour of the United Kingdom, in which persons under sentence or order of transportation may now by law be confined, or in any other prison in the United Kingdom, or in any part of Her Majesty's dominions beyond the seas, or in any port or harbour thereof, as one of Her Majesty's principal secretaries of state may from time to time direct; and such person may during such term be kept to hard labour, and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with whilst so confined.

Persons under  
sentence or  
order of penal  
servitude how  
to be dealt  
with.

7. All Acts and provisions of Acts now applicable with respect to persons under sentence or order of transportation shall, so far as may be consistent with the express provisions of this Act, be construed to extend and be applicable to persons under any sentence or order of penal servitude under this Act; and all the powers and provisions contained in the Act of the fifth year of King George the Fourth, chapter eighty-four, authorizing the appointment by Her Majesty from time to time of places of confinement as therein mentioned for male offenders under sentence or order of transportation, and authorizing Her Majesty to order male offenders convicted in Great Britain and under sentence or order of transportation to be kept to hard labour in any part of Her Majesty's dominions out of England, shall extend and be applicable to and for the appointment by Her Majesty of like places of confinement in any part of the United Kingdom for offenders (whether male or female) sentenced under this Act in any part of the United Kingdom, and to and for the ordering of such offenders to be kept to hard labour in any part of Her

All Acts, &c.  
concerning  
convicts sen-  
tenced to  
transporta-  
tion made ap-  
plicable for  
the purposes  
of this Act.

Majesty's dominions out of England; and all the provisions of the said Act concerning the removal to or from and confinement in the places of confinement in or out of England, appointed under the said Act, of the offenders therein mentioned, and all Acts and provisions of Acts now in force concerning or relating to the regulation and government of such places of confinement, and the custody, treatment, management, and control of or otherwise in relation to the offenders confined therein, shall, so far as the same may be consistent with the express provisions of the Act, extend and be applicable to and for the removal to and from and confinement in the places of confinement appointed under this Act, of the offenders sentenced in any part of the United Kingdom, and otherwise be applicable to and in respect of such places of confinement and the offenders to be confined therein.

Powers of secretary of state to be exercised in Ireland by lord lieutenant.

8. Provided always, that all the powers vested under this Act expressly or by reference to any other Act, in one of Her Majesty's principal secretaries of state, shall in relation to places of confinement in Ireland, or where such powers are otherwise to be exercised in Ireland, be exercised by the lord lieutenant or other chief governor or governors of Ireland; and where the signature of one of Her Majesty's principal secretaries of state would be necessary in relation to the exercise of such powers, the signature of such lord lieutenant or chief governor or governors, or his or their chief secretary, shall be sufficient in the case of the exercise of such powers by such lord lieutenant or chief governor or governors.

Her Majesty may grant licences to be at large to convicts under sentence of transportation.

9. It shall be lawful for Her Majesty, by an order in writing under the hand and seal of one of Her Majesty's principal secretaries of state, to grant to any convict now under sentence of transportation, or who may hereafter be sentenced to transportation, or to any punishment substituted for transportation by this Act, a licence to be at large in the United Kingdom and the Channel Islands, or in such part thereof respectively as in such licence shall be expressed, during such portion of his or her term of transportation or imprisonment, and upon such conditions in all respects as to Her Majesty shall seem fit; and it shall be lawful for Her Majesty to revoke or alter such licence by a like order at Her Majesty's pleasure.

Holder of licence not to be imprisoned, &c. by reason of his sentence.

10. So long as such licence shall continue in force and unrevoked, such convict shall not be liable to be imprisoned or transported by reason of his or her sentence, but shall be allowed to go and remain at large according to the term of such licence.

If licence revoked, the convict may be apprehended and committed to prison.

11. If it shall please Her Majesty to revoke any such licence as aforesaid, it shall be lawful for one of Her Majesty's principal secretaries of state, by warrant under his hand and seal, to signify to any one of the police magistrates of the metropolis that such licence has been revoked, and to require such magistrate to issue his warrant under his hand and seal for the apprehension of the convict to whom such licence was granted, and such magistrate shall issue his warrant accordingly, and such warrant shall and may be executed by the constable to whom the same shall be delivered for that purpose in any part of the United Kingdom, or in the Isles of Jersey, Guernsey, Alderney, or Sark, and shall have the same force and effect in all the said places as if the same had been originally issued or subsequently endorsed by a justice of the peace or magistrate, or other lawful authority having jurisdiction in the place where the same shall be executed; and such convict when apprehended under such warrant shall be brought, as soon as he conveniently may be, before the magistrate by whom the said warrant shall have been issued, or some other magistrate of the same court, and such magistrate shall thereupon make out his warrant under his hand and seal for the recommitment of such convict to the prison or place of confinement from which he was released by virtue of the said licence, and such convict shall be so recommitment accordingly, and shall thereupon be remitted to his or her original



sentence, and shall undergo the residue thereof as if no such licence had been granted.

12 is repealed by the 24 & 25 Vict. c. 95.

13. Nothing in this Act contained shall in any manner affect Her Majesty's royal prerogative of mercy, or any prerogative of mercy vested in the lord lieutenant or other chief governor or governors of Ireland for the time being.

Queen's prerogative.

14. Nothing herein contained shall interfere with or affect the authority or discretion of any court in respect of any punishment which such court may now award or pass on any offender other than transportation, but where such other punishment may be awarded at the discretion of the court, instead of transportation, or in addition thereto, the same may be awarded instead of or (as the case may be) in addition to the punishment substituted for transportation under this Act.

Discretion of courts as to alternative punishments not to be affected.

15. For the purposes of this Act, the term 'Transportation' shall include banishment beyond the seas.

Transportation.

17 & 18 Vict. c. 86, s. 2, whenever after the passing of this Act any person under the age of sixteen years shall be convicted of any offence punishable by law, either upon an indictment or on summary conviction before a police magistrate of the metropolis or other stipendiary magistrate, or before two or more justices of the peace, or before a sheriff or magistrate in Scotland, then and in every such case it shall be lawful for any court, judge, police magistrate of the metropolis, stipendiary magistrate, or any two or more justices of the peace, or in Scotland for any sheriff or magistrate of a burgh or police magistrate, before or by whom such offender shall be so convicted, in addition to the sentence then and there passed as a punishment for his offence, to direct such offender to be sent, at the expiration of his sentence, to some one of the aforesaid reformatory schools to be named in such direction, the directors or managers of which shall be willing to receive him, and to be there detained for a period not less than two years, and not exceeding five years, and such offender shall be liable to be detained pursuant to such direction: provided always, that no offender shall be directed to be so sent and detained as aforesaid unless the sentence passed as a punishment for his offence, at the expiration of which he is directed to be so sent and detained, shall be one of imprisonment for fourteen days at the least: provided also, that the Secretary of State for the Home Department may at any time order any such offender to be discharged from any such school.

Juvenile offenders how to be dealt with.

19 & 20 Vict. c. 109, recites the 17 & 18 Vict. c. 86, and by sec. 1, it shall not be necessary at the time of passing sentence for any court, judge, sheriff, or magistrate proceeding under the said first-recited Act to name the particular school to which any youthful offender is to be sent, but it shall be sufficient for such court, judge, sheriff, or magistrate to direct that such youthful offender be sent to such school (being a school duly certified under the said Act, and the directors or managers of which may be willing to receive him) as may thereafter, and before the expiration of the term of imprisonment to which he or she has been sentenced, be directed by the chairman or deputy chairman of the said court, or by the said judge, sheriff, or magistrate.

School to which youthful offenders committed need not be named in the sentence.

2. Any court, judge, sheriff, or magistrate, or the chairman or deputy chairman of such court, having made an order under the authority of either of the said recited Acts or of this Act for sending any young person to any reformatory or industrial school, or in Scotland to any similar institution, may, at his or their discretion, make a supplemental order in England at any time before the expiration of the term of imprisonment to which he or she has been sentenced, and in Scotland at any time within fourteen days of the

Supplemental orders may be made.

date of the order, exchanging the name of such school or institution for the name of any other school or institution to which he or she might in the first instance legally have been sent: provided the managers thereof be willing to receive him or her, and such young person shall be sent or transferred to such last-mentioned school or institution accordingly.

20 & 21 VICT. c. 3.

*An Act to amend the Act of the Sixteenth and Seventeenth Years of Her Majesty, to substitute in certain Cases other Punishment in lieu of Transportation.*

[26th June, 1857.]

Sec. 1 repeals secs. 1, 2, 3, and 4 of the 16 & 17 Vict. c. 99.

Sentence of transportation abolished, and sentence of penal servitude substituted.

2. After the commencement of this Act, no person shall be sentenced to transportation; and any person who, if this Act and the said Act had not been passed, might have been sentenced to transportation, shall, after the commencement of this Act, be liable to be sentenced to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if the said Act and this Act had not been passed; and in every case where, at the discretion of the court, one of any two or more terms of transportation might have been awarded, the court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorized to be awarded instead of such terms of transportation: provided always, that any person who might, at the discretion of the court, have been sentenced either to transportation for any term, or to any period of imprisonment, shall be liable, at the discretion of the court, to be sentenced either to penal servitude for the same term, or to the same period of imprisonment; and in any case in which before the passing of the said Act sentence of seven years transportation might have been passed, it shall be lawful for the court in its discretion to pass a sentence of penal servitude of not less than three years.

Provisions of Acts concerning transported offenders to apply to offenders under sentence of penal servitude.

3. 'And whereas the provisions applicable to persons under sentence of transportation extend to persons under sentence of penal servitude conveyed to parts beyond the seas in those cases only where they are conveyed to and kept in places of confinement appointed under the said Act, or the Act of the fifth year of King George the Fourth, chapter eighty-four, and it is expedient to extend the said provisions to other cases:'

Any person now or hereafter under sentence or order of penal servitude may, during the term of the sentence or order, be conveyed to any place or places beyond the seas to which offenders under sentence or order of transportation may be conveyed, or to any place or places beyond the seas which may be hereafter appointed as herein mentioned; and all Acts and provisions now applicable to and for the removal and transportation of offenders under sentence or order of transportation to and from any places beyond the seas, and concerning their custody, management, and control, and the property in their services, and the punishment of such offenders if at large without lawful cause before the expiration of their sentence, and all other provisions now applicable to and in the case of persons under sentence or order of transportation, shall apply to and in the case of persons under sentence or order of penal servitude, as if they were persons under sentence or order of transportation.

Existing power to appoint places of transportation to be applicable for the purposes of this Act.

4. The provisions and powers of the said Act of the fifth year of King George the Fourth, authorizing the appointment (by Her Majesty, with the advice of her privy council) of any place or places beyond the seas to which felons and other offenders under sentence or order of transportation shall be conveyed, and all other powers of Her Majesty, or the lord lieutenant or chief governor or governors of Ireland, for the like

purpose, shall extend and be applicable to and for the appointment of any place or places beyond the seas to which offenders under sentence or order of penal servitude may be conveyed, as herein provided.

5. 'And whereas by the said Act of the sixteenth and seventeenth years of Her Majesty it is provided, that any convict whose licence is revoked shall be recommitted to the prison or place of confinement from which he was released by virtue of the said licence:' be it enacted, that from and after the passing of this Act, any such convict may be recommitted by the magistrate issuing his warrant in that behalf, either to the prison from which he was released by virtue of his licence, or to any other prison in which convicts under sentence of penal servitude may be lawfully confined.

6. Where in any enactment now in force the expression 'any crime punishable with transportation,' or 'any crime punishable by law with transportation,' or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any crime punishable with penal servitude.

7. The said Act of the sixteenth and seventeenth years of Her Majesty and this Act shall be read and construed together as one Act.

Magistrates may recommit convicts whose licences are revoked to penal servitude in any convict prison.

All enactments referring to transportation to have reference to penal servitude.  
Recited Act and this to be read as one.

22 & 23 VICT. c. 17.

*An Act to prevent Vexatious Indictments for certain Misdemeanors.*  
[8th August, 1859.]

1. No bill of indictment for any of the offences following; viz.

Perjury,  
Subornation of perjury,  
Conspiracy,  
Obtaining money or other property by false pretences,  
Keeping a gambling house,  
Keeping a disorderly house, and  
Any indecent assault,

No indictment for offences herein named to be preferred without previous authorization.

shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent, in writing, of a judge of one of the superior courts of law at Westminster, or of Her Majesty's attorney-general or solicitor-general for England, or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent, in writing, of a judge of one of the superior courts of law in Dublin, or of Her Majesty's attorney-general or solicitor-general for Ireland, or (in the case of an indictment for perjury) by the direction of any court, judge, or public functionary authorized by an Act of the session holden in the fourteenth and fifteenth years of Her Majesty, chapter one hundred, to direct a prosecution for perjury.

14 & 15 Vict.  
c. 100.

2. That where any charge or complaint shall be made before any one or more of Her Majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice, and he is hereby required to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information, and depositions,

In certain cases where prosecutor desires to prefer an indictment, justice to take his recognizance to prosecute.



if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence.

24 & 25 VICT. c. 94.

*An Act to consolidate and amend the Statute Law of England and Ireland relating to Accessories to and Abettors of Indictable Offences.*  
[6th August, 1861.]

‘Whereas it is expedient to consolidate and amend the statute law of England and Ireland relating to accessories to and abettors of indictable offences:’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

As to accessories before the fact:

Accessories before the fact may be tried and punished as principals.

Accessories before the fact may be indicted as such, or as substantive felons.

1. Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.

2. Whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished.

As to accessories after the fact:

Accessories after the fact may be indicted as such, or as substantive felons.

3. Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished.

Punishment of accessories after the fact.

4. Every accessory after the fact to any felony (except where it is otherwise specially enacted), whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be liable, at the discretion of the court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour, and it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to such punishment: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

As to accessories generally:

Prosecution of accessory after principal has been convicted, but not attainted.

5. If any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainer; and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attainted.

6. Any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

Several accessories may be included in the same indictment, although principal felon not included.

7. Where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory either before or after the fact to any such felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the Act by reason whereof such person shall have become such accessory shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within Her Majesty's dominions or without, or partly within Her Majesty's dominions and partly without: provided that no person who shall be once duly tried either as an accessory before or after the fact, or for a substantive felony under the provisions hereinbefore contained, shall be liable to be afterwards prosecuted for the same offence.

Trial of accessories.

As to abettors in misdemeanors:

8. Whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

Abettors in misdemeanors.

As to other matters:

9. Where any person shall, within the jurisdiction of the Admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed 'on the high seas:' provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

As to offences committed within the jurisdiction of the Admiralty.

10. Nothing in this Act contained shall extend to Scotland, except as hereinbefore otherwise expressly provided.

Act not to extend to Scotland.

11. This act shall commence and take effect on the first day of November, one thousand eight hundred and sixty-one.

Commencement of Act.

#### 24 & 25 VICT. c. 95.

*An Act to repeal certain Enactments which have been consolidated in several Acts of the present Session, relating to Indictable Offences and other Matters.* [6th August, 1861.]

'Whereas by six several Acts of the present session of Parliament, relating respectively to offences against the person, malicious injuries to property, larceny, forgery, coining, and accessories and abettors, divers Acts and parts of Acts have been consolidated and amended, and it is

expedient to repeal the enactments so consolidated and amended, and certain other enactments:’ be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Repeal of Acts and parts of Acts mentioned in schedule.

1. The several Acts and parts of Acts in the schedule hereto annexed shall continue in force until and throughout the last day of October in the present year, and shall from and after that day be repealed to the extent following (that is to say): in any case where the enactment does not form part of the law of Scotland, then the enactment shall be wholly repealed, but in any case where the enactment does form part of the law of Scotland, then the enactment shall be wholly repealed as to every other place, but shall not be repealed as to Scotland, unless otherwise expressly mentioned.

Repeal not to affect the colonies in certain cases.

2. Provided, that where any enactment shall have been extended to any part of Her Majesty’s dominions out of the United Kingdom by any Act of the Parliament of the United Kingdom or otherwise, the same shall not be repealed as to that part of Her Majesty’s dominions.

Repeal not to affect offences, &c. committed before the commencement of this Act.

3. Provided also, that every offence which shall have been wholly or partly committed against any of the said Acts or parts of Acts before this Act comes into operation shall be dealt with, inquired of, tried, determined, and punished, and every penalty in respect of any such offence shall be recovered, in the same manner as if the said Acts and parts of Acts had not been repealed; and that every Act duly done, and every warrant and other instrument duly made or granted before this Act comes into operation, shall continue and be of the same force and effect as if the said Acts and parts of Acts had not been repealed; and that every right, liability, privilege, and protection in respect of any matter or thing committed or done before this Act comes into operation shall continue and be of the same force and effect as if the said Acts and parts of Acts had not been repealed; and that every action, prosecution, and other proceeding which shall have been commenced before this Act comes into operation, or shall thereafter be commenced in respect of any such matter or thing, may be prosecuted, continued, and defended in the same manner as if the said Acts and parts of Acts had not been repealed.

Repeal not to affect any authority to amend registers of births, &c.

4. Provided also, that nothing herein contained shall in any manner alter or affect any power or authority given by any Act to alter or amend any register of births, baptisms, marriages, deaths, or burials.

#### THE SCHEDULE.

References to Act.	Extent of Repeal.
10 C. 1, Sess. 3, c. 20 (I)	The whole.
7 W. 3, c. 18 (I) ... ..	Section Four.
2 & 3 Ann. c. 4 ... ..	So much of Section Nineteen as relates to any forging or counterfeiting therein mentioned.
6 Ann. c. 2 (I) ... ..	So much of Section Seventeen as relates to any forging or counterfeiting therein mentioned.
6 Ann. c. 35 ... ..	So much of Section Twenty-six as relates to any forging or counterfeiting therein mentioned.
7 Ann. c. 20 ... ..	So much of Section Fifteen as relates to any forging or counterfeiting therein mentioned.



References to Act.	Extent of Repeal.
8 Ann. c. 10 (I) ... ..	So much of Section Four as relates to any forging or counterfeiting therein mentioned.
8 Geo. 1, c. 15 (I) ... ..	So much of Section Four as relates to any forging or counterfeiting therein mentioned.
11 Geo. 1, c. 9 ... ..	Section Six.
12 Geo. 1, c. 32 ... ..	Section Nine.
3 Geo. 2, c. 4 (I) ... ..	Section One.
8 Geo. 2, c. 6 ... ..	So much of Section Thirty-one as relates to any forging or counterfeiting therein mentioned.
15 Geo. 2, c. 13 ... ..	Section Twelve.
17 Geo. 2, c. 11 (I) ... ..	Section One.
13 & 14 Geo. 3, c. 14 (I) ... ..	The whole.
21 & 22 Geo. 3, c. 16 (I) ... ..	Sections Fifteen and Sixteen.
23 & 24 Geo. 3, c. 22 (I) ... ..	Section Twenty-two.
25 Geo. 3, c. 37 (I) ... ..	The whole.
27 Geo. 3, c. 15 (I) ... ..	Section Five.
35 Geo. 3, c. 66 ... ..	Section Three and all the subsequent Sections.
37 Geo. 3, c. 26 (I) ... ..	The whole.
37 Geo. 3, c. 46 ... ..	Section Three and all the subsequent Sections.
37 Geo. 3, c. 54 (I) ... ..	Section Eleven and all the subsequent Sections.
37 Geo. 3, c. 126 ... ..	The whole, both as to England and Scotland, except Section One.
38 Geo. 3, c. 53 (I) ... ..	The whole.
39 Geo. 3, c. 63 (I) ... ..	The whole, except the last Section.
40 Geo. 3, c. 96 (I) ... ..	So much of Section Five as perpetuates the part of the 27 Geo. 3, c. 15, hereby repealed.
41 Geo. 3, c. 57 ... ..	The whole.
43 Geo. 3, c. 139 ... ..	Sections One and Two as to Ireland, and the rest of the Act as to the whole United Kingdom.
48 Geo. 3, c. 1 ... ..	Section Nine.
49 Geo. 3, c. 13 (I) ... ..	The whole.
1 Geo. 4, c. 4 ... ..	The whole.
1 Geo. 4, c. 92 ... ..	Sections One and Two.
3 Geo. 4, c. 116 ... ..	So much of Section Seven as relates to any forging or counterfeiting therein mentioned.
4 Geo. 4, c. 54 ... ..	The whole.
5 Geo. 4, c. 25 (I) ... ..	Section Five.
7 Geo. 4, c. 64 ... ..	Sections Nine, Ten, and Eleven.
7 & 8 Geo. 4, c. 18 ... ..	The whole.
7 & 8 Geo. 4, c. 29 ... ..	The whole, as to the whole United Kingdom.
7 & 8 Geo. 4, c. 30 ... ..	The whole.
9 Geo. 4, c. 31 ... ..	The whole.
9 Geo. 4, c. 54 (I) ... ..	Sections Twenty-three, Twenty-four, and Twenty-five.
9 Geo. 4, c. 55 (I) ... ..	The whole, as to the whole United Kingdom.

References to Act.	Extent of Repeal.
9 Geo. 4, c. 56 (I) ...	The whole.
10 Geo. 4, c. 34 (I) ...	The whole.
11 Geo. 4 & 1 W. 4, c. 66	The whole, except Section Twenty-one.
2 & 3 W. 4, c. 4 ...	The whole.
2 & 3 W. 4, c. 34 ...	The whole, as to the whole United Kingdom.
2 & 3 W. 4, c. 75 ...	Section Sixteen.
2 & 3 W. 4, c. 123 ...	The whole.
3 & 4 W. 4, c. 44 ...	The whole.
4 & 5 W. 4, c. 26 ...	Section Two.
5 & 6 W. 4, c. 34 (I) ...	The whole.
5 & 6 W. 4, c. 81 ...	So much as relates to the punishment of any person who shall break and enter any church or chapel, and steal therein any chattel, or, having stolen any chattel in any church or chapel, shall break out of the same, and to principals in the second degree and accessories in such offences.
6 & 7 W. 4, c. 4 ...	So much as alters and amends that part of the 5 & 6 Will. 4, c. 81, which is hereby repealed.
6 & 7 W. 4, c. 30 ...	The whole.
6 & 7 W. 4, c. 86 ...	Section Forty-three.
7 W. 4 & 1 Vict. c. 77 ...	So much of Section Three as empowers the court to direct sentence of death to be recorded in cases of murder.
7 W. 4 & 1 Vict. c. 84 ...	So much of Sections One and Three as relates to the forging, altering, offering, uttering, disposing of, or putting off any will, testament, codicil, or testamentary writing, or any power of attorney, or other authority therein mentioned, and to principals in the second degree and accessories before the fact in such offences, and so much of Sections Two and Three as relates to the punishment of any offence created by or formerly punishable under any enactment in this schedule before mentioned and hereby repealed.
7 W. 4 & 1 Vict. c. 85 ...	The whole.
7 W. 4 & 1 Vict. c. 86 ...	The whole.
7 W. 4 & 1 Vict. c. 87 ...	The whole.
7 W. 4 & 1 Vict. c. 89 ...	The whole.
7 W. 4 & 1 Vict. c. 90 ...	The whole, except Section Five.
2 & 3 Vict. c. 58 ...	Section Ten.
3 & 4 Vict. c. 97 ...	Section Fifteen.
4 & 5 Vict. c. 56 ...	Sections Two and Three, and so much of Section One as relates to embezzlements by officers or servants of the bank of England.
5 & 6 Vict. c. 28 (I) ...	Sections Four, Thirteen, Fourteen, and Fifteen, and so much of Section Seven as alters the punishment contained in any enactment hereby repealed, and so

References to Act.	Extent of Repeal.
	much of Section Eighteen as relates to principals in the second degree and accessories before the fact to any offence mentioned in the said Sections Four, Thirteen, Fourteen, and Fifteen, or in the said part of the said Section Eighteen hereby repealed.
5 & 6 Vict. c. 39 ...	Section Six.
5 & 6 Vict. c. 66 ...	Sections Nine and Ten.
5 & 6 Vict. c. 106 (I) ...	Sections Eleven and Twelve.
6 & 7 Vict. c. 10 ...	The whole.
7 & 8 Vict. c. 62 ...	The whole.
7 & 8 Vict. c. 81 (I) ...	Section Seventy-five.
8 & 9 Vict. c. 44 ...	The whole.
8 & 9 Vict. c. 47 ...	The whole.
8 & 9 Vict. c. 108 (I) ...	Section Eighteen.
9 & 10 Vict. c. 25 ...	The whole.
10 & 11 Vict. c. 66 ...	The whole.
11 & 12 Vict. c. 46 ...	Sections One, Two, and Three.
12 & 13 Vict. c. 11 ...	The whole.
12 & 13 Vict. c. 76 ...	The whole.
13 & 14 Vict. c. 72 (I) ...	Section Sixty-two.
13 & 14 Vict. c. 88 (I) ...	Section Forty-two.
14 & 15 Vict. c. 11 ...	Sections One, Two, Six, and Seven.
14 & 15 Vict. c. 19 ...	Sections One, Two, Three, Four, Six, Seven, Eight, and Nine.
14 & 15 Vict. c. 92 (I) ...	Sections Two, Three, Four, and Five.
14 & 15 Vict. c. 100 ...	Sections Four, Six, Eight, Eleven, Thirteen, Fourteen, Fifteen, Sixteen, Seventeen, and so much of Section Five as relates to forging or uttering any instrument, and so much of Section Twenty-nine as relates to any indecent assault, or any assault occasioning actual bodily harm, or any attempt to have carnal knowledge of a girl under twelve years of age.
16 & 17 Vict. c. 23 ...	Section Forty-one.
16 & 17 Vict. c. 30 ...	Section One.
16 & 17 Vict. c. 99 ...	Section Twelve.
16 & 17 Vict. c. 102 ...	The whole, as to the whole United Kingdom.
16 & 17 Vict. c. 113 ...	So much of Section Seventy-one as relates to any action which shall be commenced against any person for anything done in pursuance of any of the Acts of this Session for consolidating and amending the Statute Law of England and Ireland relating to Larceny, Malicious Injuries, and Coin.
16 & 17 Vict. c. 132 ...	Sections Ten and Eleven.
17 & 18 Vict. c. 33 ...	Section Six.
20 & 21 Vict. c. 54 ...	The whole.
21 & 22 Vict. c. 3 ...	Section Ten.
21 & 22 Vict. c. 47 ...	The whole.
21 & 22 Vict. c. 79 ...	Section Three.



References to Act.	Extent of Repeal.
21 & 22 Vict. c. 106 ...	Section Fifty.
22 Vict. c. 11 ...	Section Ten.
22 & 23 Vict. c. 32 ...	Section Twenty-five.
22 & 23 Vict. c. 39 ...	Section Thirteen.
23 & 24 Vict. c. 8 ...	The whole.
23 & 24 Vict. c. 29 ...	The whole.
23 & 24 Vict. c. 130 ...	Section Thirteen.

## 24 &amp; 25 VICT. c. 96.

*An Act to consolidate and amend the Statute Law of England and Ireland relating to Larceny and other similar Offences.*

[6th August, 1861.]

‘Whereas it is expedient to consolidate and amend the statute law of England and Ireland relating to larceny and other similar offences:’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Interpretation  
of terms:

‘Document of  
title to goods:’

1. In the interpretation of this Act:

The term ‘document of title to goods’ shall include any bill of lading, India warrant, dock warrant, warehouse keeper’s certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to:

‘Document of  
title to lands:’

The term ‘document of title to lands’ shall include any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate, or to any interest in or out of any real estate:

‘Trustee:’

The term ‘trustee’ shall mean a trustee on some express trust created by some deed, will, or instrument in writing, and shall include the heir, or personal representative, of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer, acting under any present or future Act relating to joint-stock companies, bankruptcy, or insolvency:

‘Valuable se-  
curity:’

The term ‘valuable security’ shall include any order, exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom

or of Great Britain, or of Ireland, or of any foreign state, and any document of title to lands or goods as hereinbefore defined :

The term 'property' shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include, not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and any thing acquired by such conversion or exchange, whether immediately or otherwise :

For the purposes of this Act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day.

2. Every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the twenty-first day of June, one thousand eight hundred and twenty-seven; and every court whose power as to the trial of larceny was before that time limited to petty larceny shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny.

3. Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction.

4. Whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

5. It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them.

6. If upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings.

7. Whosoever shall commit the offence of simple larceny after a previous conviction for felony, whether such conviction shall have taken place upon an indictment, or under the provisions of the Act passed in the session held in the eighteenth and nineteenth years of Queen Victoria, chapter one hundred and twenty-six, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and

'Property.'

'Night.'

All larcenies to be of the same nature.

Bailees fraudulently converting property guilty of larceny.

Punishment for simple larceny.

Three larcenies within six months may be charged in one indictment.

Where a single taking is charged, and several takings at different times are proved.

Larceny after a conviction for felony.

with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Larceny after conviction of an indictable misdemeanor under this Act.

8. Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been previously convicted of any indictable misdemeanor punishable under this Act, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Larceny after two summary convictions.

9. Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction, under the provisions contained in the Act of the session held in the seventh and eighth years of King George the Fourth, chapter twenty-nine, or the Act of the same session, chapter thirty, or the Act of the ninth year of King George the Fourth, chapter fifty-five, or the Act of the same year, chapter fifty-six, or the Act of the session held in the tenth and eleventh years of Queen Victoria, chapter eighty-two, or the Act of the session held in the eleventh and twelfth years of Queen Victoria, chapter fifty-nine, or in sections three, four, five, and six of the Act of the session held in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-two, or in this Act, or the Act of this session, intituled, An Act to consolidate and amend the Statute Law of England and Ireland relating to Malicious Injuries to Property (whether each of the convictions shall have been in respect of an offence of the same description or not, and whether such convictions or either of them shall have been or shall be before or after the passing of this Act), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

As to larceny of cattle or other animals :

Stealing horses, cows, sheep, &c.

10. Whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Killing animals with intent to steal the carcase, &c.

11. Whosoever shall wilfully kill any animal, with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony.

Stealing deer in an uninclosed part of a forest.

12. Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet ; and whosoever having been previously convicted of any offence relating to deer, for which a pecuniary penalty shall have been imposed by this or by any former Act of Parliament, shall afterwards commit any of the offences hereinbefore enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof shall be liable, at the

Second offence.



discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

13. Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Stealing deer in any inclosed ground.

14. If any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being taken or summoned before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding twenty pounds; and if any such person shall not under the said provisions be liable to conviction, then, for the discovery of the party who actually killed or stole such deer, the justice, at his discretion, as the evidence given and the circumstances of the case shall require, may summon before him every person through whose hands such deer, or the head, skin, or other part thereof shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is hereinbefore last mentioned.

Suspected persons found in possession of venison, &c., and not satisfactorily accounting for it.

Penalty.

In case they cannot be convicted, how the justice may proceed.

15. Whosoever shall unlawfully and wilfully set or use any snare or engine whatsoever, for the purpose of taking or killing deer in any part of any forest, chase, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding twenty pounds, as to the justice shall seem meet.

Setting engines for taking deer or pulling down park fences.

16. If any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, every person intrusted with the care of such deer, and any of his assistants, whether in his presence or not, may demand from every such offender any gun, firearms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this Act, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Deer-keepers, &c. may seize the guns, &c. of offenders who, on demand, do not deliver up the same.

Penalty on resistance to keepers, &c. in the execution of their duty.

17. Whosoever shall unlawfully and wilfully, between the expiration Killing, &c.

hares or rabbits in a warren in the night-time.  
The like in the day-time.

Exception.

of the first hour after sunset and the beginning of the last hour before sunrise, take or kill any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanor; and whosoever shall unlawfully and wilfully, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, take or kill any hare or rabbit in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or rabbits, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided that nothing in this section contained shall affect any person taking or killing in the daytime any rabbits on any sea bank or river bank in the county of Lincoln, so far as the tide shall extend, or within one furlong of such bank.

Stealing dogs.

18. Whosoever shall steal any dog shall, on conviction thereof before two justices of the peace, either be committed to the common gaol or house of correction, there to be imprisoned, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or shall forfeit and pay, over and above the value of the said dog, such sum of money, not exceeding twenty pounds, as to the said justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards steal any dog, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour.

Second offence.

Possession of stolen dogs.

19. Whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen or such skin to be the skin of a stolen dog, shall, on conviction thereof before two justices of the peace, be liable to pay such sum of money, not exceeding twenty pounds, as to such justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards be guilty of any such offence as in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour.

Second offence.

Taking money to restore dogs.

20. Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour.

Stealing beasts or birds ordinarily kept in confinement, and not the subjects of larceny.

21. Whosoever shall steal any bird, beast, or other animal ordinarily kept in a state of confinement or for any domestic purpose, not being the subject of larceny at common law, or shall wilfully kill any such bird, beast, or animal, with intent to steal the same or any part thereof, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the bird, beast, or other animal, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any offence in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit.

Second offence.



22. If any such bird, or any of the plumage thereof, or any dog, or any such beast, or the skin thereof, or any such animal, or any part thereof, shall be found in the possession or on the premises of any person, any justice may restore the same respectively to the owner thereof; and any person in whose possession or on whose premises such bird or the plumage thereof, or such beast or the skin thereof, or such animal or any part thereof, shall be so found (such person knowing that the bird, beast, or animal has been stolen, or that the plumage is the plumage of a stolen bird, or that the skin is the skin of a stolen beast, or that the part is a part of a stolen animal), shall, on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment, as any person convicted of stealing any beast or bird is made liable to by the last preceding section.

Persons found in possession of stolen beasts, &c. liable to penalties.

23. Whosoever shall unlawfully and wilfully kill, wound, or take any house dove or pigeon under such circumstances as shall not amount to larceny at common law, shall, on conviction before a justice of the peace, forfeit and pay, over and above the value of the bird, any sum not exceeding two pounds.

Killing pigeons.

24. Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor; and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided, that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset; but whosoever shall by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds, and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds, as to the justice shall seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto.

Taking fish in any water situate in land belonging to a dwelling house; in a private fishery elsewhere.

Provision respecting anglers.

Provision as to boundaries of parishes.

25. If any person shall at any time be found fishing against the provisions of this Act, the owner of the ground, water, or fishery where such offender shall be so found, his servant, or any person authorized by him, may demand from such offender any rod, line, hook, net, or other implement for taking or destroying fish which shall then be in his possession, and in case such offender shall not immediately deliver up the same, may seize and take the same from him for the use of such owner: provided, that any person angling against the provisions of this Act, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, from whom any implement used by anglers shall be taken, or by whom the same shall be so delivered up, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling.

The tackle of fishers may be seized.

Angler, on seizure of his tackle, exempt from penalty.

26. Whosoever shall steal any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person,

Stealing or dredging for



oysters in  
oyster fish-  
eries.

Form of in-  
dictment.

Proviso as to  
floating fish.

Bonds, bills,  
notes, &c.

Deeds, &c.  
relating to real  
property.

Form of in-  
dictment.

Wills or  
codicils.

Other re-  
medies not to  
be affected.

and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall unlawfully and wilfully, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three months, with or without hard labour, and with or without solitary confinement; and it shall be sufficient in any indictment to describe either by name or otherwise the bed, laying, or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: provided, that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery with any net, instrument, or engine adapted for taking floating fish only.

As to larceny of written instruments:

27. Whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, or obliterate, the whole or any part of any valuable security, other than a document of title to lands, shall be guilty of felony, of the same nature and in the same degree and punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security.

28. Whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of any document of title to lands shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and in any indictment for any such offence relating to any document of title to lands, it shall be sufficient to allege such document to be or to contain evidence of the title or of part of the title of the person, or of some one of the persons having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof.

29. Whosoever shall, either during the life of the testator or after his death, steal, or for any fraudulent purpose destroy, cancel, obliterate, or conceal, the whole or any part of any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or other instrument is the property of any person: provided, that nothing in this or the last preceding section mentioned, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any such offence might or would have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of any of the felonies in this and the last preceding section mentioned, by any evidence whatever,

in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.

30. Whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy the whole or any part of any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or of any bill, petition, answer, interrogatory, deposition, affidavit, order, or decree, or of any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any court of justice, or in any of Her Majesty's castles, palaces, or houses, or in any government or public office, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and it shall not in any indictment for such offence be necessary to allege that the article in respect of which the offence is committed is the property of any person.

Stealing records or other legal documents.

Form of indictment.

As to larceny of things attached to or growing on land :

31. Whosoever shall steal, or shall rip, cut, sever, or break with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material or of both, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling house, garden, or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and in the case of any such thing fixed in any such square, street, or place as aforesaid, it shall not be necessary to allege the same to be the property of any person.

Metal, glass, wood, &c. fixed to house or land.

32. Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling house, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood respectively growing elsewhere than in any of the situations in this section before mentioned, shall (in case the value of the article or articles stolen, or the amount of the injury done shall exceed the sum of five pounds) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny.

Trees in pleasure grounds of the value of 1*l.*, or elsewhere of the value of 5*l.*

33. Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any

Stealing trees, shrubs, &c.



whosoever growing, and of any value above 1s., punishable on summary conviction for first and second offence; third offence, felony.

Second offence.

Third offence.

Stealing, &c. any live or dead fence, wooden fence, stile, or gate.

Second offence.

Suspected persons in possession of wood, &c. not satisfactorily accounting for it.

Stealing, &c. any fruit or vegetable production in a garden, &c. punishable on summary conviction for first offence;

Second offence, felony.

Stealing, &c. vegetable productions not

tree, sapling, or shrub, or any underwood, whosoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and whosoever having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit; and whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this Act) shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

34. Whosoever shall steal, or shall cut, break, or throw down with intent to steal, any part of any live or dead fence, or any wooden post, pale, wire, or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, shall on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding five pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit.

35. If the whole or any part of any tree, sapling, or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, rail, stile, or gate, or any part thereof, being of the value of one shilling at the least, shall be found in the possession of any person, or on the premises of any person, with his knowledge, and such person, being taken or summoned before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, he shall on conviction by the justice forfeit and pay, over and above the value of the article or articles so found, any sum not exceeding two pounds.

36. Whosoever shall steal, or shall destroy or damage with intent to steal, any plant, root, fruit, or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

37. Whosoever shall steal, or shall destroy or damage with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of



any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, pleasure ground, or nursery ground, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding one month, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding twenty shillings, as to the justice shall seem meet, and in default of payment thereof, together with the costs (if ordered) shall be committed as aforesaid for any term not exceeding one month, unless payment be sooner made; and whosoever, having been convicted of any such offence either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour, for such term not exceeding six months as the convicting justice shall think fit.

growing in gardens, &c.

Second offence.

As to larceny from mines:

38. Whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Ore of metal, coal, &c.

39. Whosoever, being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Miners removing ore with intent to defraud.

As to larceny from the person, and other like offences:

40. Whosoever shall rob any person, or shall steal any chattel, money, or valuable security from the person of another, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Robbery or stealing from the person.

41. If upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried.

On trial for robbery, jury may convict of an assault with intent to rob.

42. Whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall (save and except in the cases where a greater punishment is provided by this Act) be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Assault with intent to rob.

Robbery or assault by a person armed, or by two or more, or robbery and wounding.

43. Whosoever shall, being armed with any offensive weapon or instrument, rob, or assault with intent to rob, any person, or shall, together with one or more other person or persons, rob, or assault with intent to rob, any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Letter demanding money, &c. with menaces.

44. Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Demanding money, &c. with menaces, or by force, with intent to steal.

45. Whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or other valuable thing of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Letter threatening to accuse of crime, with intent to extort.

46. Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as herein-after defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, chattel, money, valuable security, or other valuable thing, from any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act.

'Infamous crime' defined.

Accusing or threatening to accuse, with intent to extort.

47. Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard

labour, and, if a male under the age of sixteen years, with or without whipping.

48. Whosoever, with intent to defraud or injure any other person, shall, by any unlawful violence to or restraint of, or threat of violence to or restraint of, the person of another, or by accusing or threatening to accuse any person of any treason, felony, or infamous crime as hereinbefore defined, compel or induce any person to execute, make, accept, indorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Inducing a person by violence or threats to execute deeds, &c. with intent to defraud.

49. It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person.

It shall be immaterial from whom the menaces proceed.

As to sacrilege, burglary, and housebreaking :

50. Whosoever shall break and enter any church, chapel, meeting house, or other place of Divine worship, and commit any felony therein, or being in any church, chapel, meeting house, or other place of Divine worship, shall commit any felony therein and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Breaking and entering a church or chapel and committing any felony.

51. Whosoever shall enter the dwelling house of another with intent to commit any felony therein, or being in such dwelling house shall commit any felony therein, and shall in either case break out of the said dwelling house in the night, shall be deemed guilty of burglary.

Burglary by breaking out.

52. Whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Burglary.

53. No building, although within the same curtilage with any dwelling house and occupied therewith, shall be deemed to be part of such dwelling house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling house, either immediate, or by means of a covered and inclosed passage leading from the one to the other.

What building within the curtilage shall be deemed part of the dwelling house.

54. Whosoever shall enter any dwelling house in the night, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Entering a dwelling house in the night with intent to commit any felony.

55. Whosoever shall break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, or being in any such building shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years—or to be

Breaking into any building within the curtilage which is not part of the dwelling house and committing any felony.



imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Breaking into any house, shop, warehouse, &c. and committing any felony.

56. Whosoever shall break and enter any dwelling house, school house, shop, warehouse, or counting house, and commit any felony therein, or, being in any dwelling house, school house, shop, warehouse, or counting house, shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Housebreaking, &c. with intent to commit any felony.

57. Whosoever shall break and enter any dwelling house, church, chapel, meeting house, or other place of Divine worship, or any building within the curtilage, school house, shop, warehouse, or counting house, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Being armed with intent to break and enter any house in the night.

58. Whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling house or other building whatsoever, and to commit any felony therein, or shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock key, crow, jack, bit, or other implement of housebreaking, or shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or shall be found by night in any dwelling house or other building whatsoever with intent to commit any felony therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

The like after a previous conviction for felony, &c.

59. Whosoever shall be convicted of any such misdemeanor as in the last preceding section mentioned, committed after a previous conviction, either for felony or such misdemeanor, shall on such subsequent conviction be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour.

#### As to larceny in the house :

Stealing in a dwelling house to the value of 5*l*.

60. Whosoever shall steal in any dwelling house any chattel, money, or valuable security, to the value in the whole of five pounds or more, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Stealing in a dwellinghouse with menaces.

61. Whosoever shall steal any chattel, money, or valuable security in any dwelling house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

#### As to larceny in manufactories :

Stealing goods in process of manufacture.

62. Whosoever shall steal, to the value of ten shillings, any woollen, linen, hempen, or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca, or mohair or of any one or more of those materials

mixed with each other, or mixed with any other material, whilst laid, placed, or exposed during any stage, process, or progress of manufacture, in any building, field, or other place, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to larceny in ships, wharfs, &c. :

63. Whosoever shall steal any goods or merchandise in any vessel, barge, or boat of any description whatsoever in any haven, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal, or shall steal any goods or merchandise from any dock, wharf, or quay adjacent to any such haven, port, river, canal, creek, or basin, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Stealing from ships, docks, wharfs, &c.

64. Whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and the offender may be indicted and tried either in the county or place in which the offence shall have been committed, or in any county or place next adjoining.

Stealing from ship in distress or wrecked.

65. If any goods, merchandise, or articles of any kind, belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being taken or summoned before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof; and the offender shall, on conviction of such offence before the justice, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the goods, merchandise, or articles, such sum of money not exceeding twenty pounds as to the justice shall seem meet.

Persons in possession of shipwrecked goods not giving a satisfactory account.

66. If any person shall offer or expose for sale any goods, merchandise, or articles whatsoever, which shall have been unlawfully taken, or shall be reasonably suspected so to have been taken, from any ship or vessel in distress, or wrecked, stranded, or cast on shore, in every such case any person to whom the same shall be offered for sale, or any officer of the customs or excise, or peace officer, may lawfully seize the same, and shall with all convenient speed carry the same, or give notice of such seizure, to some justice of the peace; and if the person who shall have offered or exposed the same for sale, being summoned by such justice, shall not appear and satisfy the justice that he came lawfully by such goods, merchandise, or articles, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof, upon payment of a reasonable reward (to be ascertained by the justice) to the person who seized the same; and the offender shall, on conviction of such offence by the justice, at the discretion of

If any person offers shipwrecked goods for sale, the goods may be seized, &c.



the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the goods, merchandise, or articles, such sum of money not exceeding twenty pounds as to the justice shall seem meet.

As to larceny or embezzlement by clerks, servants, or persons in the public service :

Larceny by  
servants.

67. Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Embezzlement  
by clerks or  
servants.

68. Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Larceny by  
persons in the  
Queen's service  
or by the  
police.

69. Whosoever being employed in the public service of Her Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, shall steal any chattel, money, or valuable security belonging to or in the possession or power of Her Majesty, or intrusted to or received or taken into possession by him by virtue of his employment, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Embezzlement  
by persons in  
the Queen's  
service or by  
the police.

70. Whosoever, being employed in the public service of Her Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, and intrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle any chattel, money, or valuable security which shall be intrusted to or received or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently apply or dispose of the same or any part thereof to his own use or benefit, or for any purpose whatsoever except for the public service, shall be deemed to have feloniously stolen the same from Her Majesty, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour; and every offender against this or the last preceding section may be dealt with, indicted, tried, and punished either in the county or place in which he shall be apprehended or be in custody, or in which he shall have committed the offence; and in every case of

Venue.



larceny, embezzlement, or fraudulent application or disposition of any chattel, money, or valuable security in this and the last preceding section mentioned, it shall be lawful in the warrant of commitment by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security in Her Majesty.

Form of warrant of commitment and indictment.

71. For preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition, hereinbefore mentioned, it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against Her Majesty or against the same master or employer, within the space of six months from the first to the last of such acts; and in every such indictment where the offence shall relate to any money or any valuable security it shall be sufficient to allege the embezzlement, or fraudulent application or disposition, to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled or fraudulently applied or disposed of any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled or fraudulently applied or disposed of any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly.

Distinct acts of embezzlement may be charged in the same indictment.

72. If upon the trial of any person indicted for embezzlement, or fraudulent application or disposition as aforesaid, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, or fraudulent application or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or fraudulent application or disposition as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, or fraudulent application or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition, or embezzlement, upon the same facts.

Person indicted for embezzlement as a clerk, &c. to be acquitted if the offence turn out to be larceny; and vice versa.

73. Whosoever, being an officer or servant of the governor and company of the Bank of England or of the Bank of Ireland, and being intrusted with any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or with any security, money, or other effects of or belonging to the said governor and company, or having any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or any security, money, or other effects of any other person, body politic or corporate,

Embezzlement by officers of the Bank of England or Ireland.

lodged or deposited with the said governor and company, or with him as an officer or servant of the said governor and company, shall secrete, embezzle, or run away with any such bond, deed, note, bill, dividend or other warrant, security, money, or other effects as aforesaid, or any part thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to larceny by tenants or lodgers :

Tenant or  
lodger steal-  
ing chattel or  
fixture let to  
hire with  
house or  
lodgings.

74. Whosoever shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping, and in case the value of such chattel or fixture shall exceed the sum of five pounds, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping ; and in every case of stealing any chattel in this section mentioned it shall be lawful to prefer an indictment in the common form as for larceny, and in every case of stealing any fixture in this section mentioned to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire.

As to frauds by agents, bankers, or factors :

Agent,  
banker, &c.  
embezzling  
money or  
selling secu-  
rities, &c. in-  
trusted to him ;

75. Whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively ; and whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, or society, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding

or goods, &c.  
intrusted to  
him for safe  
custody.

Punishment.

two years, with or without hard labour, and with or without solitary confinement ; but nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage ; nor shall restrain any banker, merchant, broker, attorney, or other agent from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this Act had not been passed ; nor from selling, transferring, or otherwise disposing of any securities or effects in his possession upon which he shall have any lien, claim, or demand entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand.

76. Whosoever, being a banker, merchant, broker, attorney, or agent, and being intrusted, either solely, or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

77. Whosoever, being intrusted, either solely, or jointly with any other person, with any power of attorney for the sale or transfer of any property, shall fraudulently sell or transfer or otherwise convert the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

78. Whosoever, being a factor or agent intrusted, either solely, or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods, shall, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien, or security for any money or valuable security borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer, or delivery, or intended to be thereafter borrowed or received, or shall, contrary to or without such authority, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned ; and every clerk or other person who shall knowingly and willfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the same punishments : provided, that no such factor or agent shall be liable to any prosecution for consigning, depo-

Not to affect trustees or mortgagees ;

nor bankers, &c. receiving money due on securities ;

or disposing of securities on which they have a lien.

Bankers, &c. fraudulently selling, &c. property intrusted to their care.

Persons under powers of attorney fraudulently selling property.

Factors obtaining advances on the property of their principals.

Clerks willfully assisting.

Cases excepted where the



pledge does not exceed the amount of their lien.

Definitions of terms:

‘intrusted :’

‘pledge :’

‘possessed :’

‘advance :’

‘contract or agreement :’

‘advance.’

Possession to be evidence of intrusting.

Trustees, fraudulently disposing of property, guilty of a misdemeanor.

No prosecution shall be commenced without the sanction of some judge or the attorney general.

Directors, &c. of any body

siting, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by such factor or agent.

79. Any factor or agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such factor or agent having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been intrusted with the possession of the goods represented by such document of title; and every contract pledging or giving a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates; and such factor or agent shall be deemed to be possessed of such goods or document, whether the same shall be in his actual custody, or shall be held by any other person subject to his control, or for him or on his behalf; and where any loan or advance shall be *bonâ fide* made to any factor or agent intrusted with and in possession of any such goods or document of title, on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or documents of title, and such goods or document of title shall actually be received by the person making such loan or advance, without notice that such factor or agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title within the meaning of the last preceding section, though such goods or document of title shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such factor or agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent; and any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the last preceding section; and a factor or agent in possession as aforesaid of such goods or document shall be taken, for the purposes of the last preceding section, to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence.

80. Whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned: provided, that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of Her Majesty's attorney general, or, in case that office be vacant, of Her Majesty's solicitor general: provided also, that where any civil proceeding shall have been taken against any person to whom the provisions of this section may apply, no person who shall have taken such civil proceeding shall commence any prosecution under this section without the sanction of the court or judge before whom such civil proceeding shall have been had or shall be pending.

81. Whosoever, being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply for

his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

corporate or public company fraudulently appropriating property;

82. Whosoever, being a director, public officer, or manager of any body corporate or public company, shall as such receive or possess himself of any of the property of such body corporate or public company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

or keeping fraudulent accounts;

83. Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.

or wilfully destroying books, &c.;

84. Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.

or publishing fraudulent statements.

85. Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.

No person to be exempt from answering questions in any court, but no person making a disclosure in any compulsory proceeding to be liable to prosecution.

86. Nothing in any of the last eleven preceding sections of this Act contained, nor any proceeding, conviction, or judgment to be had or taken thereon against any person under any of the said sections, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any offence against any of the said sections might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any

No remedy at law or in equity shall be effected.

Convictions shall not be received in evidence in civil suits.



trustee, having for its object the restoration or repayment of any trust property misappropriated.

Certain misdemeanors not triable at sessions.

87. No misdemeanor against any of the last twelve preceding sections of this Act shall be prosecuted or tried at any court of general or quarter sessions of the peace.

False pretences.

As to obtaining money, &c. by false pretences :

88. Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement: provided, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts: provided also, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security; and on the trial of any such indictment it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.

No acquittal because the offence amounts to larceny.

Form of indictment and evidence.

Where money, &c. is caused to be paid, &c. to any person other than person making a false pretence.

89. Whosoever shall by any false pretence cause or procure any money to be paid, or any chattel, or valuable security, to be delivered to any other person, for the use or benefit or on account of the person making such false pretence, or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel, or valuable security within the meaning of the last preceding section.

Inducing persons by fraud to execute deeds and other instruments.

90. Whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to execute, make, accept, endorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to receiving stolen goods :

Receiving where the principal is guilty of felony.

91. Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, — or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping: provided, that no person, howsoever



tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.

92. In any indictment containing a charge of feloniously stealing any property it shall be lawful to add a count or several counts for feloniously receiving the same or any part or parts thereof, knowing the same to have been stolen, and in any indictment for feloniously receiving any property knowing it to have been stolen it shall be lawful to add a count for feloniously stealing the same; and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving the same, or any part or parts thereof, knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or of receiving the same, or any part or parts thereof, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same or any part or parts thereof, knowing the same to have been stolen.

Indictment for stealing and receiving.

93. Whenever any property whatsoever shall have been stolen, taken, extorted, obtained, embezzled, or otherwise disposed of in such a manner as to amount to a felony, either at common law or by virtue of this Act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

Separate receivers may be included in the same indictment in the absence of the principal.

94. If upon the trial of any two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part or parts of such property.

On an indictment for jointly receiving, persons may be convicted of separately receiving.

95. Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Receiving where the principal has been guilty of a misdemeanor.

96. Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, or disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, be dealt with, indicted, tried, and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property.

Receiver where triable.

97. Where the stealing or taking of any property whatsoever is by Receivers of

property where the original offence is punishable on summary conviction.

Principals in the second degree and accessories.

Abettors in misdemeanors.

Abettors in offences punishable on summary conviction.

The owner of stolen property prosecuting thief or receiver to conviction shall have restitution of his property.

Provision as to valuable and negotiable securities.

Not to apply to prosecutions of trustees, bankers, &c.

Taking a reward for helping to the recovery of stolen property without bringing the offender to trial.

this Act punishable on summary conviction, either for every offence, or for the first and second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a justice of the peace, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this Act made liable.

98. In case of every felony punishable under this Act every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except only a receiver of stolen property) shall, on conviction, be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be indicted and punished as a principal offender.

99. Whosoever shall aid, abet, counsel, or procure the commission of any offence which is by this Act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, shall, on conviction before a justice of the peace, be liable, for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence as a principal offender is by this Act made liable.

As to restitution and recovery of stolen property:

100. If any person guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the court before whom any person shall be tried for any such felony or misdemeanor shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided, that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security: provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods for any misdemeanor against this Act.

101. Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, as in this Act before mentioned, shall (unless he shall have used all due diligence to cause the offender to be brought to trial for the same) be guilty of



felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of eighteen years, with or without whipping.

102. Whosoever shall publicly advertise a reward for the return of any property whatsoever which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost the money so paid or advanced or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence to any person who will sue for the same by action of debt, to be recovered, with full costs of suit.

Advertising a reward for the return of stolen property, &c.

As to apprehension of offenders, and other proceedings :

103. Any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this Act, except only the offence of angling in the day-time, may be immediately apprehended without a warrant by any person, and forthwith taken, together with such property, if any, before some neighbouring justice of the peace, to be dealt with according to law ; and if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence, punishable either upon indictment or upon summary conviction by virtue of this Act, shall have been committed, the justice may grant a warrant to search for such property as in the case of stolen goods ; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorized, and, if in his power, is required to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law.

A person in the act of committing any offence may be apprehended without a warrant.

Justice, upon grounds of suspicion proved on oath, may grant a search warrant.

Person to whom stolen property is offered may seize the party offering it.

104. Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law.

A person loitering at night and suspected of any felony against this Act may be apprehended.

105. Where any person shall be charged on the oath of a credible witness before any justice of the peace with any offence punishable on summary conviction under this Act, the justice may summon the person charged to appear at a time and place to be named in such summons, and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person, by delivering the same to him personally, or by leaving the same at his usual place of abode), the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person, and bringing him before himself or some other justice of the peace ; or the justice before whom the charge shall be made may (if he shall so think fit), without any previous summons (unless where otherwise specially directed), issue such warrant, and the justice before whom the person charged shall appear or be brought shall proceed to hear and determine the case.

Mode of compelling the appearance of persons punishable on summary conviction.



Application of forfeitures and penalties on summary convictions.

Proviso where several persons join in commission of same offence.

If a person summarily convicted shall not pay, &c. the justice may commit him.

Scale of imprisonment.

Justice may discharge the offender in certain cases.

A summary conviction shall be a bar to any other proceeding for the same cause.

Appeal.

106. Every sum of money which shall be forfeited on any summary conviction for the value of any property stolen or taken, or for the amount of any injury done (such value or amount to be assessed in each case by the convicting justice), shall be paid to the party aggrieved, except where he is unknown, and in that case such sum shall be applied in the same manner as a penalty; and every sum which shall be imposed as a penalty by any justice of the peace, whether in addition to such value or amount or otherwise, shall be paid and applied in the same manner as other penalties recoverable before justices of the peace are to be paid and applied in cases where the statute imposing the same contains no direction for the payment thereof to any person: provided, that where several persons shall join in the commission of the same offence, and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the value of the property or to the amount of the injury, in every such case no further sum shall be paid to the party aggrieved than such value or amount; and the remaining sum or sums forfeited shall be applied in the same manner as any penalty imposed by a justice of the peace is hereinbefore directed to be applied.

107. In every case of a summary conviction under this Act, where the sum which shall be forfeited for the value of the property stolen or taken, or for the amount of the injury done, or which shall be imposed as a penalty by the justice, shall not be paid, either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the convicting justice (unless where otherwise specially directed) may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the justice, for any term not exceeding two months, where the amount of the sum forfeited or of the penalty imposed, or of both (as the case may be), together with the costs, shall not exceed five pounds, and for any term not exceeding four months where the amount, with costs, shall not exceed ten pounds, and for any term not exceeding six months in any other case, the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.

108. Where any person shall be summarily convicted before a justice of the peace of any offence against this Act, and it shall be a first conviction, the justice may, if he shall so think fit, discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice.

109. In case any person convicted of any offence punishable upon summary conviction by virtue of this Act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or from the lord lieutenant or other chief governor in Ireland, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment adjudged in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, in every such case he shall be released from all further or other proceedings for the same cause.

110. In all cases where the sum adjudged to be paid on any summary conviction shall exceed five pounds, or the imprisonment adjudged shall exceed one month, or the conviction shall take place before one justice only, any person who shall think himself aggrieved by any such conviction may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction for the county or place wherein the cause of complaint shall have arisen: provided, that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the

sessions, or shall enter into a recognizance, with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; or if such appeal shall be against any conviction, whereby only a penalty or other sum of money shall be adjudged to be paid, shall deposit with the clerk of the convicting justice such a sum of money as such justice shall deem to be sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction and the costs of the appeal; and upon such notice being given, and such recognizance being entered into, or such deposit being made, the justice before whom such recognizance shall be entered into, or such deposit shall be made, shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet, and in case of the dismissal of the appeal or the affirmance of the conviction shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment; and in any case where after any such deposit shall have been made as aforesaid the conviction shall be affirmed, the court may order the sum thereby adjudged to be paid, together with the costs of the conviction and the costs of the appeal, to be paid out of the money deposited, and the residue thereof, if any, to be repaid to the party convicted; and in any case where after any such deposit the conviction shall be quashed, the court shall order the money deposited to be repaid to the party convicted; and in every case where any conviction shall be quashed on appeal as aforesaid the clerk of the peace, or other proper officer, shall forthwith endorse on the conviction a memorandum that the same has been so quashed; and whenever any copy or certificate of such conviction shall be made, a copy of such memorandum shall be added thereto, and shall be sufficient evidence that the conviction has been quashed in every case where such copy or certificate would be sufficient evidence of such conviction.

111. No such conviction, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

No certiorari,  
&c.

112. Every justice of the peace before whom any person shall be convicted of any offence against this Act shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shown.

Convictions to  
be returned to  
the quarter  
sessions.

113. All actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this Act and the special matter in evidence, at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court

Venue, in  
proceedings  
against per-  
sons acting  
under this Act.

Notice of  
action.

General  
issue, &c.



after such action brought, by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant has by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant unless the judge before whom the trial shall be shall certify his approbation of the action.

As to other matters :

Stealers of property in one part of the United Kingdom who have the same in any other part of the United Kingdom, may be tried and punished in that part of the United Kingdom where they have property.

114. If any person shall have in his possession in any one part of the United Kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part.

Offences committed within the jurisdiction of the Admiralty.

115. All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in which the offender shall be apprehended or be in custody, and in any indictment for any such offence or for being an accessory to any such offence the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence itself shall be averred to have been committed 'on the high seas:' provided, that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

Form of indictment for a subsequent offence.

116. In any indictment for any offence punishable under this Act, and committed after a previous conviction or convictions for any felony, misdemeanor, or offence or offences punishable upon summary conviction, it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place or at certain times and places convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the case may be), without otherwise describing the previous felony, misdemeanor, offence, or offences; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, or a copy of any such summary conviction purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or to which such summary conviction shall have been returned, or by the deputy of such clerk or officer (for which certificate or copy a fee of five shillings and no more shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction, without proof of the signature or official character of the person appearing to have signed the same; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to

When the previous conviction is to be



say), the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted the court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: provided, that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

proved on the trial.

117. Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized: provided, that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Fine and sureties for keeping the peace: in what cases.

118. Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Hard labour.

119. Whenever solitary confinement may be awarded for any indictable offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any indictable offence under this Act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence.

Solitary confinement and whipping.

120. Every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the Act of the session holden in the eleventh and twelfth years of Queen Victoria, chapter forty-three, so far as no provision is hereby made for any matter or thing which may be required to be done in the course of such prosecution, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the Act of the session holden in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any Act that may be passed for like purposes; and all provisions contained in the said Acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this Act: provided, that nothing in this Act contained shall in any manner alter or affect any enactment relating to procedure in the case of any

Summary proceedings in England may be under the 11 & 12 Viet. c. 43. and in Ireland under the 14 & 15 Vict. c. 93;

except in London and

metropolitan police district.

The costs of the prosecution of misdemeanors against this Act may be allowed.

Act not to extend to Scotland.<sup>1</sup>  
Commencement of Act.

offence punishable on summary conviction within the City of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence.

121. The court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

122. Nothing in this Act contained shall extend to Scotland, except as hereinbefore otherwise expressly provided.

123. This Act shall commence and take effect on the first day of November, one thousand eight hundred and sixty-one.

24 & 25 VICT. c. 97.

*An Act to consolidate and amend the Statute Law of England and Ireland relating to Malicious Injuries to Property.*

[6th August, 1861.]

‘Whereas it is expedient to consolidate and amend the statute law of England and Ireland relating to malicious injuries to property:’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

*Injuries by Fire to Buildings and Goods therein.*

Setting fire to a church or chapel.

1. Whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting house, or other place of Divine worship, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Setting fire to a dwelling house, any person being therein.

2. Whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Setting fire to a house, outhouse, manufactory, farm building, &c.

3. Whosoever shall unlawfully and maliciously set fire to any house, stable, coachhouse, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Setting fire to any railway station.

4. Whosoever shall unlawfully and maliciously set fire to any station, enginehouse, warehouse, or other building belonging or appertaining to any railway, port, dock, or harbour, or to any canal or other navigation, shall be guilty of felony, and being convicted thereof shall be liable, at

the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

5. Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this Act before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university, or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

Setting fire to any public building.

6. Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this Act before mentioned shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

Setting fire to other buildings.

7. Whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

Setting fire to goods in any building the setting fire to which is felony.

8. Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any building, or any matter or thing in the last preceding section mentioned, under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Attempting to set fire to buildings.

#### *Injuries by Explosive Substances to Buildings and Goods therein.*

9. Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling house, any person being therein, or of any building whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Destroying or damaging a house with gunpowder, any person being therein.

10. Whosoever shall unlawfully and maliciously place or throw in, into, upon, under, against, or near any building any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods, or chattels, shall, whether or not any explosion take place, and whether or not any damage

Attempting to destroy buildings with gunpowder



be caused, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

*Injuries to Buildings by Rioters, &c.*

Rioters demolishing church, building, &c.

11. If any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, or pull down or destroy, or begin to demolish, pull down, or destroy, any church, chapel, meeting house, or other place of Divine worship, or any house, stable, coachhouse, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, or any building, other than such as are in this section before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Rioters injuring building, machinery, &c.

12. If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such church, chapel, meeting house, place of Divine worship, house, stable, coachhouse, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, waggonway, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour: provided, that if upon the trial of any person for any felony in the last preceding section mentioned the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly.

*Injuries to Buildings by Tenants.*

Tenants of houses, &c. maliciously injuring them.

13. Who-soever, being possessed of any dwelling house or other building, or part of any dwelling house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling house or building, or part of such dwelling house or building, shall be guilty of a misdemeanor.

*Injuries to Manufactures, Machinery, &c.*

14. Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or render useless, any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Destroying goods in process of manufacture, certain machinery, &c.

15. Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or moveable, used or intended to be used for sowing, reaping, mowing, thrashing, ploughing, or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Destroying machines in other manufactures, threshing machines, &c.

*Injuries to Corn, Trees, and Vegetable Productions.*

16. Whosoever shall unlawfully and maliciously set fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, whosoever the same may be growing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Setting fire to crops of corn, &c.

17. Whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not

Setting fire to stacks of corn, &c.

less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Attempting to set fire to any crops of corn, &c. or to any stack or steer.

18. Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any such matter or thing as in either of the last two preceding sections mentioned, under such circumstances that if the same were thereby set fire to the offender would be, under either of such sections, guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Destroying hopbinds.

19. Whosoever shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Destroying or damaging trees, shrubs, &c. to the value of more than 1*l.* growing in a pleasure ground, &c.

20. Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling house (in case the amount of the injury done shall exceed the sum of one pound), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Destroying or damaging trees, shrubs, &c. of the value to more than 5*l.* growing elsewhere than in a pleasure ground, &c.

21. Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing elsewhere than in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining to or belonging to any dwelling house (in case the amount of injury done shall exceed the sum of five pounds), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Damaging trees, where-soever growing, to the amount of 1*s.*

22. Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be growing, the injury done being to the amount of one shilling at the least, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the

Second offence.



convicting justice shall think fit; and whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this Act), shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Third offence

23. Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Destroying any fruit or vegetable production in a garden.

Second offence.

24. Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or inclosed, not being a garden, orchard, or nursery ground, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty shillings as to the justice shall seem meet, and in default of payment thereof, together with the costs, if ordered, shall be committed as aforesaid for any term not exceeding one month, unless payment be sooner made; and whosoever, having been convicted of any such offence either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding six months as the convicting justice shall think fit.

Destroying, &amp;c. vegetable productions not growing in gardens, &amp;c.

Second offence.

#### *Injuries to Fences.*

25. Whosoever shall unlawfully and maliciously cut, break, throw down, or in anywise destroy any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, shall, on conviction thereof before a justice of the peace, for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding five pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit.

Destroying, &amp;c. any fence, wall, stile, or gate.

Second offence.

*Injuries to Mines.*

Setting fire to  
a coal mine.

26. Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite, or other mineral fuel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Attempting to  
set fire to a  
mine.

27. Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any mine, under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Conveying  
water into a  
mine, obstruct-  
ing the shaft,  
&c.

28. Whosoever shall unlawfully and maliciously cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall with the like intent unlawfully and maliciously pull down, fill up, or obstruct, or damage with intent to destroy, obstruct, or render useless, any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping: provided, that this provision shall not extend to any damage committed underground by any owner of any adjoining mine in working the same, or by any person duly employed in such working.

Damaging  
steam engines,  
staiths, wag-  
gonways, &c.  
for working  
mines.

29. Whosoever shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or render useless, any steam engine or other engine for sinking, draining, ventilating, or working, or for in anywise assisting in sinking, draining, ventilating, or working any mine, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggonway, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggonway, or trunk be completed or in an unfinished state, or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof, or shall unlawfully and maliciously wholly or partially cut through, sever, break, or unfasten, or damage with intent to destroy or render useless, any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, or other work whatsoever, in anywise belonging or appertaining to or connected with or employed in any mine or the working or business thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

*Injuries to Sea and River Banks, and to Works on Rivers, Canals, &c.*

30. Whosoever shall unlawfully and maliciously break down or cut down or otherwise damage or destroy any sea bank or sea wall, or the bank, dam, or wall of or belonging to any river, canal, drain, reservoir, pool, or marsh, whereby any land or building shall be or shall be in danger of being overflowed or damaged, or shall unlawfully and maliciously throw, break, or cut down, level, undermine, or otherwise destroy, any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, watercourse, or other work belonging to any port, harbour, dock, or reservoir, or on or belonging to any navigable river or canal, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Destroying  
any sea bank,  
or wall on any  
canal.

31. Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Removing the  
piles of any  
sea bank, &c.  
or doing any  
damage to  
obstruct the  
navigation of  
a river or  
canal.

*Injuries to Ponds.*

32. Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, floodgate, or sluice of any fishpond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish that may then be or that may thereafter be put therein, or shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam or floodgate of any millpond, reservoir, or pool, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Breaking  
down the dam  
of a fishery,  
&c. or mill  
dam, or  
poisoning fish.

*Injuries to Bridges, Viaducts, and Toll Bars.*

33. Whosoever shall unlawfully and maliciously pull or throw down or in anywise destroy any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct, or aqueduct any highway, railway, or canal shall pass, or do any injury with intent and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway, or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less

Injury to a  
public bridge.



than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Destroying a  
turnpike gate,  
toll, house, &c.

34. Whosoever shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate or toll bar, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike gate or toll bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act of Parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, shall be guilty of a misdemeanor.

*Injuries to Railway Carriages and Telegraphs.*

Placing wood,  
&c. on rail-  
way with in-  
tent to obstruct  
or overthrow  
any engine,  
&c.

35. Whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen, with or without whipping.

Obstructing  
engines or  
carriages on  
railways.

36. Whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed, any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Injuries to  
electric or  
magnetic tele-  
graphs.

37. Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour: provided, that if it shall appear to any justice, on the examination of any person charged with any offence against this section, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may proceed summarily to hear and determine the same, and the offender shall, on conviction thereof, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet.

Attempt to in-  
jure such tele-  
graphs.

38. Whosoever shall unlawfully and maliciously, by any overt act, attempt to commit any of the offences in the last preceding section mentioned, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned

and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet.

*Injuries to Works of Art.*

39. Whosoever shall unlawfully and maliciously destroy or damage any book, manuscript, picture, print, statue, bust, or vase, or any other article or thing kept for the purposes of art, science, or literature, or as an object of curiosity in any museum, gallery, cabinet, library, or other repository, which museum, gallery, cabinet, library, or other repository is either at all times or from time to time open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof or by the payment of money before entering the same, or any picture, statue, monument, or other memorial of the dead, painted glass, or other ornament or work of art, in any church, chapel, meeting house, or other place of Divine worship, or in any building belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or to any university, or college or hall of any university, or to any inn of court, or in any street, square, churchyard, burial ground, public garden or ground, or any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping: provided, that nothing herein contained shall be deemed to affect the right of any person to recover, by action at law, damages for the injury so committed.

Destroying or damaging works of art in museums, churches, &c., or in public places.

*Injuries to Cattle and other Animals.*

40. Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Killing or maiming cattle.

41. Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit.

Killing or maiming other animals.

Second offence.

42. Whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Setting fire to a ship.

43. Whosoever shall unlawfully and maliciously set fire to, or cast

Setting fire to



ships to pre-  
judice the  
owner or  
underwriters.

away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Attempting to  
set fire to a  
vessel.

44. Whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to, cast away, or destroy any ship or vessel, under such circumstances that if the ship or vessel were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Placing gun-  
powder near a  
vessel with in-  
tent to damage  
it.

45. Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any ship or vessel any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels, shall, whether or not any explosion take place, and whether or not any injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Damaging  
ships other-  
wise than by  
fire.

46. Whosoever shall unlawfully and maliciously damage, otherwise than by fire, gunpowder, or other explosive substance, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or render the same useless, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Exhibiting  
false signals,  
&c.

47. Whosoever shall unlawfully mask, alter, or remove any light or signal, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, or boat into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship, vessel, or boat, and for which no punishment is hereinbefore provided, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Removing or  
concealing  
buoys and  
other sea  
marks.

48. Whosoever shall unlawfully and maliciously cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat, buoy, buoy rope, perch, or mark used or intended for the guidance of seamen or the purpose of navigation, shall be guilty of felony, and being convicted thereof shall be



liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

49. Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Destroying wrecks or any articles belonging thereto.

*Sending Letters threatening to burn or destroy.*

50. Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other agricultural produce in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Sending letters threatening to burn or destroy houses, buildings, ships, &c.

*Injuries not before provided for.*

51. Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding five years and not less than three, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Persons committing malicious injuries not before provided for exceeding the amount of 5*l*.

52. Whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding two months, or else shall forfeit and pay such sum of money not exceeding five pounds as to the justice shall seem meet, and also such further sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds; which last-mentioned sum of money shall, in the case of private property, be paid to the party aggrieved; and in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in the same manner as every penalty imposed by a justice of the peace under this Act; and if such sums of money, together with costs (if ordered), shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or

Persons committing damage to any property, in any case not previously provided for, may be committed or fined, and compelled by a justice to pay compensation not exceeding 5*l*.

Application of the money awarded.

Not to extend to certain cases herein named.

Preceding section to extend to trees.

Making or having gunpowder, &c. with intent to commit any felony against this Act.

Justices may issue warrants for searching houses, &c. for such gunpowder, &c.

Principals in the second degree and accessories.  
Abettors in misdemeanors.

house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two months, unless such sums and costs be sooner paid : provided, that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as if this Act had not passed.

53. The provisions in the last preceding section contained shall extend to any person who shall wilfully or maliciously commit any injury to any tree, sapling, shrub, or underwood, for which no punishment is hereinbefore provided.

*Making Gunpowder to commit Offences and searching for the same.*

54. Whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

55. Any justice of the peace of any county or place in which any machine, engine, implement, or thing, or any gunpowder or other explosive, dangerous, or noxious substance, is suspected to be made, kept, or carried for the purpose of being used in committing any of the felonies in this Act mentioned, upon reasonable cause assigned upon oath by any person, may issue a warrant under his hand and seal for searching in the daytime any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other place, or any carriage, waggon, cart, ship, boat, or vessel, in which the same is suspected to be made, kept, or carried for such purpose as hereinbefore mentioned; and every person acting in the execution of any such warrant shall have, for seizing, removing to proper places, and detaining every such machine, engine, implement, and thing, and all such gunpowder, explosive, dangerous, or noxious substances found upon such search, which he shall have good cause to suspect to be intended to be used in committing any such offence, and the barrels, packages, cases, and other receptacles in which the same shall be, the same powers and protections which are given to persons searching for unlawful quantities of gunpowder under the warrant of a justice by the Act passed in the session holden in the twenty-third and twenty-fourth years of the reign of Her present Majesty, chapter one hundred and thirty-nine, intituled, 'An Act to amend the law concerning the making, keeping, and carriage of gunpowder and compositions of an explosive nature, and concerning the manufacture, sale, and use of fireworks.'

*Other Matters.*

56. In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be



liable to be proceeded against, indicted, and punished as a principal offender.

57. Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony against this Act, and shall take such person as soon as reasonably may be before a justice of the peace, to be dealt with according to law.

58. Every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise.

59. Every provision of this Act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud any other person, shall do any of the Acts hereinbefore made penal, although the offender shall be in possession of the property against or in respect of which such Act shall be done.

60. It shall be sufficient in any indictment for any offence against this Act, where it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be).

61. Any person found committing any offence against this Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law.

62. Where any person shall be charged on the oath of a credible witness before any justice of the peace with any offence punishable on summary conviction under this Act, the justice may summon the person charged to appear at a time and place to be named in such summons; and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person by delivering the same to him personally, or by leaving the same at his usual place of abode), the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person and bringing him before himself or some other justice of the peace; or the justice before whom the charge shall be made may (if he shall so think fit), without any previous summons (unless where otherwise specially directed), issue such warrant; and the justice before whom the person charged shall appear or be brought shall proceed to hear and determine the case.

63. Whosoever shall aid, abet, counsel, or procure the commission of any offence which is by this Act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, shall, on conviction before a justice of the peace, be liable, for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence as a principal offender is by this Act made liable.

64. Every sum of money which shall be forfeited for the amount of any injury done shall be assessed in each case by the convicting justice, and shall be paid to the party aggrieved, except where he is unknown, and in that case such sum shall be applied in the same manner as a

A person loitering at night, and suspected of any felony against this Act, may be apprehended.

Malice against owner of property unnecessary.

Provisions of this Act shall apply to persons in possession of the property injured.

Intent to injure or defraud particular persons need not be stated in any indictment.

Persons in the act of committing any offence may be apprehended without a warrant.

Mode of compelling the appearance of persons punishable on summary conviction.

Abettors in offences punishable on summary conviction.

Application of forfeitures and penalties upon summary convictions.



Proviso where several persons join in commission of same offence.

If a person summarily convicted shall not pay, &c., the justice may commit him.

The justice may discharge the offender in certain cases.

A summary conviction shall be a bar to any other proceeding for the same cause.

Appeal.

penalty; and every sum which shall be imposed as a penalty by any justice of the peace, whether in addition to such amount or otherwise, shall be paid and applied in the same manner as other penalties recoverable before justices of the peace are to be paid and applied in cases where the statute imposing the same contains no directions for the payment thereof to any person: provided, that where several persons shall join in the commission of the same offence, and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the amount of the injury done, in every such case no further sum shall be paid to the party aggrieved than such value or amount; and the remaining sum or sums forfeited shall be applied in the same manner as any penalty imposed by a justice of the peace is hereinbefore directed to be applied.

65. In every case of a summary conviction under this Act, where the sum which shall be forfeited for the amount of the injury done, or which shall be imposed as a penalty by the justice, shall not be paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction, appoint, the convicting justice (unless where otherwise specially directed), may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the justice, for any term not exceeding two months, where the amount of the sum forfeited, or of the penalty imposed, or of both (as the case may be), together with the costs, shall not exceed five pounds; and for any term not exceeding four months where the amount, with costs, shall not exceed ten pounds; and for any term not exceeding six months in any other case; the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs.

66. Where any person shall be summarily convicted before a justice of the peace of any offence against this Act, and it shall be a first conviction, the justice may, if he shall so think fit, discharge the offender from his conviction upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice.

67. When any person convicted of any offence punishable upon summary conviction by virtue of this Act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the Crown, or the lord lieutenant or other chief governor of Ireland, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment awarded in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, he shall be released from all further or other proceedings for the same cause.

68. In all cases where the sum adjudged to be paid on any summary conviction shall exceed five pounds, or the imprisonment adjudged shall exceed one month, or the conviction shall take place before one justice only, any person who shall think himself aggrieved by any such conviction may appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction, for the county or place wherein the cause of complaint shall have arisen: provided, that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or shall enter into a recognizance, with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; or if such appeal shall be against any conviction whereby only a penalty or sum of money shall be adjudged to be paid, shall deposit with the clerk of the convicting justice such a sum of money as such justice shall deem to be

sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction and the costs of the appeal; and upon such notice being given, and such recognizance being entered into, or such deposit being made, the justice before whom such recognizance shall be entered into, or such deposit shall be made, shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall if necessary issue process for enforcing such judgment; and in any case where after any such deposit shall have been made as aforesaid the conviction shall be affirmed, the court may order the sum thereby adjudged to be paid, together with the costs of the conviction and the costs of the appeal, to be paid out of the money deposited, and the residue thereof, if any, to be repaid to the party convicted; and in any case where after any such deposit the conviction shall be quashed, the court shall order the money deposited to be repaid to the party convicted; and in every case where any conviction shall be quashed on appeal as aforesaid, the clerk of the peace or other proper officer shall forthwith indorse on the conviction a memorandum that the same has been quashed; and whenever any copy or certificate of such conviction shall be made, a copy of such memorandum shall be added thereto, and shall be sufficient evidence that the conviction has been quashed in every case where such copy or certificate would be sufficient evidence of such conviction.

69. No such conviction, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

No certiorari,  
&c.

70. Every justice of the peace before whom any person shall be convicted of any offence against this Act shall transmit the conviction to the next Court of General or Quarter Sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shown.

Convictions to  
be returned to  
the Quarter  
Sessions.

How far evi-  
dence in  
future cases.

71. All actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant has by law in other cases;

Venue in  
proceedings  
against per-  
sons acting  
under this  
Act.

Notice of  
action.

General  
issue, &c.



and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action.

Offences committed within the jurisdiction of the Admiralty.

72. All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed 'on the high seas:' provided, that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

Fine and sureties for keeping the peace; in what cases.

73. Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized: provided, that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

Hard labour.

74. Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Solitary confinement and whipping.

75. Whenever solitary confinement may be awarded for any indictable offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any indictable offence under this Act, the court may sentence the offender to be once privately whipped; and the number of strokes, and the instrument with which they shall be inflicted, shall be specified by the court in the sentence.

Summary proceedings in England may be under the 11 & 12 Vict. c. 43, and in Ireland under the 14 & 15 Vict. c. 93 ;

76. Every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the Act of the session holden in the eleventh and twelfth years of Queen Victoria, chapter forty-three, so far as no provision is hereby made for any matter or thing which may be required to be done in the course of such prosecution, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the Act of the session holden in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any Act that may be passed for like purposes, and all provisions contained in the said Acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this Act: provided, that nothing in this Act contained shall in any manner alter or affect any enactment relating to procedure in the case of any offence punishable on summary conviction within the City of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence.

except in London and the metropolitan police district.



77. The court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

The costs of the prosecution of misdemeanors against this Act may be allowed.

78. Nothing in this Act contained shall extend to Scotland, except as hereinbefore otherwise expressly provided.

Act not to extend to Scotland. Commencement of Act.

79. This Act shall commence and take effect on the first day of November, one thousand eight hundred and sixty-one.

24 & 25 VICT. C. 98.

*An Act to consolidate and amend the Statute Law of England and Ireland relating to Indictable Offences by Forgery.*

[6th August, 1861.]

‘Whereas it is expedient to consolidate and amend the statute law of England and Ireland relating to indictable offences by forgery:’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

As to forging Her Majesty’s seals:—

1. Whosoever shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, the great seal of the United Kingdom, Her Majesty’s privy seal, any privy signet of Her Majesty, Her Majesty’s royal sign manual, any of Her Majesty’s seals appointed by the twenty-fourth article of the union between England and Scotland to be kept, used, and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, or shall forge or counterfeit the stamp or impression of any of the seals aforesaid, or shall utter any document or instrument whatsoever, having thereon or affixed thereto the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impression of such forged or counterfeited seal, or any forged or counterfeited stamp or impression made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or shall forge or alter, or utter knowing the same to be forged or altered, any document or instrument having any of the said stamps or impressions thereon or affixed thereto, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, —or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging the great seal, privy seal, &c.

As to forging transfers of stock, &c.:—

2. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of Parliament, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, or to receive any dividend or money payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or

Forging transfer of certain stock, and power of attorney relating thereto.

altered power of attorney or other authority, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Personating the owner of certain stock, and transferring or receiving or endeavouring to transfer or receive the dividends.

3. Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England, or at the Bank of Ireland, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of Parliament, or any owner of any dividend or money payable in respect of any such share or interest as aforesaid, and shall thereby transfer or endeavour to transfer any share or interest belonging to any such owner, or thereby receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging attestation to power of attorney for transfer of stock, &c.

4. Whosoever shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock as is in either of the last two preceding sections mentioned, or to receive any dividend or money payable in respect of any such share or interest, or shall offer, utter, dispose of, or put off any such power of attorney or other authority, with any such forged name, handwriting, or signature thereon, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Making false entries in the books of the public funds.

5. Whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the governor and company of the Bank of England or the governor and company of the Bank of Ireland, in which books the accounts of the owners of any stock, annuities, or other public funds which now are or hereafter may be transferable at the Bank of England or at the Bank of Ireland shall be entered and kept, or shall in any manner wilfully falsify any of the accounts of any of such owners in any of the said books, with intent in any of the cases aforesaid to defraud, or shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Clerks of the bank making out false dividend warrants.

6. Whosoever, being a clerk, officer, or servant of or other person employed or intrusted by the governor and company of the Bank of England or the governor and company of the Bank of Ireland, shall knowingly make out or deliver any dividend warrant, or warrant for payment of any annuity, interest, or money payable at the Bank of England or

Ireland, for a greater or less amount than the person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years with or without hard labour, and with or without solitary confinement.

As to forging India bonds :—

7. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bond commonly called an East India Bond, or any bond, debenture, or security issued or made under the authority of any Act passed or to be passed relating to the East Indies, or any indorsement on or assignment of any such bond, debenture, or security, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging an East India Bond.

As to forging exchequer bills, &c. :—

8. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill or exchequer bond or exchequer debenture, or any indorsement on or assignment of any exchequer bill or exchequer bond or exchequer debenture, or any receipt or certificate for interest accruing thereon, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging exchequer bills, bonds, and debentures, &c.

9. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or cause or procure to be made, or shall aid or assist in making, or shall knowingly have in his custody or possession, any frame, mould, or instrument having therein any words, letters, figures, marks, lines, or devices peculiar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills or exchequer bonds or exchequer debentures, or any machinery for working any threads into the substance of any paper, or any such thread, and intended to imitate such words, letters, figures, marks, lines, threads, or devices, or any plate peculiarly employed for printing such exchequer bills, bonds, or debentures, or any die or seal peculiarly used for preparing any such plate, or for sealing such exchequer bills, bonds, or debentures, or any plate, die, or seal intended to imitate any such plate, die, or seal as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Making plates, &c. in imitation of those used for exchequer bills, &c.

10. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or cause or procure to be made, or aid or assist in making, any paper in the substance of which shall appear any words, letters, figures, marks, lines, threads, or other devices peculiar to and appearing in the substance of any paper provided or to be provided or used for such exchequer bills, bonds, or debentures, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall knowingly have in his custody or possession any paper whatsoever, in the substance whereof shall appear any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any parts of such words, letters,

Making paper in imitation of that used for exchequer bills, &c.



figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall cause or assist in causing any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, to appear in the substance of any paper whatever, or shall take or assist in taking any impression of any such plate, die, or seal as in the last preceding section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Having in possession paper, plates, or dies to be used for exchequer bills, &c.

11. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or receive, or knowingly have in his custody or possession, any paper manufactured and provided by or under the directions of the commissioners of inland revenue or commissioners of Her Majesty's treasury, for the purpose of being used as exchequer bills or exchequer bonds or exchequer debentures, before such paper shall have been duly stamped, signed, and issued for public use, or any such plate, die, or seal as in the last two preceding sections mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three years, with or without hard labour.

As to forging bank notes:—

Forging a bank note, &c.

12. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Purchasing or receiving or having forged bank notes.

13. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or receive from any other person, or have in his custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

As to making and engraving plates, &c. for bank notes, &c.:—

Making or having mould for making paper with the words 'Bank of England,' or 'Bank of Ireland;' or with curved bar lines, &c. or selling such paper.

14. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or use, or knowingly have in his custody or possession, any frame, mould, or instrument for the making of paper with the words 'Bank of England' or 'Bank of Ireland,' or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used by the governor and company of the Banks of England and Ireland respectively for any notes, bills of

exchange, or bank post bills of such banks respectively, or shall make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession, any paper whatsoever, with the words 'Bank of England' or 'Bank of Ireland,' or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters, appearing visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used by the governor and company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively, or shall by any art or contrivance cause the words 'Bank of England' or 'Bank of Ireland,' or any part of such words intended to resemble and pass for the same, or any device or distinction peculiar to and appearing in the substance of the paper used by the governor and company of the Banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively, to appear visible in the substance of any paper, or shall cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

15. Nothing in the last preceding section contained shall prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in a numerical figure or figures denoting the amount thereof in pounds sterling, appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines or any other devices in the nature of watermarks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines or the watermarks of the paper used by the governor and company of the Banks of England and Ireland respectively.

16. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any promissory note, bill of exchange, or bank post bill, or part of a promissory note, bill of exchange, or bank post bill, purporting to be a bank note, bank bill of exchange, or bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, or to be a blank bank note, blank promissory note, blank bank bill of exchange, or blank bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or to be a part of a bank note, promissory note, bank bill of exchange, or bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or any name, word, or character resembling or apparently intended to resemble any subscription to any bill of exchange or promissory note issued by the governor and company of the Bank of England or the governor and company of the Bank of Ireland, or by

Proviso as to  
paper used  
for bills of  
exchange, &c.

Engraving or  
having any  
plate, &c. for  
making notes  
of Bank of  
England or  
Ireland, or  
other banks,  
or having  
such plate,  
&c., or utter-  
ing or having  
paper upon  
which a blank  
bank note,  
&c. shall be  
printed.



any such other body corporate, company, or person as aforesaid, or shall use any such plate, wood, stone, or other material, or any other instrument or device, for the making or printing any bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, or knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any blank bank note, blank bank bill of exchange, or blank bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or part of a bank note, bank bill of exchange, or bank post bill, or any name, word, or character resembling or apparently intended to resemble any such subscription, shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Engraving on a plate, &c. any word, number, or device resembling part of a bank note or bill, or using or having any such plate, &c., or uttering or having any paper on which any such word, &c. is impressed.

17. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any word, number, figure, device, character, or ornament the impression taken from which shall resemble or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, or shall use, or knowingly have in his custody or possession, any such plate, wood, stone, or other material, or any other instrument or device for the impressing or making upon any paper or other material any word, number, figure, character, or ornament which shall resemble or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post bill of the governor and company of the Bank of England or of the governor and company of the Bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper or other material upon which there shall be an impression of any such matter as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Making or having mould for making paper with the name of any banker, or making or having such paper.

18. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any body corporate, company, or person carrying on the business of bankers (other than and except the Banks of England and Ireland respectively), appearing visible in the substance of the paper, or knowingly have in his custody or possession any such frame, mould, or instrument, or make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession, any paper in the substance of which the name or firm of any such body corporate, company, or person shall appear visible, or by any art or contrivance cause the name or firm of any such body corporate, company, or person to appear visible in the substance of the paper upon which the same shall be written or printed, shall be guilty of felony, and being convicted thereof shall be liable, at



the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

19. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatsoever language the same may be expressed, and whether the same shall or shall not be or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate or body of the like nature, constituted or recognized by any foreign prince or state, or of any person or company of persons, resident in any country not under the dominion of Her Majesty, or shall use, or knowingly have in his custody or possession, any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any part of any such foreign bill, note, undertaking, or order shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Engraving plates for foreign bills or notes, or using or having such plates, or uttering paper on which any part of any such bill or note is printed.

As to forging deeds, wills, bills of exchange, &c. :—

20. Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging deeds, bonds, &c.

21. Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging wills.

22. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, indorsement, or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement or assignment of any such promissory note, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not

Forging bills of exchange or promissory notes.

exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging orders, receipts, &c. for money, goods, &c.

23. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Any person making or accepting any bill, note, &c. by procuration, without lawful authority, or uttering any such bill, note, &c. so made or accepted, with intent to defraud, to be guilty of felony.

24. Whosoever, with intent to defraud, shall draw, make, sign, accept, or indorse any bill of exchange or promissory note, or any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money, by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, note, undertaking, warrant, order, authority, or request so drawn, made, signed, accepted, or indorsed by procuration or otherwise, without lawful authority or excuse, as aforesaid, knowing the same to have been so drawn, made, signed, accepted, or indorsed as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Obliterating crossings on cheques.

25. Whenever any cheque or draft on any banker shall be crossed with the name of a banker, or with two transverse lines with the words 'and company,' or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off any cheque or draft whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging debentures.

26. Whosoever shall fraudulently forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any debenture issued under any lawful authority whatsoever, either within Her Majesty's dominions or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to forging records, process, instruments of evidence, &c. :—

Forging proceedings of courts of record or courts of equity.

27. Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognizance, cognovit actionem, or warrant of attorney, or any original document whatsoever



of or belonging to any court of record, or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order, or decree, or any original document whatsoever of or belonging to any court of equity or court of admiralty in England or Ireland, or any document or writing, or any copy of any document or writing, used or intended to be used as evidence in any court in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

28. Whosoever, being the clerk of any court, or other officer having the custody of the records of any court, or being the deputy of any such clerk or officer, shall utter any false copy or certificate of any record, knowing the same to be false; and whosoever, other than such clerk, officer, or deputy, shall sign or certify any copy or certificate of any record as such clerk, officer, or deputy; and whosoever shall forge or fraudulently alter, or offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any copy or certificate of any record, or shall offer, utter, dispose of, or put off any copy or certificate of any record having thereon any false or forged name, handwriting, or signature, knowing the same to be false or forged; and whosoever shall forge the seal of any court of record, or shall forge or fraudulently alter any process of any court other than such courts as in the last preceding section mentioned, or shall serve or enforce any forged process of any court whatsoever, knowing the same to be forged, or shall deliver or cause to be delivered to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any court of law or equity, or a copy thereof, knowing the same to be false, or shall act or profess to act under any such false process, knowing the same to be false, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging copies or certificates of records, process of courts not of record, and using forged process.

29. Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any instrument, whether written or printed, or partly written and partly printed, which is or shall be made evidence by any Act passed or to be passed, and for which offence no punishment is herein provided, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging instruments made evidence by any Act of Parliament.

As to forging court rolls:—

30. Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any court roll or copy of any court roll, relating to any copyhold or customary estate, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging court rolls.

As to forging registers of deeds:—

31. Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing, made or issued under the provisions of any

Forgery as to the registry of deeds.



Act passed or hereafter to be passed for or relating to the registry of deeds, or shall forge or counterfeit the seal of or belonging to any office for the registry of deeds, or any stamp or impression of any such seal ; or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of any person to any such memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing which shall be required or directed to be signed by or by virtue of any Act passed or to be passed, or shall offer, utter, dispose of, or put off any such memorial or other writing as in this section before mentioned, having thereon any such forged stamp or impression of any such seal, or any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to forging orders, &c. of justices of the peace :—

Forging orders of justices, recognizances, affidavits, &c.

32. Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any summons, conviction, order, or warrant of any justice of the peace, or any recognizance purporting to have been entered into before any justice of the peace, or other officer authorized to take the same, or any examination, deposition, affidavit, affirmation, or solemn declaration, taken or made before any justice of the peace, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to forging the name of the accountant-general, &c. :—

Forging name of accountant-general, &c. of Court of Chancery in England or Ireland, or of any judge of the Landed Estates Court in Ireland.

33. Whosoever, with intent to defraud, shall forge or alter any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing made or purporting or appearing to be made by the accountant-general, or any other officer of the Court of Chancery in England or Ireland, or by any judge or officer of the Landed Estates Court in Ireland, or by any officer of any court in England or Ireland, or by any cashier or other officer or clerk of the governor and company of the Bank of England or Ireland, or the name, handwriting, or signature of any such accountant-general, judge, cashier, officer, or clerk as aforesaid, or shall offer, utter, dispose of, or put off any such certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing, knowing the same to be forged or altered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to falsely acknowledging recognizances, &c. :—

Acknowledging recognizance, bail, cognovit, &c. in the name of another.

34. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall, in the name of any other person, acknowledge any recognizance or bail, or any cognovit actionem, or judgment, or any deed or other instrument, before any court, judge, or other person lawfully authorized in that behalf, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to forging marriage licences :—

Forging or

35. Whosoever shall forge or fraudulently alter any licence of or

certificate for marriage, or shall offer, utter, dispose of, or put off any such licence or certificate, knowing the same to be forged or fraudulently altered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

uttering marriage licence or certificate.

As to forging registers of births, marriages, and deaths :—

36. Whosoever shall unlawfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of births, baptisms, marriages, deaths, or burials which now is or hereafter shall be by law authorized or required to be kept in England or Ireland, or any part of any such register, or any certified copy of any such register, or any part thereof, or shall forge or fraudulently alter in any such register any entry relating to any birth, baptism, marriage, death, or burial, or any part of any such register, or any certified copy of such register, or of any part thereof, or shall knowingly and unlawfully insert or cause or permit to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and unlawfully give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any such register, knowing such writing, or the part of such register whereof such copy or extract shall be so given, to be false in any material particular, or shall forge or counterfeit the seal of or belonging to any register office or burial board, or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, forged, or altered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Forging registers of births, baptisms, marriages, deaths, or burials.

37. Whosoever shall knowingly and wilfully insert, or cause or permit to be inserted in any copy of any register directed or required by law to be transmitted to any registrar or other officer, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any copy of any register so directed or required to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed or required to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, or shall unlawfully destroy, deface, or injure, or shall for any fraudulent purpose take from its place of deposit, or conceal, any such copy of any register, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Making false entries in copies of register sent to registrar.

As to demanding property upon forged instruments :—

38. Whosoever, with intent to defraud, shall demand, receive, or obtain, or cause or procure to be delivered or paid to any person, or endeavoured to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever, under, upon, or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which

Demanding property upon forged instruments.



such probate or letters of administration shall have been obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

As to other matters :—

Forging any instrument, however designated, which is in law a will, bill of exchange, &c.

39. Where by this or by any other Act any person is or shall hereafter be made liable to punishment for forging or altering, or for offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any instrument or writing designated in such Act by any special name or description, and such instrument or writing, however designated, shall be in law a will, testament, codicil, or testamentary writing, or a deed, bond, or writing obligatory, or a bill of exchange, or a promissory note for the payment of money, or an indorsement on or assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant, order, authority, or request for the payment of money, or an indorsement on or assignment of an undertaking, warrant, order, authority, or request for the payment of money, within the true intent and meaning of this Act, in every such case the person forging or altering such instrument or writing, or offering, uttering, disposing of, or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this Act, and punished accordingly.

Forging, &c. in England or Ireland documents purporting to be made, or actually made, out of England and Ireland, forging, &c. in England or Ireland bills of exchange, &c. purporting to be payable out of England or Ireland.

40. Where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this Act expressed to be an offence, if any person shall, in England or Ireland, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter in whatsoever place or country out of England and Ireland, whether under the dominion of Her Majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this Act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in England or Ireland; and if any person shall in England or Ireland forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or security, or any deed, bond, or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), or any indorsement on or assignment of any such undertaking, warrant, order, authority, request, deed, bond, or writing obligatory, in whatsoever place or country out of England and Ireland, whether under the dominion of Her Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, authority, request, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, order, authority, or request be or be not under seal, every such person, and



every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this Act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England or Ireland.

41. If any person shall commit any offence against this Act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law, or by virtue of any Act passed or to be passed, every such offender may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence, and the offence of his principal, had been actually committed in such county or place.

42. In any indictment for forging, altering, offering, uttering, disposing, or putting off any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or facsimile thereof, or otherwise describing the same or the value thereof.

43. In any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful custody or possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing by any name or designation by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter, or thing.

44. It shall be sufficient, in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.

45. Where the having any matter in the custody or possession of any person is in this Act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in the actual custody or possession of any other person, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this Act.

46. If it shall be made to appear by information on oath or affirmation before a justice of the peace, that there is reasonable cause to believe that any person has in his custody or possession, without lawful authority or excuse, any note or bill of the governor and company of the

Forgers, &c.  
may be tried in the county where they are apprehended or are in custody.

Description of instrument in indictments for forgery.

Description of instrument in indictments for engraving, &c.

Intent to defraud particular persons need not be alleged or proved.

Interpretation as to criminal possession.

Search for paper or implements employed in any forgery, and

for forged instruments.

Bank of England or Ireland, or of any body corporate, company, or person carrying on the business of bankers, or any frame, mould, or implement for making paper in imitation of the paper used for such notes or bills, or any such paper, or any plate, wood, stone, or other material having thereon any words, forms, devices, or characters capable of producing or intended to produce the impression of any such note or bill, or any part thereof, or any tool, implement, or material used or employed or intended to be used or employed in or about any of the operations aforesaid, or any forged security, document, or instrument whatsoever, or any machinery, frame, mould, plate, die, seal, paper, or other matter or thing used or employed or intended to be used or employed in the forgery of any security, document, or instrument whatsoever, such justice may, if he think fit, grant a warrant to search for the same, and if the same shall be found upon such search, it shall be lawful to seize and carry the same before some justice of the county or place, to be by him disposed of according to law; and all such matters and things so seized as aforesaid shall by order of the court where any such offender shall be tried, or in case there shall be no such trial, then by order of some justice of the peace, be defaced and destroyed or otherwise disposed of as such court or justice shall direct.

Other punishments substituted for those of 5 Eliz. c. 14, which have been adopted in other Acts.

47. Whosoever shall, after the commencement of this Act, be convicted of any offence which shall have been subjected by any Act or Acts to the same pains and penalties as are imposed by the Act passed in the fifth year of the reign of Queen Elizabeth, intituled, 'An Act against forgers of false deeds and writings,' for any of the offences first enumerated in the said Act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

All forgeries which were capital before the 1 Will. 4, c. 66, and are not otherwise punishable under this Act, shall be punished with penal servitude for life, &c.

48. Where by any Act now in force any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to have been falsely made, forged, counterfeited, erased, or altered, or any person demanding or endeavouring to receive or have anything, or to do or cause to be done any act, upon or by virtue of any matter whatsoever, knowing such matter to have been falsely made, forged, counterfeited, erased, or altered, would, according to the provisions contained in any such Act, be guilty of felony, and would, before the passing of the Act of the first year of King William the Fourth, chapter sixty-six, have been liable to suffer death as a felon; or where by any Act now in force any person falsely personating another, or falsely acknowledging anything in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund in the name of any person not being the owner thereof, or knowingly taking any false oath, or knowingly making any false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any such Act, be guilty of felony, and would before the passing of the said Act of the first year of King William the Fourth have been liable to suffer death as a felon; or where by any Act now in force any person making or using, or knowingly having in his custody or possession, any frame, mould, or instrument for the making of paper, with certain words



visible in the substance thereof, or any person making such paper or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any such Act, be guilty of felony, and would before the passing of the said Act of the first year of King William the Fourth have been liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall after the commencement of this Act be convicted of any such felony as is hereinbefore in this section mentioned, or of aiding, abetting, counselling, or procuring the commission thereof, and the same shall not be punishable under any of the other provisions of this Act, every such person shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

49. In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender.

50. All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed on 'the high seas:' provided, that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

51. Whenever any person shall be convicted of a misdemeanor under this Act it shall be lawful for the court, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, to fine the offender, and to require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in all cases of felonies in this Act mentioned it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any of the punishments by this Act authorized: provided, that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.

52. Whenever imprisonment, with or without hard labour, may be awarded for any offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

53. Whenever solitary confinement may be awarded for any offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year.

54. The court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution

Principals in the second degree and accessories.  
Abettors in misdemeanors.

Offences committed within the jurisdiction of the Admiralty.

Fine and sureties for keeping the peace; in what cases.

Hard labour.

Solitary confinement.

The costs of the prosecution



tion of misdemeanor against this Act may be allowed.

Act not to extend to Scotland.

Commencement of Act.

in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

55. Nothing in this Act contained shall extend to Scotland, except as otherwise hereinbefore expressly provided.

56. This Act shall commence and take effect on the first day of November, one thousand eight hundred and sixty-one.

24 & 25 VICT. c. 99.

*An Act to consolidate and amend the Statute Law of the United Kingdom against Offences relating to the Coin.*

[6th August, 1861.]

‘Whereas it is expedient to consolidate and amend the statute law of the United Kingdom against offences relating to the coin:’ be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Interpretation of terms.  
Current gold and silver coin.  
Copper coin.

False or counterfeit coin.

Current coin.

What shall be possession.

Counterfeiting the gold or silver coin.

Colouring counterfeit coin or any

1. In the interpretation of and for the purposes of this Act, the expression ‘the Queen’s current gold or silver coin’ shall include any gold or silver coin coined in any of Her Majesty’s mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty’s dominions, whether within the United Kingdom or otherwise; and the expression ‘the Queen’s copper coin’ shall include any copper coin and any coin of bronze or mixed metal coined in any of Her Majesty’s mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty’s said dominions; and the expression ‘false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen’s current gold or silver coin’ shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble or pass for any of the Queen’s current coin of a higher denomination; and the expression ‘the Queen’s current coin’ shall include any coin coined in any of Her Majesty’s mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty’s said dominions, and whether made of gold, silver, copper, bronze, or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this Act, it shall include, not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of any other person.

2. Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the Queen’s current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

3. Whosoever shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever, wash, case over, or colour any coin whatso-

ever resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever, wash, case over, or colour any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the colour or appearance of gold, or by any means whatsoever, wash, case over, or colour any of the Queen's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or silver, or by any means whatsoever, wash, case over, or colour any of the Queen's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

pieces of metal with intent to make them pass for gold or silver coin.

Colouring or altering genuine coin with intent to make it pass for a higher coin.

4. Whosoever shall impair, diminish, or lighten any of the Queen's current gold or silver coin, with intent that the coin so impaired, diminished, or lightened may pass for the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Impairing the gold or silver coin with intent, &c.

5. Whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing, or lightening any of the Queen's current gold or silver coin, knowing the same to have been so produced or obtained, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Unlawful possession of filings or clippings of gold or silver coin.

6. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin at or for a lower rate or value than the same imports or was apparently intended to import, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and in any indictment for any such offence as in this section aforesaid it shall be sufficient to allege that the party accused did buy, sell, receive, pay, or put off, or did offer to buy, sell, receive, pay, or put off, the false or counterfeit

Buying or selling, &c. counterfeit gold or silver coin for lower value than its denomination.



coin at or for a lower rate or value than the same imports or was apparently intended to import, without alleging at or for what rate, price, or value the same was bought, sold, received, paid, or put off, or offered to be bought, sold, received, paid, or put off.

Importing  
counterfeit  
coin from  
beyond seas.

7. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall import or receive into the United Kingdom from beyond the seas any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Exporting  
counterfeit  
coin.

8. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall export, or put on board any ship, vessel, or boat for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Uttering  
counterfeit  
gold or silver  
coin.

9. Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.

Uttering, ac-  
companied by  
possession of  
other counter-  
feit coin, or  
followed by a  
second utter-  
ing.

10. Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Having three  
or more pieces  
of counterfeit  
gold or silver  
coin in pos-  
session, &c.  
with intent,  
&c.

11. Whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.



12. Whosoever, having been convicted, either before or after the passing of this Act, of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former Act relating to the coin, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Every second offence of uttering, &c. after a previous conviction shall be felony.

13. Whosoever shall, with intent to defraud, tender, utter, or put off as or for any of the Queen's current gold or silver coin, any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure, and colour the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal or mixed metals so tendered, uttered, or put off being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.

Uttering foreign coin, medals, &c. as current coin, with intent to defraud.

14. Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin; and whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any instrument, tool, or engine adapted and intended for the counterfeiting any of the Queen's current copper coin; or shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, at or for a lower rate or value than the same imports or was apparently intended to import, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Counterfeiting, &c. copper coin.

15. Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.

Uttering base copper coin.

16. Whosoever shall deface any of the Queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour.

Defacing the coin by stamping words thereon.

Tender of coin so defaced not to be a legal tender, and penalty for uttering the same.

17. No tender of payment in money made in any gold, silver, or copper coin so defaced by stamping as in the last preceding section mentioned shall be allowed to be a legal tender; and whosoever shall tender, utter, or put off any coin so defaced shall, on conviction thereof before two justices, be liable to forfeit and pay any sum not exceeding forty shillings: provided, that it shall not be lawful for any person to proceed for any such last-mentioned penalty without the consent, in England or Ireland, of Her Majesty's attorney-general for England or Ireland respectively, or in Scotland of the lord advocate.

Counterfeiting foreign gold and silver coin.

18. Whosoever shall make or counterfeit any kind of coin not being the Queen's current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Bringing such counterfeit coin into the United Kingdom.

19. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall bring or receive into the United Kingdom any such false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Penalty for uttering such counterfeit coin.

20. Whosoever shall tender, utter, or put off any such false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding six months, with or without hard labour.

Second offence of uttering counterfeit foreign coin.

21. Whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and whosoever, having been so convicted of a second offence, shall afterwards commit

Third offence.

the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Persons counterfeiting foreign coin other than gold and silver coin.

22. Whosoever shall falsely make or counterfeit any kind of coin not being the Queen's current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of a



misdeemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, for the first offence to be imprisoned for any term not exceeding one year, and for the second offence to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

23. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall have in his custody or possession any greater number of pieces than five pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, or any such copper or other coin as in the last preceding section mentioned, shall, on conviction thereof before any justice of the peace, forfeit and lose all such false and counterfeit coin, which shall be cut in pieces and destroyed by order of such justice, and shall for every such offence forfeit and pay any sum of money not exceeding forty shillings nor less than ten shillings for every such piece of false and counterfeit coin which shall be found in the custody or possession of such person, one moiety to the informer, and the other moiety to the poor of the parish where such offence shall be committed; and in case any such penalty shall not be forthwith paid it shall be lawful for any such justice to commit the person who shall have been adjudged to pay the same to the common gaol or house of correction, there to be kept to hard labour for the space of three months, or until such penalty shall be paid.

Penalty on persons having more than five pieces of such counterfeit foreign coin in their possession.

24. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any puncheon, counter puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, or of any coin of any foreign prince, state, or country, or any part or parts of both or either of such sides; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any edger, edging or other tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw or of any other contrivance, round blanks out of gold, silver, or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin as in this section aforesaid, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Making, mending, or having possession of any coining tools, felony.

25. Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly convey out of any of Her Majesty's mints any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion,

Conveying tools or monies out of the mint without authority, felony.



metal, or mixture of metals, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Coin suspected to be diminished or counterfeit may be cut by any person to whom it is tendered.

Who shall bear the loss.

26. Where any coin shall be tendered as the Queen's current gold or silver coin to any person who shall suspect the same to be diminished otherwise than by reasonable wearing, or to be counterfeit, it shall be lawful for such person to cut, break, bend, or deface such coin, and if any coin so cut, broken, bent, or defaced shall appear to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and shall appear to be lawful coin, the person cutting, breaking, bending, or defacing the same is hereby required to receive the same at the rate it was coined for; and if any dispute shall arise whether the coin so cut, broken, bent, or defaced be diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who is hereby empowered to examine upon oath as well the parties as any other person, in order to the decision of such dispute; and the tellers at the receipt of Her Majesty's exchequer, and their deputies and clerks, and the receivers-general of every branch of Her Majesty's revenue, are hereby required to cut, break, or deface, or cause to be cut, broken, or defaced every piece of counterfeit or unlawfully diminished gold or silver coin which shall be tendered to them in payment of any part of Her Majesty's revenue.

Provision for the discovery and seizure of counterfeit coin and coining tools, for securing them as evidence, and for ultimately disposing of them.

27. If any person shall find or discover in any place whatever, or in the custody or possession of any person having the same without lawful authority or excuse, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current gold, silver, or copper coin, or any coin of any foreign prince, state, or country, or any instrument, tool, or engine whatsoever, adapted and intended for the counterfeiting of any such coin, or any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by diminishing or lightening any of the Queen's current gold or silver coin, it shall be lawful for the person so finding or discovering and he is hereby required to seize the same, and to carry the same forthwith before some justice of the peace; and where it shall be proved, on the oath of a credible witness before any justice of the peace, that there is reasonable cause to suspect that any person has been concerned in counterfeiting the Queen's current gold, silver, or copper coin, or any such foreign or other coin as in this Act before mentioned, or has in his custody or possession any such false or counterfeit coin, or any instrument, tool, or engine whatsoever adapted and intended for the making or counterfeiting of any such coin, or any other machine used or intended to be used for making or counterfeiting any such coin, or any such filings, clippings, or bullion, or any such gold or silver in dust, solution, or otherwise as aforesaid, it shall be lawful for any justice of the peace, by warrant under his hand, to cause any place whatsoever belonging to or in the occupation or under the control of such suspected person to be searched, either in the day or in the night, and if any such false or counterfeit coin, or any such instrument, tool, or engine, or any such machine, or any such filings, clippings, or bullion, or any such gold or silver in dust, solution, or otherwise as aforesaid, shall be found in any place so searched, to cause the same to be seized and carried forthwith before some justice of the peace; and whensever any such false or counterfeit coin, or any such instrument, tool, or engine, or any such machine, or any such filings, clippings, or bullion, or any such gold or silver in dust, solution, or otherwise as aforesaid, shall in any case whatsoever be seized and carried

before a justice of the peace, he shall, if necessary, cause the same to be secured, for the purpose of being produced in evidence against any person who may be prosecuted for any offence against this Act; and all such false and counterfeit coin, and all instruments, tools, and engines adapted and intended for the making or counterfeiting of coin, and all such machines, and all such filings, clippings, and bullion, and all such gold and silver in dust, solution, or otherwise as aforesaid, after they shall have been produced in evidence, or when they shall have been seized, and shall not be required to be produced in evidence, shall forthwith be delivered up to the officers of Her Majesty's mint, or to the solicitors of Her Majesty's treasury, or to any person authorized by them to receive the same.

28. Where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, or where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this Act, every such offender may be dealt with, indicted, tried, and punished, and the offence laid and charged to have been committed, in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction.

29. Where, upon the trial of any person charged with any offence against this Act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer, or other officer of Her Majesty's mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness.

30. Every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off, any false or counterfeit coin, against the provisions of this Act, shall be deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.

31. It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence, against this Act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law.

32. No conviction for any offence punishable on summary conviction under this Act shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a valid conviction to sustain the same.

33. All actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall, in England or Ireland, be laid and tried in the county where the fact was committed, and shall, in England, Ireland, or Scotland, be commenced within six months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant or defender one month at least before the commencement of the action; and in any such action brought in England or Ireland the defendant may plead the general issue, and give this Act and the special matter in

Venue.

What shall be sufficient proof of coin being counterfeit.

Where the counterfeiting coin shall be complete.

Any person may apprehend any person committing any indictable offence against this Act.

No certiorari, &c.

Venue in proceedings against persons acting under this Act.

Notice of action.

General issue.



Tender of  
amends, &c.

evidence, at any trial to be had thereupon, and in Scotland the defender may insist on all relevant defences; and no plaintiff or pursuer shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant or defender; and if, in England or Ireland, a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, or if, in Scotland, the verdict shall be for the defender, or if the pursuer shall abandon the action, or the court shall dismiss it as irrelevant or improperly laid, in every such case the defendant or defender shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant or defender has by law in other cases; and though a verdict shall be given for the plaintiff or pursuer in any such action, such plaintiff or pursuer shall not have costs against the defendant or defender, unless the judge before whom the trial shall be shall certify his approbation of the action.

Trial of  
offences in  
Scotland.

34. All high crimes and offences, and crimes and offences, against this Act, which may be committed in Scotland, shall be proceeded against and tried according to the rules and procedure of the criminal law of Scotland; and all proceedings by this Act made competent before any justice or justices, and all and every the powers and authorities by this Act given to or conferred upon any such justice or justices, shall, in Scotland, be competent before and may be exercised by any sheriff, magistrate, or justice of the peace.

Punishment of  
principal in  
the second  
degree, and  
accessories.

35. In the case of every felony punishable under the Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

Offences com-  
mitted within  
the jurisdic-  
tion of the  
Admiralty.

36. All indictable offences mentioned in this Act, which shall be committed within the jurisdiction of the Admiralty of England or Ireland, shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if the same had been actually committed in that county or place, and in any indictment for any such offence, or for being accessory to any such offence, the venue in the margin shall be the same as if such offence had been committed in such county or place, and the offence itself shall be averred to have been committed 'on the high seas;' and where any of the crimes and offences, or high crimes and offences mentioned in this Act, shall be committed at sea, and the vessel in which the same shall be committed shall be registered in Scotland, or touch at any part thereof, the courts of criminal law of Scotland may inquire, try, and determine the same in the same manner as if such crime and offence, or high crime and offence, had been committed in Scotland: provided, that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

What shall be  
sufficient evi-  
dence of con-  
viction for a  
previous  
offence.

37. Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the



previous offence, purporting to be signed by the clerk of the court or other officer having or purporting to have the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court, and for every such certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say,) the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted the court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: provided, that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

When the previous conviction is to be proved on the trial.

38. Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized: provided, that no person shall be imprisoned under this clause for not finding sureties for any period not exceeding one year.

Fine and sureties for keeping the peace; in what cases.

39. Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction.

Hard labour.

40. Whenever solitary confinement may be awarded for any offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year.

Solitary confinement.

41. Every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the Act of the session holden in the eleventh and twelfth years of Queen Victoria, chapter forty-three, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the Act of the session holden in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any Act that may be passed for like

Summary proceedings in England may be under the 11 & 12 Vict. c. 43, and in Ireland under the 14 & 15 Vict. c. 93.

Except in  
London and  
the metropo-  
litan police  
district.

Costs of pro-  
secutions.

Commence-  
ment of Act.

purposes; and all provisions contained in the said Acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this Act: provided, that nothing in this Act contained shall in any manner alter or affect any enactment relating to procedure in the case of any offence punishable on summary conviction within the City of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence.

42. In all prosecutions for any offence against this Act in England, which shall be conducted under the direction of the solicitors of Her Majesty's treasury, the court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony; and in all prosecutions for any such offence in England which shall not be so conducted it shall be lawful for such court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

43. This Act shall commence and take effect on the first day of November, one thousand eight hundred and sixty-one.

24 & 25 VICT. c. 100.

*An Act to consolidate and amend the Statute Law of England and Ireland relating to Offences against the Person.*

[6th August, 1861.]

'Whereas it is expedient to consolidate and amend the statute law of England and Ireland relating to offences against the person:' be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

#### *Homicide.*

Murder.

1. Whosoever shall be convicted of murder shall suffer death as a felon.

Sentence for  
murder.

2. Upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken, before the passing of this Act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon.

Body to be  
buried in  
prison.

3. The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so direct.

Conspiring or  
soliciting to  
commit  
murder.

4. All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not more than ten and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Manslaughter.

5. Whosoever shall be convicted of manslaughter shall be liable, at



the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, or to pay such fine as the court shall award, in addition to or without any such other discretionary punishment as aforesaid.

6. In any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed.

Indictment for murder or manslaughter.

7. No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony.

Excusable homicide.

8. Every offence which before the commencement of the Act of the ninth year of King George the Fourth, chapter thirty-one, would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder.

Petit treason.

9. Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place: provided, that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act.

Murder or manslaughter abroad.

10. Where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or, being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place.

Provision for the trial of murder and manslaughter where the death or cause of death only happens in England or Ireland.

#### *Attempts to Murder.*

11. Whosoever shall administer to or cause to be administered to or to be taken by any person any poison or other destructive thing, or shall by any means whatsoever wound or cause any grievous bodily harm to any person, with intent in any of the cases aforesaid to commit murder,

Administering poison, or wounding with intent to murder.



shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Destroying or damaging a building with gunpowder, with intent to murder.

12. Whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building with intent to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Setting fire to or casting away a ship with intent to murder.

13. Whosoever shall set fire to any ship or vessel or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being therein, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Attempting to administer poison, or shooting or attempting to shoot, or attempting to drown, &c. with intent to murder.

14. Whosoever shall attempt to administer to or shall attempt to cause to be administered to or to be taken by any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

By any other means attempting to commit murder.

15. Whosoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

#### *Letters threatening to Murder.*

Sending letters threatening to murder.

16. Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

#### *Acts causing or tending to cause Danger to Life, or Bodily Harm.*

Impeding a person endeavouring to save himself from shipwreck.

17. Whosoever shall unlawfully and maliciously prevent or impede any person, being on board of or having quitted any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his life, or shall unlawfully and maliciously prevent or impede any person in his endeavour to save the life of any such person as in this section first aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be

kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

18. Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Shooting or attempting to shoot, or wounding with intent to do grievous bodily harm.

19. Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this Act, although the attempt to discharge the same may fail from want of proper priming or from any other cause.

What shall constitute loaded arms.

20. Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Inflicting bodily injury, with or without weapon.

21. Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Attempting to choke, &c. in order to commit any indictable offence.

22. Whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to or attempt to cause to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any other term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Using chloroform, &c. to commit any indictable offence.

23. Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Maliciously administering poison, &c. so as to endanger life or inflict grievous bodily harm.

24. Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy

Maliciously administering poison, &c.



with intent to injure, aggrrieve, or annoy any other person.

If the jury be not satisfied that person charged is guilty of felony, but guilty of misdemeanor, they may find him guilty accordingly.

Not providing apprentices or servants with food, &c., whereby life endangered.

Exposing children, whereby life endangered.

Causing bodily injury by gunpowder.

Causing gunpowder to explode, or sending to any person an explosive substance, or throwing corrosive fluid on a person, with intent to do grievous bodily harm.

Placing gunpowder near a building, with intent to do bodily injury to any person.

such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

25. If, upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor.

26. Whosoever, being legally liable, either as a master or mistress, to provide for any apprentice or servant necessary food, clothing, or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

27. Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

28. Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

29. Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance or any other dangerous or noxious thing, or put or lay at any place, or cast or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

30. Whosoever shall unlawfully and maliciously place or throw in into, upon, against, or near any building, ship, or vessel any gunpowder or other explosive substance, with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept



in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

31. Whosoever shall set or place, or cause to be set or placed, any spring gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall knowingly and wilfully permit any such spring gun, man-trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid: provided, that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin: provided also, that nothing in this section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring gun, man-trap, or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling house, for the protection thereof.

Setting spring guns, &c. with intent to inflict grievous bodily harm.

32. Whosoever shall unlawfully and maliciously put or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove, any signal or light, upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.

Placing wood, &c. on a railway, with intent to endanger passengers.

33. Whosoever shall unlawfully and maliciously throw, or cause to fall or strike, at, against, into, or upon any engine, tender, carriage, or truck, used upon any railway, any wood, stone, or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage, or truck, or in or upon any other engine, tender, carriage, or truck of any train of which such first-mentioned engine, tender, carriage, or truck shall form part, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Casting stone, &c. upon a railway carriage, with intent to endanger the safety of any person therein.

34. Whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Doing or omitting anything to endanger passengers by railway.

35. Whosoever, having the charge of any carriage or vehicle, shall

Drivers of

carriages injuring persons by furious driving.

by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

#### *Assaults.*

Obstructing or assaulting a clergyman or other minister in the discharge of his duties.

36. Whosoever shall, by threats or force, obstruct or prevent, or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating Divine service or otherwise officiating in any church, chapel, meeting-house, or other place of Divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Assaulting a magistrate, &c. on account of his preserving wreck.

37. Whosoever shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorized, in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Assault with intent to commit felony, or on peace officers, &c.

38. Whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct any peace officer, in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Assaults with intent to obstruct the sale of grain, or its free passage.

39. Whosoever shall beat, or use any violence or threat of violence to any person, with intent to deter or hinder him from buying, selling, or otherwise disposing of, or to compel him to buy, sell, or otherwise dispose of, any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or shall beat or use any such violence or threat to any person having the care or charge of any wheat or other grain, flour, meal, malt, or potatoes, whilst on the way to or from any city, market town, or other place, with intent to stop the conveyance of the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding three months: provided, that no person who shall be punished for any such offence by virtue of this section shall be punished for the same offence by virtue of any other law whatsoever.

Assaults on seamen, &c.

40. Whosoever shall unlawfully and with force hinder or prevent any seaman, keelman, or caster from working at or exercising his lawful trade, business, or occupation, or shall beat, or use any violence to any such person with intent to hinder or prevent him from working at or exercising the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding three months: provided, that no person who shall be punished for any such



offence by reason of this section shall be punished for the same offence by virtue of any other law whatsoever.

41. Whosoever, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business, or manufacture, or respecting any person concerned or employed therein, shall unlawfully assault any person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Assaults arising from combination.

42. Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned with or without hard labour for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of five pounds; and if such fine as shall be so awarded, together with the costs (if ordered), shall not be paid, either immediately after the conviction or within such period as the said justices shall at the time of the conviction appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, unless such fine and costs be sooner paid.

Persons committing any common assault or battery may be imprisoned or compelled by two magistrates to pay fine and costs not exceeding 5*l*.

43. When any person shall be charged before two justices of the peace with an assault or battery upon any male child whose age shall not in the opinion of such justices exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to common assaults and batteries, may proceed to hear and determine the same in a summary way, and, if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of twenty pounds, and in default of payment to be imprisoned in the common gaol or house of correction for any period not exceeding six months, unless such fine and costs be sooner paid, and, if the justices shall so think fit, in any of the said cases, shall be bound to keep the peace and be of good behaviour for any period not exceeding six months from the expiration of such sentence.

Persons convicted of aggravated assaults on females and boys under fourteen years of age may be imprisoned or fined.

44. If the justices, upon the hearing of any such case of assault or battery upon the merits, where the complaint was preferred by or on the behalf of the party aggrieved, under either of the last two preceding sections, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.

If the magistrates dismiss the complaint, they shall make out a certificate to that effect.

45. If any person, against whom any such complaint as in either of the last three preceding sections mentioned shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause.

Certificate or conviction shall be a bar to any other proceedings.

46. Provided, that in case the justices shall find the assault or battery

These provi-



sions not to apply to certain cases.

complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same: provided also, that nothing herein contained shall authorize any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.

Assault occasioning bodily harm.

47. Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall be convicted upon an indictment for a common assault shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour.

Common assault.

### *Rape, Abduction, and Defilement of Women.*

Rape.

48. Whosoever shall be convicted of the crime of rape shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Procuring the defilement of girl under age.

49. Whosoever shall, by false pretences, false representations, or other fraudulent means, procure any woman or girl under the age of twenty-one years to have illicit carnal connexion with any man, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Carnally knowing a girl under ten years of age.

50. Whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Carnally knowing a girl between the ages of ten and twelve.

51. Whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Attempt to commit the last two offences.

52. Whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Abduction of a woman against her will, from motives of lucre.

53. Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or coheiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with

Fraudulent abduction of a girl under age against

intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she shall have any such interest, or which shall come to her as such heiress, coheiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the attorney-general appoint.

the will of her father, &c.

Offender incapable of taking any of her property.

54. Whosoever shall, by force, take away or detain against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Forceful abduction of any woman with intent to marry her.

55. Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Abduction of a girl under sixteen years of age.

#### *Child-stealing.*

56. Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping: provided, that no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof.

Child-stealing.

#### *Bigamy.*

57. Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard

Bigamy.

Offence may be dealt with where offender shall be apprehended.

Not to extend to second marriages, &c. herein stated.

labour; and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place: provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

#### *Attempts to procure Abortion.*

Administering drugs or using instruments to procure abortion.

58. Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Procuring drugs, &c. to cause abortion.

59. Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

#### *Concealing the Birth of a Child.*

Concealing the birth of a child.

60. If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour: provided, that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of the birth.

#### *Unnatural Offences.*

Sodomy and bestiality.

61. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than ten years.



62. Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour.

Attempt to commit an infamous crime.

63. Whenever, upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only.

Carnal knowledge defined.

*Making Gunpowder to commit Offences, and searching for the same.*

64. Whosoever shall knowingly have in his possession, or make or manufacture, any gunpowder, explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

Making or having gunpowder, &c., with intent to commit any felony against this Act.

65. Any justice of the peace of any county or place in which any such gunpowder, or other explosive, dangerous, or noxious substance or thing, or any such machine, engine, instrument, or thing, is suspected to be made, kept, or carried for the purpose of being used in committing any of the felonies in this Act mentioned, upon reasonable cause assigned upon oath by any person, may issue a warrant under his hand and seal for searching, in the daytime, any house, mill, magazine, storehouse, warehouse, shop, cellar, yard, wharf, or other place, or any carriage, waggon, cart, ship, boat, or vessel, in which the same is suspected to be made, kept, or carried for such purpose as hereinbefore mentioned; and every person acting in the execution of any such warrant shall have for seizing, removing to proper places, and detaining all such gunpowder, explosive, dangerous, or noxious substances, machines, engines, instruments, or things, found upon such search, which he shall have good cause to suspect to be intended to be used in committing any such offence, and the barrels, packages, cases, and other receptacles in which the same shall be, the same powers and protections which are given to persons searching for unlawful quantities of gunpowder, under the warrant of a justice by the Act passed in the session holden in the twenty-third and twenty-fourth years of the reign of Her present Majesty, chapter one hundred and thirty-nine, intituled 'An Act to amend the law concerning the making, keeping, and carriage of gunpowder and compositions of an explosive nature, and concerning the manufacture, sale, and use of fireworks.'

Justices may issue warrants for searching houses, &c., in which explosive substances are suspected to be made for the purpose of committing felonies against this Act.

23 & 24 Vict. c. 139.

*Other Matters.*

66. Any constable or peace officer may take into custody, without a warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony in this Act mentioned, and shall take such person as soon as reasonably may be before a justice of the peace, to be dealt with according to law.

A person loitering at night, and suspected of any felony against this Act, may be apprehended.

67. In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first

Punishment of principals in the second

degree, and accessories.

degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; and every accessory after the fact to murder shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender.

Offences committed within the jurisdiction of the Admiralty.

68. All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed 'on the high seas:' provided, that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.

Hard labour in gaol or house of correction.

69. Whenever imprisonment, with or without hard labour, may be awarded for any indictable offence under this Act, the court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or house of correction.

Solitary confinement and whipping.

70. Whenever solitary confinement may be awarded for any offence under this Act, the court may direct the offender to be kept in solitary confinement for any portion or portions of any imprisonment, or of any imprisonment with hard labour, which the court may award, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any offence under this Act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence.

Fine and sureties for keeping the peace; in what cases.

71. Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any punishment by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act otherwise than with death the court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized: provided, that no person shall be imprisoned for not finding sureties under this clause for any period exceeding one year.

No certiorari, &c.

72. No summary conviction under this Act shall be quashed for want of form, or be removed by certiorari into any of Her Majesty's Superior Courts of Record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

Guardians and overseers may be required to

73. Where any complaint shall be made of any offence against section twenty-six of this Act, or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party commit-

ting it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom such complaint is heard shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or, where there are no guardians, by the overseers of the poor of the place, in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of any court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and, where there is a board of guardians, the clerk or some other officer of the union or place, and, where there is no board of guardians, one of the overseers of the poor, may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute.

prosecute in certain cases of offences against this Act.

Costs of prosecution.

Clerk of guardians may be bound over to prosecute.

74. Where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry and examination ascertain to be reasonable; and, unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence.

On a conviction for assault the court may order payment of the prosecutor's costs by the defendant.

75. The court may, by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from such sale, shall be paid to the owner; and in case such sum shall be so levied the imprisonment awarded until payment of such sum shall thereupon cease.

Such costs may be levied by distress.

76. Every offence hereby made punishable on summary conviction may be prosecuted in England in the manner directed by the Act of the session holden in the eleventh and twelfth years of Queen Victoria, chapter forty-three, and may be prosecuted in Ireland before two or more justices of the peace, or one metropolitan or stipendiary magistrate, in the manner directed by the Act of the session holden in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-three, or in such other manner as may be directed by any Act that may be passed for like purposes; and all provisions contained in the said Acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this Act: provided, that nothing in this Act contained shall in any manner alter or affect any enactment now in force relating to procedure, in the case of any offence punishable on summary conviction, within the City of London or the metropolitan police district, or the recovery or application of any penalty or forfeiture for any such offence.

Summary proceedings in England may be under the 11 & 12 Viet. c. 43, and in Ireland under the 14 & 15 Viet. c. 93.

Except in London and the metropolitan police district.

77. The court before which any misdemeanor indictable under the provisions of this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony.

The costs of the prosecution of misdemeanors against this Act may be allowed.



Act not to  
extend to  
Scotland.  
Commence-  
ment of Act.

78. Nothing in this Act contained shall extend to Scotland, except as hereinbefore otherwise expressly provided.

79. This Act shall commence and take effect on the first day of November, one thousand eight hundred and sixty-one.

27 & 28 VICT. c. 47.

*An Act to amend the Penal Servitude Acts.*

[25th July, 1864.]

16 & 17 Vict.  
c. 99.  
20 & 21 Vict.  
c. 3.

‘Whereas two Acts were passed, the one chapter ninety-nine in the session of the sixteenth and seventeenth years of the reign of Her present Majesty, and the other chapter three in the session of the twentieth and twenty-first years of the same reign, having for their object the substitution of other punishments in lieu of transportation: And whereas it is expedient to amend the said Acts:’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short titles.

1. This Act shall be construed as one with the above-mentioned Acts, and the said Acts, together with this Act, may be cited for all purposes as the Penal Servitude Acts, 1853, 1857, and 1864, and each of the said Acts may be cited as the Penal Servitude Act of the year in which it was passed.

*Sentences of Penal Servitude.*

Length of  
sentences,  
penal servi-  
tude.

2. No person shall be sentenced to penal servitude in respect to any offence committed after the passing of this Act for a period of less than five years, and where under any Act now in force a period of less than five years is the utmost sentence of penal servitude that can be awarded, a period of five years shall, in respect to any offence committed after the passing of this Act, in such Act be substituted for the less period; and where under any Act now in force a period of either less or more than five years may be awarded as a sentence of penal servitude, the least sentence of penal servitude that can be awarded under that Act shall, in respect to any offence committed after the passing of this Act, be a period of five years; and where any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, or, in Scotland, of any crime (whether such previous conviction shall have taken place upon an indictment or under the provisions of the Act passed in the eighteenth and nineteenth of Victoria, chapter one hundred and twenty-six), the least sentence of penal servitude that can be awarded in such case shall be a period of seven years.

*Convict Prisons.*

Punishment  
of offences  
in convict  
prisons.

3. One of Her Majesty’s principal secretaries of state in Great Britain, and the lord lieutenant or other chief governor in Ireland, may, by warrant under his hand and seal, empower any two or more justices of the peace, to be named in such warrant, acting for any county in which a prison for the reception of convicts under sentence of penal servitude is situate, to order, from time to time, the infliction of corporal punishment on any convict confined in such prison, for an offence committed by such convict in such prison, and against the discipline thereof; and any two or more justices of the peace thus empowered shall have the same power of adjudicating on such offences, and of ordering the infliction of such punishment, to be exercised under the same conditions as one of the directors of convict prisons would have, and no greater.

*Licences.*

Forfeiture of  
licence.

4. A licence granted under the said Penal Servitude Acts, or any of

them, may be in the form set forth in Schedule (A.) to this Act annexed, and may be written, printed, or lithographed. If any holder of a licence granted in the form set forth in the said Schedule (A.) is convicted, either by the verdict of a jury, or upon his own confession, of any offence for which he is indicted, his licence shall be forthwith forfeited by virtue of such conviction; or if any holder of a licence granted under the said Penal Servitude Acts, or any of them, who shall be at large in the United Kingdom, shall, unless prevented by illness or other unavoidable cause, fail to report himself personally, if in Great Britain to the chief police station of the borough or police division, and if in Ireland to the constabulary station of the locality, to which he may go within three days after his arrival therein, and being a male subsequently, once in each month, at such time and place, in such manner, and to such person as the chief officer of the constabulary force to which such station belongs shall appoint, or shall change his residence from one police district to another without having previously notified the same to the police or constabulary station to which he last reported himself, he shall be deemed guilty of a misdemeanor, and may be summarily convicted thereof, and his licence shall be forthwith forfeited by virtue of such conviction, but he shall not be liable to any other punishment by virtue of such conviction.

5. If any holder of a licence granted in the form set forth in the said Schedule (A.)—

Offences by  
holders of a  
licence.

1. Fails to produce his licence when required to do so by any judge, justice of the peace, sheriff, sheriff substitute, police or other magistrate before whom he may be brought charged with any offence, or by any constable or officer of the police in whose custody he may be, and also fails to make any reasonable excuse why he does not produce the same; or
2. Breaks any of the other conditions of his licence by an act that is not of itself punishable either upon indictment or upon summary conviction;

he shall be deemed guilty of an offence punishable summarily by imprisonment for any period not exceeding three months, with or without hard labour.

6. Any constable or police officer may, without warrant, take into custody any holder of such a licence whom he may reasonably suspect of having committed any offence, or having broken any of the conditions of his licence, and may detain him in custody until he can be taken before a justice of the peace or other competent magistrate, and dealt with according to law.

Apprehension  
of holder of  
licence with-  
out warrant.

7. In England and Ireland any offence under this Act punishable summarily may be prosecuted summarily before two or more justices; as to England, in manner directed by an Act passed in the session holden in the eleventh and twelfth years of the reign of Her Majesty Queen Victoria, chapter forty-three, intituled ‘An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders,’ or any Act amending the same; and as to Ireland, in manner directed by the Act passed in the session holden in the fourteenth and fifteenth years of the reign of Her Majesty Queen Victoria, chapter ninety-three, intituled ‘An Act to consolidate and amend the acts regulating the proceedings of petty sessions, and the duties of justices of the peace out of quarter sessions in Ireland, or any Act amending the same.’

Summary  
punishment  
of offences.

In Scotland any offence under this Act punishable summarily may be prosecuted upon summary conviction at the instance of the procurator fiscal before any sheriff or sheriff substitute, or before any two justices of the county, or before the magistrates or any police magistrate of the burgh in which the offence is committed.

8. Where any holder of a licence granted in the form set forth in the

Where holder  
of licence is

summarily convicted, convicting magistrate to forward certificate to secretary of state or lord lieutenant of Ireland.

Effect of forfeiture or revocation of licence.

Licences may be granted in form differing from that in Schedule (A.)

said Schedule (A.) is convicted of an offence punishable summarily under this or any other Act, the justices, sheriff, sheriff substitute, or other magistrate convicting the prisoner shall without delay forward by post a certificate in the form given in Schedule (B.) to this Act annexed, if in England or Scotland to one of Her Majesty's principal secretaries of state, if in Ireland to the lord lieutenant or other chief governor of Ireland, and thereupon the licence of the said holder may be revoked in manner provided by the said Penal Servitude Acts.

9. Where any licence granted in the form set forth in the said Schedule (A.) is forfeited by a conviction of any indictable offence, or is revoked in pursuance of a summary conviction under this Act or any other Act of Parliament, the person whose licence is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted, and shall, for the purpose of his undergoing such last-mentioned punishment, be removed from the prison of any county, borough, or place in which he may be confined, to any prison in which convicts under sentence of penal servitude may lawfully be confined, by warrant under the hand and seal of any justice of the peace of the said county, borough, or place, and shall be liable to be there dealt with in all respects as if such term of penal servitude had formed part of his original sentence.

10. Provided always, that it shall be lawful for Her Majesty, or for the lord lieutenant or other chief governor in Ireland, whenever they shall respectively think fit, to grant from time to time to convicts under sentence of penal servitude, licences in any other form different from that set forth in Schedule (A.), which they may respectively consider it expedient to adopt, and containing other and different conditions; and such last-mentioned licences shall be revocable at pleasure by the authority by which they are granted; but no holder of such last-mentioned licence shall be deemed guilty of an offence punishable upon summary conviction merely by reason of the breach of the conditions of the said last-mentioned licences, or any of them.

#### SCHEDULE (A.)

##### *Order of Licence to a Convict made under the Statute.*

Whitehall,  
day of 18 .

Her Majesty is graciously pleased to grant to  
who was convicted of at the  
for the on the

and was then and there sentenced to be kept in penal servitude for the  
term of and is now confined in the

Her Royal licence to be at large from the day  
of his liberation under this order during the remaining portion of his said  
term of penal servitude, unless the said  
shall before the expiration of the said term be convicted of some indictable offence within the United Kingdom, in which case such licence will be immediately forfeited by law, or unless it shall please Her Majesty sooner to revoke or alter such licence.

This licence is given subject to the conditions endorsed upon the same, upon the breach of any of which it will be liable to be revoked, whether such breach is followed by a conviction or not.

And Her Majesty hereby orders that the said  
be set at liberty within thirty days from the date of this order.

Given under my hand and seal



*Conditions.*

1. The holder shall preserve his licence and produce it when called upon to do so by a magistrate or police officer.

2. He shall abstain from any violation of the law.

3. He shall not habitually associate with notoriously bad characters, such as reputed thieves and prostitutes.

4. He shall not lead an idle and dissolute life, without visible means of obtaining an honest livelihood.

If his licence is forfeited or revoked in consequence of a conviction for any offence, he will be liable to undergo a term of penal servitude equal to the portion of his term of \_\_\_\_\_ years which remained unexpired when his licence was granted, viz. the term of \_\_\_\_\_ years.

## SCHEDULE (B.)

*Form of Certificate of Conviction of Holder of Licence.*

I do hereby certify that A. B., the holder of a licence under the Penal Servitude Acts, was on the \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_ duly convicted by \_\_\_\_\_ of the offence of \_\_\_\_\_ and sentenced to \_\_\_\_\_

C. D.,  
Clerk to the said Justices.

28 VICT. c. 18.

*An Act for amending the Law of Evidence and Practice on Criminal Trials.*

[9th May, 1865.]

‘Whereas it is expedient that the law of evidence and practice on trials for felony and misdemeanor and other proceedings in courts of criminal judicature should be more nearly assimilated to that on trials at Nisi Prius:’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows; that is to say,

1. That the provisions of section two of this Act shall apply to every trial for felony or misdemeanor which shall be commenced on or after the first day of July, one thousand eight hundred and sixty-five, and that the provisions of sections from three to eight, inclusive, of this Act shall apply to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence.

2. If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses

Provisions of sect. 2. of this Act to apply to trials commenced on or after July 1, 1865.

Summing up of evidence in cases of felony and misdemeanor.

as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present.

How far witness may be discredited by the party producing.

3. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

As to proof of contradictory statements of adverse witness.

4. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

Cross-examinations as to previous statements in writing.

5. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.

Proof of previous conviction of witness may be given.

6. A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of five shillings, and no more, shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

As to proof by attesting witnesses.

7. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto.

As to comparison of disputed writing.

8. Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

‘Counsel.’

9. The word ‘counsel’ in this Act shall be construed to apply to attorneys in all cases where attorneys are allowed by law or by the practice of any court to appear as advocates.

Not to apply to Scotland.

10. This Act shall not apply to Scotland.

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